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281 N.C. APP.

TABLE OF CONTENTS

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THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

DONNA S. STROUD

Judges

CHRIS DILLON
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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.
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SANFORD L. STEELMAN, JR.
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LINDA STEPHENS
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CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CROSS-REFERENCE TABLE[1]

CASE	N.C. APP. REPORTS CITATION	UNIVERSAL PARALLEL CITATION
Bill Clark Homes of Raleigh, LLC v. Town of Fuquay-Varina	281 N.C. App. 1	2021-NCCOA-688
Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.	281 N.C. App. 9	2021-NCCOA-689
Hirschler v. Hirschler	281 N.C. App. 30	2021-NCCOA-690
Mendez v. Mendez	281 N.C. App. 36	2021-NCCOA-691
Roberson v. TruPoint Bank	281 N.C. App. 45	2021-NCCOA-692
Rural Empowerment Ass'n for Cmty. Help v. State of N.C.	281 N.C. App. 52	2021-NCCOA-693
State v. Applewhite	281 N.C. App. 66	2021-NCCOA-694
State v. Barber	281 N.C. App. 99	2021-NCCOA-695
State v. Bryant	281 N.C. App. 116	2021-NCCOA-696
State v. Crisp	281 N.C. App. 127	2021-NCCOA-697
State v. Lamp	281 N.C. App. 138	2021-NCCOA-698
State v. McCutcheon	281 N.C. App. 149	2021-NCCOA-699
State v. Thomas	281 N.C. App. 159	2021-NCCOA-700
State v. Thorpe	281 N.C. App. 189	2021-NCCOA-701
State v. Whatley	281 N.C. App. 194	2021-NCCOA-702
Wadsworth v. Wadsworth	281 N.C. App. 201	2021-NCCOA-703
Am. Sw. Mortg. Corp. v. Arnold	*281 N.C. App. 214*	*2021-NCCOA-704*
Am. Sw. Mortg. Corp. v. O'Meara	*281 N.C. App. 214*	*2021-NCCOA-705*
Cram v. Raleigh Radiology, LLC	*281 N.C. App. 214*	*2021-NCCOA-706*
Granite Contracting, LLC v. Carlton Grp., Inc.	*281 N.C. App. 214*	*2021-NCCOA-707*
Hauser v. Idilbi	*281 N.C. App. 214*	*2021-NCCOA-708*
Henderson v. Target	*281 N.C. App. 214*	*2021-NCCOA-709*
In re B.H.	*281 N.C. App. 214*	*2021-NCCOA-710*
In re C.D.B.	*281 N.C. App. 214*	*2021-NCCOA-711*
Jones v. Trinity Highway Prods., LLC	*281 N.C. App. 214*	*2021-NCCOA-712*
Miller v. Graham Cnty.	*281 N.C. App. 214*	*2021-NCCOA-713*
Rice v. Rutledge Rd. Assocs., LLC	*281 N.C. App. 214*	*2021-NCCOA-714*

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

CASE	N.C. APP. REPORTS CITATION	UNIVERSAL PARALLEL CITATION
State v. Acklin	*281 N.C. App. 303*	*2022-NCCOA-16*
State v. Bowens	*281 N.C. App. 304*	*2022-NCCOA-17*
State v. Cox	*281 N.C. App. 304*	*2022-NCCOA-18*
State v. Daw	*281 N.C. App. 304*	*2022-NCCOA-19*
State v. Locklear	*281 N.C. App. 304*	*2022-NCCOA-20*
State v. Marion	*281 N.C. App. 304*	*2022-NCCOA-21*
State v. Miles	*281 N.C. App. 304*	*2022-NCCOA-22*
State v. Ruth	*281 N.C. App. 304*	*2022-NCCOA-23*
State v. Stewart	*281 N.C. App. 304*	*2022-NCCOA-24*
Vance v. Laurels Healthcare Holdings	*281 N.C. App. 304*	*2022-NCCOA-25*
Carmichael v. Cordell	281 N.C. App. 305	2022-NCCOA-26
Dan King Plumbing Heating & Air Conditioning, LLC v. Harrison	281 N.C. App. 312	2022-NCCOA-27
Davis v. Lake Junaluska Assembly, Inc.	281 N.C. App. 339	2022-NCCOA-28
In re A.P.	281 N.C. App. 347	2022-NCCOA-29
Monroe v. MV Transp.	281 N.C. App. 363	2022-NCCOA-30
Sprouse v. Turner Trucking Co.	281 N.C. App. 372	2022-NCCOA-31
State ex. rel. Utils. Comm'n v. Friesian Holdings, LLC	281 N.C. App. 391	2022-NCCOA-32
State v. Brichikov	281 N.C. App. 408	2022-NCCOA-33
State v. Cataldo	281 N.C. App. 425	2022-NCCOA-34
State v. Crew	281 N.C. App. 437	2022-NCCOA-35
State v. Guinn	281 N.C. App. 446	2022-NCCOA-36
State v. Heath	281 N.C. App. 465	2022-NCCOA-37
		2022-NCCOA-38[2]
State v. Steele	281 N.C. App. 472	2022-NCCOA-39
State v. Ward	281 N.C. App. 484	2022-NCCOA-40
Enoch v. Monarch	*281 N.C. App. 494*	*2022-NCCOA-41*
In re J.B.	*281 N.C. App. 494*	*2022-NCCOA-42*
Kim v. Calloway	*281 N.C. App. 494*	*2022-NCCOA-43*
McGirt v. Durham Cnty. Gov't	*281 N.C. App. 494*	*2022-NCCOA-44*

2. As of the publication of this volume, no opinion associated with this universal parallel citation number has been filed.

CROSS-REFERENCE TABLE

CASE	N.C. APP. REPORTS CITATION	UNIVERSAL PARALLEL CITATION
Miller v. E. Band of Cherokee Indians	*281 N.C. App. 494*	*2022-NCCOA-45*
Revis v. Schleder	*281 N.C. App. 494*	*2022-NCCOA-46*
Roth v. Roth	*281 N.C. App. 494*	*2022-NCCOA-47*
State v. Dawson	*281 N.C. App. 494*	*2022-NCCOA-48*
State v. Hugayes	*281 N.C. App. 494*	*2022-NCCOA-49*
State v. Johnson	*281 N.C. App. 494*	*2022-NCCOA-50*
Woodforest Nat'l Bank v. Edwards Brothers Malloy, Inc.	*281 N.C. App. 494*	*2022-NCCOA-51*
Alexander v. N.C. State Bd. of Elections	281 N.C. App. 495	2022-NCCOA-52
Guy M. Turner Inc. v. KLO Acquisition LLC	281 N.C. App. 504	2022-NCCOA-53
In re Chastain	281 N.C. App. 520	2022-NCCOA-54
Miller v. LG Chem, Ltd.	281 N.C. App. 531	2022-NCCOA-55
Moore v. Trout	281 N.C. App. 556	2022-NCCOA-56
Rimmer v. Town of Chapel Hill	281 N.C. App. 560	2022-NCCOA-57
State v. Draughon	281 N.C. App. 573	2022-NCCOA-58
State v. King	281 N.C. App. 587	2022-NCCOA-59
State v. McKoy	281 N.C. App. 602	2022-NCCOA-60
State v. Robinson	281 N.C. App. 614	2022-NCCOA-61
Almason v. Southgate on Fairview Condo. Ass'n, Inc.	*281 N.C. App. 627*	*2022-NCCOA-62*
Assoc. MD, LLC v. Metabolic Med., LLC	*281 N.C. App. 627*	*2022-NCCOA-63*
Best Choice Prods. v. Hendrick, Bryant, Nerhood, Sanders & Otis, LLP	*281 N.C. App. 627*	*2022-NCCOA-64*
Bossian v. Chica	*281 N.C. App. 627*	*2022-NCCOA-65*
Chalileh v. Jenkins	*281 N.C. App. 627*	*2022-NCCOA-66*
Evans v. Myers	*281 N.C. App. 627*	*2022-NCCOA-67*
In re D.A.	*281 N.C. App. 627*	*2022-NCCOA-68*
In re Foreclosure of Noori	*281 N.C. App. 627*	*2022-NCCOA-69*
Jenkins v. Wells Fargo Bank, NA	*281 N.C. App. 627*	*2022-NCCOA-70*
N.C. Farm Bureau Mut. Ins. Co., Inc. v. Kerby	*281 N.C. App. 627*	*2022-NCCOA-71*
State v. Adams	*281 N.C. App. 628*	*2022-NCCOA-72*

CROSS-REFERENCE TABLE

CASE	N.C. APP. REPORTS CITATION	UNIVERSAL PARALLEL CITATION
State v. Brown	*282 N.C. App. 401*	*2022-NCCOA-73*[3]
State v. Denny	*281 N.C. App. 628*	*2022-NCCOA-74*
State v. Faulk	*281 N.C. App. 628*	*2022-NCCOA-75*
State v. Glasson	*281 N.C. App. 628*	*2022-NCCOA-76*
State v. Hahn	*283 N.C. App. ___*	*2022-NCCOA-77*[4]
State v. Largen	*281 N.C. App. 628*	*2022-NCCOA-78*
State v. Lewis	*281 N.C. App. 628*	*2022-NCCOA-79*
State v. McCauley	*281 N.C. App. 628*	*2022-NCCOA-80*
State v. Nougier	*281 N.C. App. 628*	*2022-NCCOA-81*
State v. Parker	*281 N.C. App. 628*	*2022-NCCOA-82*
State v. Poss	*281 N.C. App. 628*	*2022-NCCOA-83*
State v. Sanford	*281 N.C. App. 628*	*2022-NCCOA-84*
State v. Torres	*281 N.C. App. 628*	*2022-NCCOA-85*
State v. Viers	*281 N.C. App. 628*	*2022-NCCOA-86*
Tuel v. Tuel	*281 N.C. App. 629*	*2022-NCCOA-87*
Wattley v. Wortham-Thomas	*281 N.C. App. 629*	*2022-NCCOA-88*
Bryant v. Wake Forest Univ. Baptist Med. Ctr.	281 N.C. App. 630	2022-NCCOA-89
Cnty. of Mecklenburg v. Ryan	281 N.C. App. 646	2022-NCCOA-90
Dep't of Transp. v. Bloomsbury Ests., LLC	281 N.C. App. 660	2022-NCCOA-91
Dow-Rein v. Sarle	281 N.C. App. 670	2022-NCCOA-92
Mahone v. Home Fix Custom Remodeling	281 N.C. App. 676	2022-NCCOA-93
Medina v. Medina	281 N.C. App. 690	2022-NCCOA-94
State v. Green	281 N.C. App. 699	2022-NCCOA-95
State v. Shuler	281 N.C. App. 709	2022-NCCOA-96
Walker-Snyder v. Snyder	281 N.C. App. 715	2022-NCCOA-97
Abernathy v. Mission Health Sys., Inc.	*281 N.C. App. 721*	*2022-NCCOA-98*
Cecil Holcomb Renovations, Inc. v. L. Firm of Wilson & Ratledge, PLLC	*281 N.C. App. 721*	*2022-NCCOA-99*

3. This opinion was moved from its original filing date and is listed in Volume 282 of the N.C. App. Reports.

4. This opinion was moved from its original filing date and is listed in Volume 283 of the N.C. App. Reports.

CROSS-REFERENCE TABLE

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BILL CLARK HOMES OF RALEIGH, LLC, PLAINTIFF
v.
TOWN OF FUQUAY-VARINA, DEFENDANT

No. COA21-79

Filed 21 December 2021

1. Cities and Towns—water and sewer impact fee ordinances—for future use and expansion—motion to dismiss

Plaintiff developer, in its suit against defendant Town of Fuquay-Varina seeking a declaratory judgment that certain water and sewage fees were unlawful pursuant to *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15 (2016), stated a claim sufficient to survive the Town's Rule 12(b)(6) motion to dismiss where, in the light most favorable to plaintiff, the Town assessed fees for services "to be furnished" pursuant to the town ordinances.

2. Statutes of Limitation and Repose—impact fees—three-year statute of limitations

Plaintiff developer's suit against defendant Town of Fuquay-Varina seeking a declaratory judgment that certain water and sewage fees were unlawful was not time-barred by N.C.G.S. § 160A-393.1's one-year statute of limitations, where the essence of plaintiff's claims was that the Town acted unlawfully by assessing a water and sewer impact fee not authorized by statute, just as in *Quality Built Homes, Inc. v. Town of Carthage*, 371 N.C. 60 (2018), which found N.C.G.S. § 1-52(2)'s three-year statute of limitations applicable.

BILL CLARK HOMES OF RALEIGH, LLC v. TOWN OF FUQUAY-VARINA

[281 N.C. App. 1, 2021-NCCOA-688]

Appeal by plaintiff from order entered 9 October 2020 by Judge Vince Rozier in Wake County Superior Court. Heard in the Court of Appeals 19 October 2021.

Ward and Smith, P.A., by Christopher S. Edwards, Ryal W. Tayloe, and Jordan M. Spanner, for plaintiff-appellant.

Hartzog Law Group LLP, by Dan M. Hartzog, Jr., and Katherine Barber-Jones, for defendant-appellee.

ZACHARY, Judge.

¶ 1 Plaintiff Bill Clark Homes of Raleigh, LLC, appeals from the trial court's order granting Defendant Town of Fuquay-Varina's motion to dismiss. After careful review, we reverse and remand for further proceedings.

I. Background

¶ 2 Plaintiff is a North Carolina limited liability company that develops and builds planned communities in the Raleigh area. On 7 October 2014, Plaintiff entered into a development and infrastructure agreement ("the Agreement") with the Town, permitting Plaintiff to build a residential subdivision ("Sunset Glen") containing 46 single-family homes. The Agreement principally concerned the Town's extension of municipal water and sewer services to Sunset Glen. To facilitate municipal water and sewer service at Sunset Glen, Plaintiff agreed that it would build water and sewer lines within the development to the Town's specifications in exchange for the Town expanding its water and sewer systems by building a water line to Sunset Glen and building a sewage pumping station on site. Plaintiff also agreed that it would "pay all applicable development fees, including capacity fees, recreation unit fees and other applicable fees as prescribed by the Town's Code of Ordinances and Annual Budget Ordinance and Fee Schedule."

¶ 3 On 4 February 2016, the Town sent Plaintiff an invoice for $241,500, labeled "WATER & SEWER CONNECTION/INSPECTION FEES," which was due prior to approval of the final plat of the subdivision. Of that amount, $195,000 was for "CAPACITY FEES" ("the Fees"): a water-capacity fee of $1,500 per unit and a sewer-capacity fee of $2,750 per unit, which were its usual and standard fees. Plaintiff paid the invoice balance in full by check dated 1 September 2016.

¶ 4 On 16 August 2016, our Supreme Court filed its opinion in *Quality Built Homes Inc. v. Town of Carthage* (*Quality Built Homes I*),

369 N.C. 15, 789 S.E.2d 454 (2016). In *Quality Built Homes I*, the Court "consider[ed] whether the Town of Carthage exceeded its municipal authority under the Public Enterprise Statutes, [N.C. Gen. Stat.] §§ 160A-311 to -338 (2015), by adopting certain water and sewer 'impact fee' ordinances." 369 N.C. at 16, 789 S.E.2d at 455.[1] The challenged ordinances provided that "the impact fees 'shall be used to cover the costs of expanding the [water and sewer] system[s].' " *Id.* at 16, 789 S.E.2d at 456 (alterations in original). "Upon approval of a subdivision of real property, the ordinances trigger[ed] immediate charges for future water and sewer system expansion, regardless of whether the landowner ever connects to the system or whether Carthage ever expands the system." *Id.* at 16, 789 S.E.2d at 455.

¶ 5 Recognizing that municipalities are "creations of the legislature" and thus "have only those powers delegated to them by the General Assembly[,]" our Supreme Court determined that "[w]hen Carthage adopted the ordinances at issue here, it exercised power that it had not been granted." *Id.* The crux of the issue in *Quality Built Homes I* was Carthage's argument that the imposition of "impact fees" fell "squarely within its 'authority to charge "fees" or "charges" ' under [N.C. Gen. Stat.] § 160A-314." *Id.* at 19, 789 S.E.2d at 458. Our Supreme Court disagreed, concluding that "[w]hile the enabling statutes allow Carthage to charge *for the contemporaneous use* of its water and sewer systems, the plain language of the Public Enterprise Statutes clearly fails to empower the Town to impose impact fees *for future services*." *Id.* at 19–20, 789 S.E.2d at 458 (emphases added). Further, the Court noted that "[t]he fees are not assessed at the time of actual use, but are payable in full at the time of final subdivision plat approval—a time when water, sewer, or other infrastructure might not have been built and only a recorded plat exists." *Id.* at 21, 789 S.E.2d at 458–59.

¶ 6 On 20 August 2019, Plaintiff filed suit against the Town, seeking a declaratory judgment that the Fees were unlawful and demanding a refund. In its complaint, Plaintiff asserted that the Town charged the Fees pursuant to § 5-1016 ("the Ordinance") of the Town's Code of Ordinances. Plaintiff further alleged:

> 14. Town Ordinance § 5-1016 required Plaintiff to pay said Capacity Fees before the Town would approve

1. "Effective 19 June 2020, the General Assembly consolidated the provisions governing planning and development regulations by local governments into a new Chapter 160D of the General Statutes." *85' & Sunny, LLC v. Currituck Cty.*, 2021-NCCOA-422, ¶ 18 n.3. As the former Chapter 160A was in effect at all times relevant to this appeal, we address that chapter in this opinion.

> the final plat of the subdivision, *i.e.*, before the Town would approve the development of Sunset Glen.
>
> 15. Pursuant to Town Ordinance § 5-1016, the Town used some of the Capacity Fees it collected "to build capital reserve funds for future investment in water and sewer collection, distribution and treatment facilities."
>
> 16. Pursuant to Town Ordinance § 5-1016, the Town used some of the Capacity Fees it collected to fund future expansion of its water and sewer system.

Plaintiff then summarized our Supreme Court's holding in *Quality Built Homes I* before alleging:

> 21. Pursuant to Town Ordinance § 5-1016, the Town charged Capacity Fees for water and sewer services "to be furnished."
>
> 22. Pursuant to Town Ordinance § 5-1016, the Town charged such Fees at the time of final subdivision plat approval.
>
> 23. The Capacity Fees collected by the [T]own from Plaintiff on or about September 1, 2016, were unauthorized by legislative act or statute, were *ultra vires*, and are unlawful.

¶ 7 Plaintiff maintained that the Agreement was unenforceable under *Quality Built Homes I* "to the extent [that] it required Plaintiff to pay Capacity Fees in connection with the development of Sunset Glen[.]"

¶ 8 On 4 November 2019, the Town filed a motion to dismiss pursuant to Rule 12(b)(6), arguing that Plaintiff's complaint failed to state a claim upon which relief could be granted. Specifically, the Town asserted that because "any fees paid were paid pursuant to [the parties'] voluntary agreement," the Fees were not *ultra vires* and unlawful:

> The Town has met its obligations under the . . . Agreement, and Plaintiff accepted said benefits of the . . . Agreement, and cannot now challenge the terms of the [A]greement. To the extent Plaintiff contends that the Town did not meet its obligations under the . . . Agreement, [Plaintiff's] exclusive remedy lies in a claim for breach of contract[.]

¶ 9 On 22 September 2020, the Town's motion to dismiss came on for hearing in Wake County Superior Court before the Honorable Vince Rozier. On 9 October 2020, the trial court entered its order granting the Town's motion and dismissing Plaintiff's complaint with prejudice. Plaintiff timely filed notice of appeal.

II. Discussion

¶ 10 Plaintiff argues that the trial court erred by granting the Town's motion to dismiss. We agree.

A. Standard of Review

¶ 11 We review de novo a trial court's order on a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). *Cheryl Lloyd Humphrey Land Inv. Co., LLC v. Resco Products, Inc.*, 377 N.C. 384, 2021-NCSC-56, ¶ 8. "The standard of review of an order granting a Rule 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Suarez v. Am. Ramp Co.*, 266 N.C. App. 604, 610, 831 S.E.2d 885, 890 (citation omitted), *disc. review denied*, 373 N.C. 257, 836 S.E.2d 653 (2019).

¶ 12 In reviewing a trial court's Rule 12(b)(6) dismissal "the issue for the court is not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claim." *Howe v. Links Club Condo. Ass'n, Inc.*, 263 N.C. App. 130, 137, 823 S.E.2d 439, 447 (2018) (citation and internal quotation marks omitted).

B. Capacity Fees

¶ 13 **[1]** On appeal, Plaintiff argues that the trial court erred in granting the Town's motion to dismiss because it "incorrectly adopted the Town's argument that the statute governing development agreements, N.C. Gen. Stat. § 160A-400.20, allowed the Town to charge capacity fees, as long as it did so by contract." Plaintiff notes that, pursuant to N.C. Gen. Stat. § 160A-400.20(b) (2019), "a local government may not exercise any authority or make any commitment not authorized by general or local act and may not impose any tax or fee not authorized by otherwise applicable law." Accordingly, Plaintiff reasons that (1) because "[t]he Town's capacity fee ordinance was unlawful" under *Quality Built Homes I*, (2) "the Town had no authority to assess fees for future water and sewer services,"[2] and (3) the Town could not contract for capacity fees;

2. At oral argument, Plaintiff clarified that it does not argue that the Ordinance is unlawful *in its entirety*, but rather that the portion of the Ordinance that authorizes capacity fees for potential future services or expansion costs is unlawful under *Quality Built Homes I*.

thus, (4) the Agreement's provision for the payment of capacity fees was unenforceable.

¶ 14 For the purposes of this appeal, we need not determine the merits of Plaintiff's claim; our task is to ascertain whether the trial court's dismissal of Plaintiff's complaint pursuant to Rule 12(b)(6) was error. Dismissal pursuant to Rule 12(b)(6) "is proper (1) when the complaint on its face reveals that no law supports the plaintiff's claim; (2) when the complaint reveals on its face the absence of facts sufficient to make a claim; or (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Broad St. Clinic Found. v. Weeks*, 273 N.C. App. 1, 5, 848 S.E.2d 224, 228 (citation and internal quotation marks omitted), *disc. review denied*, 376 N.C. 550, 851 S.E.2d 614 (2020). Reviewing Plaintiff's complaint on its face and in the light most favorable to Plaintiff, construing the complaint liberally and taking all the allegations therein as true, we cannot conclude that any of these standards have been met.

¶ 15 Assuming, as we must on review of a motion to dismiss, that the Town assessed fees for services "to be furnished," *Quality Built Homes I* supports Plaintiff's claim that the fees were unlawful. The Ordinance plainly provides for the payment prior to plat approval of capacity fees "to build capital reserve funds for future investment in water and sewer collection, distribution and treatment facilities." As the Town conceded at oral argument, a portion of the Ordinance is unlawful under *Quality Built Homes I*. Nevertheless, the Town maintains that although the Fees were standard and not negotiated, the Fees are lawful because they were not assessed pursuant to the Public Enterprise Statutes, but rather as part of the parties' bargained-for exchange, as memorialized in the Agreement. However, liberally construing Plaintiff's complaint, for the purpose of our review, we must accept as true Plaintiff's allegation that the Town assessed the Fees pursuant to the Ordinance. Accordingly, the complaint on its face finds support in *Quality Built Homes I*.

¶ 16 Similarly, we cannot conclude that the complaint, on its face, lacks sufficient facts to state a claim for relief or contains any facts that necessarily defeat Plaintiff's claims. Plaintiff alleged that the Town assessed the Fees for future services pursuant to the Ordinance, and that under *Quality Built Homes I*, such assessment is impermissible. Although the Town contends that the Fees were not assessed for future services, when pressed at oral argument for record evidence supporting that contention, the Town asserted that the Agreement—which Plaintiff attached as an exhibit to its complaint—represents the bargained-for exchange between the parties and does not indicate that the Fees were assessed

for future services. Indeed, in its appellate brief, the Town argues that the Agreement "concerns only provision of current infrastructure and services that are very specifically described . . . and does not require Plaintiff to contribute toward 'future discretionary spending.' " The Town further maintains that the Agreement "does not describe any obligations for future maintenance or upgrades, any kind of system-wide expansion, or future discretionary spending."

¶ 17 However, construing the complaint liberally and taking the allegations therein as true, we conclude that the Agreement's terms do not rise to the level of "some fact disclosed in the complaint [that] necessarily defeats . . . [P]laintiff's claim." *Id.* (citation omitted). The Agreement does not indicate whether the Fees were, in fact, assessed for past, current, or future services. Such evidence would presumably be the subject of discovery on remand.

C. Statute of Limitations

¶ 18 **[2]** On appeal, the Town presents an alternative argument that this action is time-barred by N.C. Gen. Stat. § 160A-393.1, in the event that this Court determines that the Fees were assessed pursuant to the Ordinance, rather than the Agreement. However, this assertion lacks merit, as it is foreclosed by our Supreme Court's decision in *Quality Built Homes Inc. v. Town of Carthage* (*Quality Built Homes II*), 371 N.C. 60, 813 S.E.2d 218 (2018).

¶ 19 While the Town disagrees with Plaintiff's allegation that the Fees were unlawful capacity fees, the Town maintains that even assuming, *arguendo*, that Plaintiff is correct, "Plaintiff's claim is time-barred because it was brought more than one year after the regulation was applied to Plaintiff." The Town asserts that former N.C. Gen. Stat. § 160A-393.1's one-year statute of limitations applies to this case because "the nature of Plaintiff's challenge and relief sought is to a development regulation."

¶ 20 However, in *Quality Built Homes II*, our Supreme Court considered, *inter alia*, whether the plaintiffs' claims against the Town of Carthage—first addressed in *Quality Built Homes I*—were time-barred "by the one-, two-, three-, or ten-year statute[s] of limitations[,]" and if so, which one applied. 371 N.C. at 61, 813 S.E.2d at 220. Our Supreme Court noted that "the essence of [*Quality Built Homes I*] was that the Town had acted unlawfully by assessing a water and sewer impact fee not authorized" by the Public Enterprise Statutes, and concluded that "the claim recognized in [*Quality Built Homes I*] was, when viewed realistically, one resting upon an alleged statutory violation that resulted in the exaction of an unlawful payment which [the] plaintiffs had

an inherent right to recoup." *Id.* at 73, 813 S.E.2d at 228. Accordingly, our Supreme Court concluded that N.C. Gen. Stat. § 1-52(2)'s three-year statute of limitations for liabilities applied in that case. *Id.* at 74, 813 S.E.2d at 228.

¶ 21 Although the Town of Carthage "asserted that a number of shorter limitations periods" should have governed, our Supreme Court disagreed. Of particular relevance here, our Supreme Court reasoned that it was "unable to conclude that the one-year statute[s] of limitations set out in N.C.G.S. §§ 160A-364.1 and 1-54(10)" applied because the plaintiffs' claims did "not rest upon *a challenge to the validity of the Town's zoning or unified development ordinances*." *Id.* at 74 n.7, 813 S.E.2d at 228 n.7 (emphasis added).

¶ 22 Notwithstanding the Town's arguments on appeal, we are unable to distinguish the nature of the claim in *Quality Built Homes I* from the claims that Plaintiff raises here. As in that case, "the essence" of Plaintiff's claims is "that the Town . . . acted unlawfully by assessing a water and sewer impact fee not authorized" by the Public Enterprise Statutes. *Id.* at 73, 813 S.E.2d at 228. These claims are thus "resting upon an alleged statutory violation that resulted in the exaction of an unlawful payment which [Plaintiff] ha[s] an inherent right to recoup." *Id.* We conclude that the reasoning of *Quality Built Homes II* applies with equal force to the case before us, and the Town's argument in the alternative is overruled.

III. Conclusion

¶ 23 After careful review of Plaintiff's complaint, we cannot say that "no law supports . . . [P]laintiff's claim[,]" nor that the complaint "reveals on its face the absence of facts sufficient to make a claim" or that "some fact disclosed in the complaint necessarily defeats . . . [P]laintiff's claim." *Broad St. Clinic Found.*, 273 N.C. App. at 5, 848 S.E.2d at 228 (citation omitted). Viewing Plaintiff's complaint in the light most favorable to Plaintiff, construing the complaint liberally and taking as true the allegations contained therein, the trial court erred in granting the Town's motion to dismiss. Further, the Town's alternative argument that Plaintiff's action is time-barred is specifically foreclosed by *Quality Built Homes II* and provides no additional support for the trial court's order granting the Town's motion to dismiss.

¶ 24 Accordingly, the trial court's order is reversed and this case is remanded for further proceedings. We offer no opinion on the validity of Plaintiff's claim at this stage of the litigation, and we anticipate that the development through discovery of a more fulsome record will provide

the trial court with the evidence required to determine whether Plaintiff's claims have merit.

REVERSED AND REMANDED.

Judges INMAN and COLLINS concur.

CEDARBROOK RESIDENTIAL CENTER, INC. AND FRED LEONARD, PLAINTIFFS
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, ADULT CARE LICENSURE SECTION, DEFENDANT

No. COA21-194

Filed 21 December 2021

1. Tort Claims Act—state agency—regulatory action—assisted living center

The claims of an assisted living center and its owner (plaintiffs) against the N.C. Department of Health and Human Services (defendant)—filed with the Industrial Commission and seeking damages for defendant's allegedly negligent regulatory actions taken in response to violations at the assisted living center—were not barred by the State Tort Claims Act (STCA) where plaintiffs filed an affidavit in compliance with the STCA. The appellate court rejected defendant's arguments that state agencies cannot be held liable for regulatory actions under the STCA and that the availability of remedies under the Administrative Procedure Act precluded claims under the STCA.

2. Tort Claims Act—public duty doctrine—conditions—failure to perform inspection—not applicable

The claims of an assisted living center and its owner (plaintiffs) against the N.C. Department of Health and Human Services (defendant)—filed with the Industrial Commission and seeking damages for defendant's allegedly negligent regulatory actions taken in response to violations at the assisted living center—were not barred by the public duty doctrine, where plaintiffs' claims were not based on an alleged negligent failure to perform a health or safety inspection (as set forth in N.C.G.S. § 143-299.1A(a)(2)) but rather were based on allegedly negligent licensure actions taken after a series of inspections.

3. Negligence—regulatory action—intentional action—not intentional harm

Where an assisted living center and its owner (plaintiffs) sued the N.C. Department of Health and Human Services (defendant)—filing claims with the Industrial Commission seeking damages for defendant's allegedly negligent regulatory actions taken in response to violations at the assisted living center—the appellate court rejected defendant's argument that it could not be held liable in negligence for its intentional actions taken pursuant to its statutory authority. Only an intentional injury would have taken the case out of the realm of negligence.

4. Tort Claims Act—public duty doctrine—public policy—legislature's prerogative

Where an assisted living center and its owner (plaintiffs) sued the N.C. Department of Health and Human Services (defendant)—filing claims with the Industrial Commission seeking damages for defendant's allegedly negligent regulatory actions taken in response to violations at the assisted living center—defendant's public policy argument that allowing tort claims for regulatory actions would endanger North Carolina citizens and unleash a flood of litigation was rejected because such arguments are more appropriately directed to the legislature.

Judge DIETZ concurring by separate opinion.

Judge TYSON dissenting.

Appeal by defendant from order entered 6 November 2020 by the North Carolina Industrial Commission ("Commission"). Heard in the Court of Appeals 3 November 2021.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Joseph A. Ponzi and Howard L. Williams, for plaintiffs-appellees.

Robinson, Bradshaw & Hinson, P.A., by Adam K. Doerr and Demi Lorant Bostian; and North Carolina Department of Justice, by Senior Deputy Attorney General Amar Majmundar, for defendant-appellant.

ARROWOOD, Judge.

¶ 1 The North Carolina Department of Health and Human Services ("defendant") appeals from the Commission's denial of defendant's motion to dismiss. Defendant contends that the claims of Cedarbrook Residential Center Inc. and Fred Leonard ("plaintiffs") are barred by the public duty doctrine, alternatively arguing that plaintiffs failed to plead a valid claim for negligence. For the following reasons, we affirm the Commission.

I. Background

¶ 2 Plaintiffs filed an Affidavit and Verified Claim for Damages with the Commission on 25 October 2018. Plaintiffs asserted in the Affidavit that defendant had harmed plaintiffs by negligently:

> (1) conducting surveys in November 2015, March 2016, and July 2016; (2) issuing statements of deficiencies that contain [defendant's] allegations against Cedarbrook from the surveys; (3) issuing a Suspension of Admissions against Cedarbrook on November 19, 2015 and leaving it in place for nearly eight months; and (4) issuing a "directed" plan of protection against Cedarbrook on March 18, 2016.

On 8 January 2019, defendant filed a response and motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6), and a motion to stay discovery pending a ruling on the motion to dismiss. Deputy Commissioner James C. Gillen denied defendant's motions on 13 March 2019. Defendant appealed to the Full Commission on 27 March 2019, and Chair Philip A. Baddour, III, approved defendant's request for an interlocutory appeal on 17 May 2019.

¶ 3 On 10 September 2019, the Commission conducted a hearing on defendant's appeal. On 6 November 2020, the Commission filed an order affirming the denial of defendant's motions to dismiss. Defendant filed notice of appeal on 4 December 2020.

II. Discussion

¶ 4 Defendant presents the following arguments: the Commission erred in denying defendant's motion to dismiss because the Tort Claims Act does not apply; the public duty doctrine bars plaintiffs' claims; plaintiffs failed to plead a valid claim for negligence; and allowing plaintiffs' claim "would endanger North Carolina citizens." We address each argument in turn.

A. Appellate Jurisdiction and Standard of Review

¶ 5 The denial of a motion to dismiss is an interlocutory order which is not immediately appealable unless that denial affects a substantial right

of the appellant. *RPR & Assocs., Inc. v. State*, 139 N.C. App. 525, 527, 534 S.E.2d 247, 249-50 (2000), *aff'd per curiam*, 353 N.C. 362, 543 S.E.2d 480 (2001); *see also* N.C. Gen. Stat. § 7A-27(b) (2019). "[T]he denial of a motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable." *RPR & Assocs., Inc.*, 139 N.C. App. at 527, 534 S.E.2d at 250 (citations omitted).

¶ 6 In this case, defendant's motion to dismiss is based in part upon the defense of sovereign immunity. Because the trial court's denial of defendant's motion to dismiss affects a substantial right, we hold that defendant's appeal is properly before this Court.

¶ 7 We review the denial of a motion to dismiss on the basis of sovereign immunity *de novo*. *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013).

> The standard of review for an appeal from the Full Commission's decision under the Tort Claims Act "shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them."

Simmons v. Columbus County Bd. of Educ., 171 N.C. App. 725, 727, 615 S.E.2d 69, 72 (2005) (quoting N.C. Gen. Stat. § 143-293 (2003)). "Thus, 'when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision.' " *Id.* at 728, 615 S.E.2d at 72 (quoting *Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. 402, 405-406, 496 S.E.2d 790, 793 (1998)).

¶ 8 Additionally, when reviewing a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, this Court treats plaintiffs' "factual allegations contained in [their] affidavit before the Industrial Commission as true." *Hunt v. N.C. Dep't of Lab.*, 348 N.C. 192, 194, 499 S.E.2d 747, 748 (1998) (citation omitted).

B. Tort Claims Act and Sovereign Immunity

¶ 9 **[1]** Defendant first argues that the State Tort Claims Act ("STCA") does not apply because plaintiffs cannot sue defendant like a "private person." We disagree.

¶ 10 An action cannot be maintained against the State of North Carolina or a state agency unless the State consents to be sued or upon its waiver of immunity; this immunity is absolute and unqualified. *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983) (citations omitted).

¶ 11 The STCA provides a limited waiver of sovereign immunity for the

> negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

Ray v. N.C. Dep't of Transp., 366 N.C. 1, 4, 727 S.E.2d 675, 678 (2012) (quoting N.C. Gen. Stat. § 143-291 (2011)). "No formal pleadings are required to invoke the jurisdiction of the Industrial Commission under the State Tort Claims Act." *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 135, 360 S.E.2d 115, 117 (1987) (citing *Branch Banking & Trust Co. v. Wilson County Bd. of Educ.*, 251 N.C. 603, 111 S.E.2d 844 (1960)). The only requirement is that the claimant file with the Commission an affidavit in duplicate, containing the following information:

> (1) The name of the claimant;
>
> (2) The name of the department, institution or agency of the State against which the claim is asserted, and the name of the State employee upon whose alleged negligence the claim is based;
>
> (3) The amount of damages sought to be recovered;
>
> (4) The time and place where the injury occurred;
>
> (5) A brief statement of the facts and circumstances surrounding the injury and giving rise to the claim.

N.C. Gen. Stat. § 143-297 (2019). Plaintiffs have filed an affidavit in compliance with these requirements.

¶ 12 Defendant argues that the STCA does not apply in this case because "[p]rivate persons cannot be held liable for regulatory actions[,]" and accordingly "state agencies cannot be held liable for the same." This argument misconstrues the meaning of "private person" under the STCA.

Although defendant contends the STCA only applies to situations where a private person may also be liable, this Court has held that the STCA "will be construed so as to effectuate its purpose of waiving sovereign immunity so that a person injured by the negligence of a State employee may sue the State as he would any other person." *Zimmer*, 87 N.C. App. at 136, 360 S.E.2d at 117-18 (citation omitted). Accordingly, the "private person" language within the STCA pertains to the nature of the proceedings but does not operate to bar waiver of sovereign immunity. Defendant's argument fails to acknowledge that many cases presented to the Commission and to this Court on appeal involve regulatory action.

¶ 13 Defendant also contends the STCA does not apply because "[t]he statutes regulating adult care homes expressly provide for challenges of penalties and suspensions under the Administrative Procedure Act." Defendant argues that allowing this claim amounts to an impermissible "end-run around" the process the General Assembly established for challenges to regulatory action. Defendant cites N.C. Gen. Stat. §§ 131D-2.7(d)(4) and 131D-34(e) to support its argument.

¶ 14 Although the General Assembly has provided several remedies under the Administrative Procedures Act, the availability of an administrative remedy does not preclude plaintiff from seeking a remedy under the STCA. This Court recently held that an entity regulated by defendant had an adequate state remedy under the STCA. *Nanny's Korner Day Care Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 264 N.C. App. 71, 80, 825 S.E.2d 34, 41, *appeal dismissed, review denied sub nom., Nanny's Korner Day Care Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs., Div. of Child Dev. & Early Educ.*, 831 S.E.2d 89 (N.C. 2019).

¶ 15 In *Nanny's Korner*, DHHS took regulatory action against a daycare center and required the center to notify its customers of an allegation of sexual abuse, resulting in loss of business and the daycare center's closure. *Id.* at 73-75, 825 S.E.2d at 37-38. The daycare center brought a claim against DHHS under the STCA, which was dismissed because the statute of limitations had run. *Id.* at 79, 825 S.E.2d at 40. While addressing a constitutional procedural due process claim, this Court held that the plaintiff did not have the right to bring a direct constitutional claim because plaintiff "had an adequate state remedy in the form of the Industrial Commission through the Torts Claim Act." *Id.* at 80, 825 S.E.2d at 41.

¶ 16 "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher

court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citation omitted). The issue in this case—whether a regulated entity has a state remedy under the STCA—has already been decided by this Court in *Nanny's Korner*, and that decision has not been overturned by a higher court. Accordingly, we are bound by this precedent and hold that plaintiffs were not barred from bringing a claim under the STCA.

C. Public Duty Doctrine

¶ 17 **[2]** Defendant further contends that plaintiffs' claims are barred by the public duty doctrine. We disagree.

¶ 18 The public duty doctrine is a common law negligence doctrine existing apart from the doctrine of sovereign immunity. *Myers v. McGrady*, 360 N.C. 460, 465, 628 S.E.2d 761, 766 (2006). The STCA did not specifically address the public duty doctrine when it was originally enacted. Our Supreme Court first recognized the public duty doctrine in *Braswell v. Braswell*, 330 N.C. 363, 370, 410 S.E.2d 897, 901 (1991) ("The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals."). Later cases expanded the applicability of the public duty doctrine to governmental functions other than law enforcement. *See Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711 (1998) (alleged negligent failure to inspect chicken processing facility); *Hunt*, 348 N.C. 192, 499 S.E.2d 747 (alleged negligent inspection of go-kart seatbelt at amusement park); *Myers*, 360 N.C. 460, 628 S.E.2d 761 (alleged negligent management of forest fires). Two exceptions were recognized:

> (i) where there is a special relationship between the injured party and the governmental entity ("special relationship") and (ii) when the governmental entity creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered ("special duty").

Hunt, 348 N.C. at 197, 499 S.E.2d at 750 (citing *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902).

¶ 19 In 2008, the General Assembly added N.C. Gen. Stat. § 143-299.1A to the STCA, which provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, the public duty doctrine is an affirmative defense on the part of the State department,

> institution, or agency against which a claim is asserted if and only if the injury of the claimant is the result of any of the following:
>
> (1) The alleged negligent failure to protect the claimant from the action of others or from an act of God by a law enforcement officer as defined in subsection (d) of this section.
>
> (2) The alleged negligent failure of an officer, employee, involuntary servant or agent of the State to perform a health or safety inspection required by statute.
>
> (b) Notwithstanding subsection (a) of this section, the affirmative defense of the public duty doctrine may not be asserted in any of the following instances:
>
> (1) Where there is a special relationship between the claimant and the officer, employee, involuntary servant or agent of the State.
>
> (2) When the State, through its officers, employees, involuntary servants or agents, has created a special duty owed to the claimant and the claimant's reliance on that duty is causally related to the injury suffered by the claimant.
>
> (3) Where the alleged failure to perform a health or safety inspection required by statute was the result of gross negligence.

N.C. Gen. Stat. § 143-299.1A (2019).

¶ 20 Our Supreme Court addressed this amendment in *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 727 S.E.2d 675 (2012). The *Ray* Court noted that the statute "incorporated much of our public duty doctrine case law." *Id.* at 7, 727 S.E.2d at 680 ("Subdivision 143-299.1A(a)(1) includes the *Braswell* holding for law enforcement officers. Subdivision 143-299.1A(a)(2) aligns with *Stone*'s holding that there is no liability for negligent failure to inspect under the public duty doctrine. Finally, subdivisions 143-299.1A(b)(1) and (b)(2) codify the exceptions to the public duty doctrine we have recognized since our first acknowledgment of the doctrine." (citations omitted)). The Court also acknowledged the General Assembly "made clear that the doctrine is to be a more limited one than

the common law might have led us to understand." *Id.* Accordingly, the Court determined that:

> By the plain language of the statute, the public duty doctrine is a defense only if the injury alleged is the result of (1) a law enforcement officer's negligent failure to protect the plaintiff from actions of others or an act of God, or (2) a State officer's, employee's, involuntary servant's, or agent's negligent failure to perform a health or safety inspection required by statute. . . . *In all other cases the public duty doctrine is unavailable to the State as a defense.*

Id. at 8, 727 S.E.2d at 680-81 (emphasis added).

¶ 21 Upon concluding that the statute limits the use of the public duty doctrine as an affirmative defense, the Court determined that the statute was a clarifying amendment, reasoning that the General Assembly reacted to "a topic that it had not previously addressed and stating that, while our Court had largely properly applied the doctrine, the doctrine is to be a limited one[,]" which "indicate[d] that the General Assembly intended to clarify the role of the public duty doctrine in the STCA with N.C. [Gen. Stat.] § 143-299.1A." *Id.* at 12, 727 S.E.2d at 683.

¶ 22 Defendant argues that the public duty doctrine applies to allegedly negligent inspections, citing our Supreme Court's holding in *Hunt* which applied the public duty doctrine to negligent inspection of seat belts. Defendant also emphasizes the portion of *Ray* holding that the amendment is clarifying to support the argument that Hunt is still controlling. Although defendant is correct that the amendment was held to be a clarifying one and *Ray* did not explicitly overrule prior precedent, defendant fails to acknowledge the plain language of the statute and *Ray*'s application of the statute.

¶ 23 The statute provides that the public duty doctrine is available as an affirmative defense "if and only if the injury of the claimant is the result of . . . [t]he alleged negligent failure of an officer, employee, involuntary servant or agent of the State *to perform* a health or safety inspection required by statute." N.C. Gen. Stat. § 143-299.1A(a)(2) (emphasis added). In *Ray*, the Court held that the plaintiffs' claims for "negligent 'design and execution' of the narrowing of [a roadway] from three lanes to two," and "negligent failure to repair" were not barred by the public duty doctrine because "[n]either claim is for negligent failure to inspect pursuant to a statute[.]" *Ray*, 366 N.C. at 12, 727 S.E.2d at 683. In the case *sub judice*, plaintiffs' claim is based on allegedly negligent licensure actions

taken after a series of inspections. Plaintiffs' claim is not for the alleged negligent failure *to perform* a health or safety inspection. Accordingly, by applying the plain language of the statute and our Supreme Court's holding in *Ray*, we hold that plaintiffs' claim is not barred by the public duty doctrine.

D. Negligence Claim

¶ 24 **[3]** Defendant contends that plaintiffs' allegations are not sufficient to state a cause of action because "[t]here is no legal basis for the claim that DHHS owes a duty to the owners or operators of the adult care homes it inspects and licenses." Defendant also asserts that the "intentional, discretionary acts taken pursuant to regulatory authority do not give rise to a tort claim."

¶ 25 Defendant's argument is intertwined with its interpretation of the public duty doctrine. Although an inquiry into a statutory duty to the public was central to our Supreme Court's precedent prior to the 2008 amendment, our Supreme Court's application of the amendment in *Ray* is clear that the General Assembly intended to limit the public duty doctrine and that our Courts should apply the plain language of the statute. As we have held that the public duty doctrine does not bar plaintiffs' claim, defendant's argument that plaintiffs have failed to state a cause of action is overruled.

¶ 26 Additionally, defendant's argument that it should not be held liable for acting intentionally pursuant to authority granted by the General Assembly "overlooks the fact that the focus is not on whether [defendant's] actions were intentional, by rather on whether [they] intended to injure or damage the [plaintiffs]." *See Crump v. N.C. Dep't of Env't & Nat. Res.*, 216 N.C. App. 39, 44-45, 715 S.E.2d 875, 880 (2011).

> The term "willful negligence" has been defined as the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed. A breach of duty may be willful while the resulting injury is still negligent. Only when the injury is intentional does the concept of negligence cease to play a part.

Pleasant v. Johnson, 312 N.C. 710, 714, 325 S.E.2d 244, 248 (1985) (internal citations omitted). In order for defendant's argument to succeed, a showing that defendant's employees intended to cause harm to plaintiffs would be required. Nothing in the record in this case, nor the parties' briefs, suggest that defendant intended to cause plaintiffs' injuries.

Accordingly, defendant's argument that it should not be held liable for intentional acts is overruled.

¶ 27 The dissent expresses concern that under this holding, defendant and other state regulatory agencies will be held "in an impossible standard" liable for both enforcing and failing to enforce statutory mandates. The dissent cites in comparison our recent opinion in *Tang v. N.C. Dep't of Health and Hum. Servs.*, 2021-NCCOA-611 (unpublished).

¶ 28 In *Tang*, we affirmed the Commission's finding that defendant had breached its duty by failing to take appropriate regulatory action. *Id.* ¶ 1. The adult care facility at issue in Tang housed a number of residents known to be disoriented or with other mental health conditions, and the facility did not have any functioning door alarms to alert staff if residents left the facility unattended. *Id.* ¶ 4. Although defendant was aware that the facility was not equipped with adequate exit alarms, defendant failed to assess appropriate violations or require appropriate corrective measures. *Id.* ¶¶ 5-6. Before the facility took any corrective action, an adult care resident eloped and was later found dead in a nearby area. *Id.* ¶¶ 8-11.

¶ 29 The dissent argues that defendant is now squeezed into an impossible predicament between *Tang* and this opinion and will be held liable regardless of what actions are taken. The dissent's concerns are misplaced for several reasons. First, *Tang* is factually distinguishable from this case. In *Tang*, it was established that the conditions actually posed a serious risk of harm to adult care facility residents, that defendant knew or should have known of the conditions, and that defendant failed to take appropriate regulatory action (i.e., assessing a Type A violation). *Id.* ¶ 13. In this case, taking the factual allegations in plaintiff's affidavit as true (as we are required to do at this stage of the litigation), the conditions did not actually pose a serious risk of harm, but defendant took the most extreme regulatory action available (i.e., multiple Type A violations and a suspension of admissions). Although the dissent characterizes this as an impossible predicament where defendant will always be liable, these cases simply present examples where defendant failed to exercise reasonable care in fulfilling its statutory duties.

E. Public Policy

¶ 30 **[4]** Defendant finally argues that allowing tort claims for regulatory actions would endanger North Carolina citizens and "unleash a flood of litigation." In so arguing, defendant warns that allowing a regulated entity to bring a tort claim "could dissuade regulators from performing their statutorily mandated duty to protect residents."

¶ 31 "North Carolina courts have recognized the jurisdiction of the Industrial Commission to determine whether discretionary acts performed by employees or agents of the State were negligent and whether they proximately caused injury to a claimant." *Zimmer*, 87 N.C. App. at 136, 360 S.E.2d at 118 (citations omitted). Our Courts have repeatedly affirmed the Commission's authority to make determinations of negligence where a party alleges harm caused by an agency's regulatory actions. We are not persuaded by defendant's concern that affirming the Commission here will encourage regulators to abandon their statutorily mandated duties. Our holding does not add or subtract any duties to which defendant or its employees were already bound to.

¶ 32 More importantly, our General Assembly "is without question the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (citation and quotation marks omitted). Here, our General Assembly chose to legislate with respect to the public duty doctrine, and the statute has become "the public policy of the State" with respect to the availability of the public duty doctrine as an affirmative defense. Defendant's public policy concerns would be more appropriately directed to the General Assembly, particularly in this case where the General Assembly limited the applicability of the public duty doctrine through legislative action.

III. Conclusion

¶ 33 For the foregoing reasons, we affirm the Commission's order denying defendant's motion to dismiss.

AFFIRMED.

Judge DIETZ concurs by separate opinion.

Judge TYSON dissents by separate opinion.

DIETZ, Judge, concurring.

¶ 34 State regulators are not angels. They are people, like all the rest of us. And, like everyone else, they owe a duty when they act to exercise ordinary care to protect others from foreseeable harm. *Fussell v. N. Carolina Farm Bureau Mut. Ins. Co.*, 364 N.C. 222,

226, 695 S.E.2d 437, 440 (2010). But the State has a power the rest of us do not; the State can cloak itself in sovereign immunity to avoid being sued when its own employees breach this universal duty of care that the law imposes on us all.

¶ 35 Several years ago, this Court held that, when State regulators act negligently in the performance of their regulatory duties, the State had opted to treat itself like everyone else. *Nanny's Korner Day Care Ctr., Inc. v. N. Carolina Dep't of Health & Hum. Servs.*, 264 N.C. App. 71, 80, 825 S.E.2d 34, 41 (2019). The State did so, this Court reasoned, through the State Tort Claims Act, which permitted the plaintiff in *Nanny's Korner* to sue a State agency (the same agency sued in this case) for the negligence of its regulators. *Id.* To be sure, the Industrial Commission dismissed that negligence claim as barred by the applicable statute of limitations, but this Court held that the claim, had it been timely filed, could have been pursued under the State Tort Claims Act. *Id.*

¶ 36 That decision is still good law and we are bound by it. My dissenting colleague strains to avoid *Nanny's Korner*'s holding by asserting that this Court's "dismissal was the ratio decidendi and the end of our appellate mandate," leaving the rest of the Court's analysis as unbinding "obiter dicta." This is nonsense. It is this Court's *holding* that binds us, not merely the mandate or disposition, and we held in *Nanny's Korner* that the plaintiff's constitutional claim was barred because the plaintiff "had an adequate state remedy in the form of the Industrial Commission through the Torts Claim Act." *Id.*

¶ 37 The dissent also points to a number of policy reasons for rejecting *Nanny's Korner*—a potential "stampede" of lawsuits against the State; the availability of relief through the APA; the State's allegations (all of which remain unproven) that Cedarbrook operated a substandard residential care home.

¶ 38 These policy considerations might be reasons for our Supreme Court to exercise its discretion to take this case and examine the holding in *Nanny's Korner*—something our State's high court chose not to do when *Nanny's Korner* was first decided. But they are not reasons for a Court of Appeals judge to dissent. *See State v. Miller*, 275 N.C. App. 843, 851, 852 S.E.2d 704, 711 (2020). I will faithfully adhere to our responsibility to follow controlling precedent and leave it to our Supreme Court to determine if that precedent should change.

TYSON, Judge, dissenting.

¶ 39 Plaintiffs failed to show any legal duty owed or breach thereof, or proximate cause in their putative negligence action. Claims challenging an agency's regulatory actions are properly heard under the North Carolina Administrative Procedures Act ("NCAPA"). The plurality opinion's conclusion will lead to a stampede of nonjusticiable suits against regulatory state agencies which are clearly barred by sovereign immunity except for the limited waiver of that immunity under the State Tort Claims Act ("STCA").

¶ 40 The Industrial Commission cannot waive North Carolina's sovereign immunity under the STCA. The Commission has no statutory mandate or jurisdiction to sit in judgment of the reasonableness of other state agencies enforcing that agency's regulatory mandates when the agency's duty is such that no "private person" can perform under the STCA.

¶ 41 That regulatory review function is clearly assigned under the NCAPA to the Office of Administrative Hearings ("OAH"). The plurality's opinion erroneously affirms the Commissioner's order denying defendant's motion to dismiss. I vote to reverse, remand for dismissal, and respectfully dissent.

I. Background

¶ 42 Defendant documented the gross violations and issues it found at Cedarbrook's senior living facility in its "Statements of Deficiencies," a comprehensive investigative report which exceeded 400 pages. The regulatory findings included documented deficiencies in: (1) supervision issues, where a Cedarbrook resident was found near I-40, five miles away from Cedarbrook's facility; (2) reports of residents involved in prostitution and sexual acts in exchange for sodas from the commissary, which plaintiff claims were all consensual activities; and, (3) cockroach infestations, among many other things.

¶ 43 In November 2015, defendant issued proposed penalties and suspended Cedarbrook from admitting new residents. Plaintiff challenged these regulatory actions in proceedings before the OAH in 2016. Plaintiff and defendant reached an agreement to settle the matter prior to hearing before an administrative law judge. As a result of the settlement, defendant agreed to dismiss the citations. Plaintiff does not challenge the factual basis for allegations in the Statement of Deficiencies, but offers alternative reasons, explanations, and excuses for these documented events and deficiencies at its facility.

II. Issue

¶ 44 Defendant argues the Commission erred in refusing to dismiss plaintiff's claims as barred by the State's sovereign immunity; and by effectively recognizing a cognizable claim for purported "negligent regulation" to permit an entity or individual, which is regulated by the State, to sue the state regulator, agency, and ultimately the taxpayers of North Carolina under general tort law under the STCA before the Industrial Commission.

III. Standard of Review

¶ 45 "[W]e review the trial court's denial of defendant's motion to dismiss *de novo*." *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) (emphasis supplied).

IV. Analysis

A. Sovereign Immunity

¶ 46 The General Assembly instituted public policy and statutorily charged defendant with licensing and inspecting adult care homes and facilities. It also mandated defendant to enforce statutes and regulations to achieve these goals and uphold the rights of captive and vulnerable residents. *See* N.C. Gen. Stat § 131D-2.4 (2019) (Defendant "shall inspect and license all adult care homes."). The statute requires defendant to impose penalties on adult care homes and facilities when and if their inspections reveal violations of state law, regulations, or violations of the residents' rights. N.C. Gen. Stat. § 131D-4.4(d) (2019).

¶ 47 Our Supreme Court held, "[i]t has long been established that an action cannot be maintained against [a state agency] unless it consents to be sued or upon its waiver of immunity, and that *this immunity is absolute and unqualified*." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983) (citations omitted). Defendant maintains "*absolute and unqualified*" sovereign immunity from suit in enforcing this statute as a state agency. *Id.* This immunity is absolute under common law, is the status quo unless waived, bars statutory claims, and compels dismissal. *See id.*

¶ 48 Plaintiff can only overcome "*absolute and unqualified*" sovereign immunity by showing the State waived its immunity and consented to be sued. *Id.* Again, our Supreme Court confirmed the General Assembly's public policy in *Guthrie*, "[t]he State is immune from suit unless and until it has expressly consented to be sued." *Id.* (citation omitted). If a plaintiff cannot demonstrate waiver of immunity and consent, its claim

fails and it must be dismissed. *Vest v. Easley*, 145 N.C. App. 70, 74, 549 S.E.2d 568, 573 (2001).

B. Tort Claims Act

¶ 49 The STCA is an expressly limited statutory waiver of the State's sovereign immunity by the General Assembly. It permits only claims arising "as a result of the negligence of any . . . employee . . . of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, *if a private person*, would be liable to the claimant in accordance with the laws of North Carolina." N.C. Gen. Stat. § 143-291(a) (2019) (emphasis supplied).

¶ 50 Pursuant to the STCA, "negligence is determined by the same rules as those applicable to private parties." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988) (citation omitted). "To establish actionable negligence, plaintiff must show that: (1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury." *Id.*

¶ 51 The party asserting a claim must establish cause. Proximate cause is "a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred," and that it could be reasonably foreseen and probable under the circumstances. *Id.* at 710, 365 S.E.2d at 901 (citation omitted).

¶ 52 The Commission concluded plaintiff's allegations "compl[y] with the requirements of the Tort Claims Act" because plaintiff filed a complaint and listed employees whose conduct was allegedly negligent. This holding expressly contradicts the plain language of the statute, upends the General Assembly's comprehensive and long-established administrative statute and procedures to challenge regulatory action, which provides an adequate state remedy.

¶ 53 The Commission's denial of defendant's motion to dismiss creates unprecedented and untenable liability for the citizens and taxpayers of this State. Further, STCA only permits parties to sue the State "where the State of North Carolina, *if a private person*, would be liable[.]" N.C. Gen. Stat. § 143-291(a). (emphasis supplied). This inclusion of "if a private person" clause is a substantive statutory limiting requirement. *See Frazier v. Murray*, 135 N.C. App. 43, 48, 519 S.E.2d 525, 529 (1999) ("Tort liability for negligence attaches to the state and its

agencies under the Tort Claims Act only where the State [], if a private person, would be liable to the claimant." (citation omitted)).

¶ 54 Plaintiff's allegations are wholly based on regulatory actions and sanctions defendant cited plaintiff for violating and which it has not denied. No "private person" has any right or authority to perform these exclusively state regulatory actions or to inspect or sanction a licensee for violations of laws and regulations. N.C. Gen. Stat. § 131D-2.4.

¶ 55 According to the Order, plaintiff asserts "[defendant] breached its 'duty of reasonable care in the exercise of its authority to investigate the facility and take licensure actions' and . . . negligently issued statements of deficiencies."

¶ 56 The STCA waives sovereign immunity only when an asserted:

> negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

Ray v. N.C. Dep't of Transp., 366 N.C. 1, 4, 727 S.E.2d 675, 678 (2012) (quoting N.C. Gen. Stat. § 143-291 (2011)).

¶ 57 Plaintiff has failed to establish a duty that any reasonable "private person" owed to them. Further, plaintiff has failed to allege that any state actor acted as an unreasonable person in breach of that putative duty during the course of their mandatory regulatory investigation and sanctions.

C. DHHS' Duties

¶ 58 This Court recently affirmed the Commission's conclusion that defendant DHHS breached a duty owed and proximately caused an elderly resident's disappearance and ultimately her death. *Tang v. N.C. Dep't of Health and Hum. Servs*, 280 N.C. App. 300, 2021-NCCOA-611 ¶ 3, 2021 WL 5071898 (unpublished). In *Tang*, DHHS, as here, was responsible for performing regulatory investigations for an adult care living facility ("Unique Living"). Upon an investigation, and after a regulatory inspection of Unique Living, DHHS issued several violations. *Id.* at *1, ¶ 4. One of the many citations pertained to a faulty door alarm system, which was specifically installed to notify staff if a patient left the facility without an attendant. *Id.* at *2, ¶ 5. The DHHS employee told Unique Living

management that no licensure action would be taken at that time because no serious non-compliance consequences had arisen. *Id.* at *2, ¶ 6.

¶ 59 Ms. Tang, an elderly resident of Unique Living, required increased monitoring. She walked out of Unique Living unattended, just days after these alarm door violations were reported. *Id.* at *2, ¶ 8. Within a week, Unique Living's license was suspended, and the facility was closed. *Id.* at *2, ¶ 9. Ms. Tang was officially declared deceased years later in 2014. *Id.* at *2, ¶ 11.

> The Commission found that [DHHS] had a duty to Ms. Tang pursuant to N.C. Gen. Stat. § 131D-2 *et. seq.*, which was "to license and periodically inspect adult care homes like Unique Living and to take reasonable steps to ensure that the conditions at those facilities did not place residents at substantial risk of serious death or harm." Based on the evidence, the Commission found that "[DHHS] had the ability and the regulatory authority to take action against Unique Living to prevent harm to its residents but failed to do so."
>
> . . . .
>
> The Commission concluded that defendant breached its duty "*by failing to take appropriate regulatory action* to ensure immediate correction of the conditions that existed at Unique Living in July 2008[,]" specifically the "wholly inadequate supervision of residents[.]" The Commission concluded that this breach was a proximate cause of Ms. Tang's disappearance and death, *because if [DHHS] had taken appropriate regulatory action* to ensure the conditions at Unique Living were corrected immediately, Ms. Tang "would not have been able to leave the facility unnoticed."

Id. at *3, ¶ 16-17 (emphasis supplied).

¶ 60 In *Tang*, the Commission held DHHS liable and ordered them to pay Ms. Tang's estate $500,000.00 in damages. *Id.* at *2-3, ¶¶ 13, 15-16. This Court affirmed the Commission's finding and conclusion, holding DHHS had breached their duty "by failing to take appropriate regulatory action to ensure immediate correction of the conditions." *Id.* at *3, ¶ 28.

¶ 61 Here, among other infractions and as with the Type A violations in *Tang*, DHHS alleged that an elderly resident from Cedarbrook had wandered from the facility without notice to or accompanied by the staff. Fortunately, the elderly resident was found alive five miles away from plaintiff's facility near the Interstate highway.

¶ 62 Plaintiff must show duty, breach thereof, causation and damage. *Parker v. Town of Erwin*, 243 N.C. App. 84, 110, 776 S.E.2d 710, 729-30 (2015). Plaintiff has not shown a duty not to "negligently regulate" was owed, nor have they shown that duty was breached, and asserted no supported allegation the purported breach was the proximate cause of their harm. DHHS, and quantitatively North Carolina taxpayers, became encumbered by a hefty fine in *Tang* because the agency's duty and breach to the deceased resident were purportedly shown. DHHS was held responsible for their failure to act within the authority given them to enforce the regulatory investigations and violations found therein to protect an elderly resident from wandering alone.

¶ 63 Here, DHHS did the opposite to meet its statutory mandates. DHHS cited the violations and acted promptly to ensure the vulnerable residents were protected and the violations were quickly addressed. As was asserted by counsel for DHHS at oral arguments, if DHHS is liable in *Tang* when they do not enforce regulatory sanctions and then, under the plurality's analysis, are also liable when they do enforce for the same conduct, how can DHHS comply with their statutory mandate to conduct regulatory investigations to protect vulnerable residents at all?

¶ 64 If DHHS enforces the statutory mandates "too" properly, but later settles the issues prior to hearing before the OAH then the agency will be subject to suit by a myriad of plaintiffs.

¶ 65 Plaintiff allowed these deficiencies in their facilities and procedures to exist, brought an administrative challenge to the Statement of Deficiencies, which was settled prior to hearing before the ALJ. Plaintiff failed to allege the elements of negligence to state a claim that is cognizable under the STCA.

¶ 66 Under the logic of *Tang* and the plurality's opinion, and as DHHS argued during oral arguments, they and all state regulatory agencies would be held in an impossible standard (1) liable for enforcing the statutory mandates; and, (2) also liable for failing to enforce those very same mandates with the Industrial Commission sitting in judgment of their "reasonableness." The limited waiver of sovereign immunity under the STCA simply does not recognize or permit plaintiff's claim, which is properly dismissed.

V. Adequate State Remedy

¶ 67 The plurality and concurring opinions cite *Nanny's Korner Day Care Ctr., Inc. v. N. C. Dep't of Health and Human Servs.*, 264 N.C. App. 71, 825 S.E.2d 34 (2019), and assert it is controlling precedent and binds us to uphold the Industrial Commission's failure to dismiss in our present case.

¶ 68 In *Nanny's Korner*, the plaintiff suffered loss of clients and eventually closed after DHHS filed reports alleging sexual abuse of children in the day care center and required the plaintiff to notify other parents. *Id.* at 75, 825 S.E.2d at 38. This Court dismissed plaintiff's expired claim and held, "Plaintiff does not have a direct constitutional claim against the State under the North Carolina Constitution." *Id.* at 80, 825 S.E.2d at 41.

¶ 69 This Court affirmed the Industrial Commission's dismissal of the plaintiff's claim. *Id.* Affirming that dismissal was the *ratio decidendi* and ended our appellate review and mandate. Any further notion, asserted by the plurality's opinion purporting to create a regulatory negligence claim against a State agency to be haled before the Industrial Commission under the STCA, is extraneous and obiter dicta. Neither the plurality nor the concurring opinion addresses the primacy of sovereign immunity as the general rule and the limited and express statutory waiver and exception under the STCA to allow tort claims only when and "if a private person would be liable to the claimant." *Ray*, 366 N.C. at 4, 727 S.E.2d at 678 (citation omitted).

¶ 70 Under the NCAPA, for an aggrieved party, an administrative law judge may:

> Order the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved in contested cases decided under this Article where the administrative law judge finds that the State agency named as respondent has substantially prejudiced the petitioner's rights and has acted arbitrarily or capriciously or under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay.

N.C. Gen. Stat. § 150B-33(b)(11) (2019).

¶ 71 Presuming DHHS or its employee-agent did not act professionally or reasonably during the scope of their investigation or in preparing its 400-page "Statement of Deficiencies," the NCAPA provides an adequate

and exclusive state remedy for allegedly improper or unjustified regulatory action by a state agency or employees.

¶ 72 Under the NCAPA's waiver of immunity and the enacted administrative procedure and remedies statute, an aggrieved party may challenge state regulatory action, and seek a remedy. If plaintiff had continued to pursue its claims before the OAH and won, it could have pursued reversal of the administrative action, remedial actions, and an award of attorneys' fees in the contested case by showing defendant "substantially prejudiced" its rights and acted "arbitrarily or capriciously." N.C. Gen. Stat. § 150B-33.

¶ 73 "[T]he law encourages settlements" of disputes. *Kirkpatrick & Assocs. v. Wickes Corp.*, 53 N.C. App. 306, 311, 280 S.E.2d 632, 636 (1981). Plaintiff voluntarily did so here and chose not to pursue its NCAPA administrative remedies to completion. That settlement does not give rise to any cognizable claim for regulatory negligence before the Industrial Commission.

¶ 74 Similarly, in an appeal following the NCAPA contested case, plaintiff could have sought attorneys' fees for the appeal and the administrative proceedings if it persuaded an appellate court that defendant acted "without substantial justification in pressing its claims." N.C. Gen. Stat. § 6-19.1 (2019). Plaintiff here did neither and settled its claims prior to hearing and waived and exhausted its administrative remedies. *Id.*

¶ 75 The General Assembly enacted public policy and created a comprehensive statutory procedure to allow and govern aggrieved party challenges to regulatory action through a contested case, including in the specific context of sanctions and penalties assessed, and suspensions of admissions to non-compliant adult care homes. The General Assembly provided clear, but limited, internal and external remedies for parties who claim injury by unjustified regulatory agency action. Negligence claims before the Industrial Commission challenging regulatory actions and sanctions are not cognizable within the STCA's limited waiver of sovereign immunity, and such putative claims are not within the jurisdiction of the Industrial Commission. If aggrieved, plaintiff possessed adequate State remedies available under the NCAPA and the OAH and failed to exhaust them. N.C. Gen. Stat. § 150B-33. Plaintiff's claims are properly dismissed.

VI. Conclusion

¶ 76 Defendant's regulatory activities and sanctions are exclusively state actions under North Carolina's sovereign immunity. Plaintiff has failed

to show any enforceable duty owed or breach thereof on part of DHHS, "if a private person would be liable to the claimant." Plaintiff's complaint is properly dismissed as not cognizable under the limited sovereign immunity waiver of the STCA. Plaintiff failed to pursue and exhaust available and adequate administrative procedures and remedies properly asserted under the NCAPA and the OAH.

¶ 77 Plaintiff's own negligence contributed to its predicament by allowing squalor and deplorable conditions to exist, and like the Type A violations in *Tang*, allowed an elderly patient to walk out and be found alive five miles away at an interstate highway, failed to provide adequate oversight of its vulnerable populations in residential adult care facilities, and utterly failed to abide by state-mandated statutes and regulations. If there are any true victims or duty owed or breach thereof here, it is plaintiff's duty to their elderly, dependent, suffering, and neglected residents, and not the taxpayers of North Carolina to the plaintiff. This appeal is properly reversed and remanded to the Commission to dismiss. I respectfully dissent.

SUBASHINI HIRSCHLER, PLAINTIFF
v.
MATTHEW HIRSCHLER, DEFENDANT

No. COA21-111

Filed 21 December 2021

Contempt—criminal contempt hearing—sua sponte civil contempt—lack of notice—appeal moot

Although the trial court erred by sua sponte holding a father in civil contempt—for violation of a child custody order—after conducting a criminal contempt hearing, the father's appeal was dismissed as moot because the parties' son had reached the age of eighteen during the pendency of the appeal and therefore the child custody order was no longer in force.

Judge INMAN concurring by separate opinion.

Appeal by Defendant from Order entered 16 September 2020 by Judge Gary L. Henderson in Mecklenburg County District Court. Heard in the Court of Appeals 25 August 2021.

Subashini M. Hirschler, pro se, for Plaintiff-Appellee.

Collins Family Law Group, by Rebecca K. Watts, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Matthew Hirschler ("Defendant") appeals a civil contempt judgment finding him in civil contempt. The trial court signed an order for Defendant to appear and show cause why he should not be held in criminal contempt, conducted a hearing for criminal contempt, then, *sua sponte*, held Defendant in civil contempt and ordered he be taken into immediate custody. Though we agree with Defendant the trial court may not order civil contempt *sua sponte*, we dismiss this case as moot.

I. Background

¶ 2 On March 16, 2017, the trial court entered an Order for Permanent Custody and Visitation (the "Custody Order") granting Subashini Hirschler ("Plaintiff") primary physical custody of Plaintiff and Defendant's then sixteen-year-old minor child, M. H. The Custody Order granted Defendant custody of M.H. for the first half of summer from June 1 to July 10. Plaintiff resides in North Carolina, and Defendant resides in Florida. For M.H.'s summer visits with Defendant, Plaintiff and Defendant agreed to deviate from the Custody Order to allow Defendant to have parenting time from May 29 through July 8. Starting in late June 2020, M.H. began communicating with Plaintiff that M.H. wanted to stay in Florida with Defendant instead of returning to North Carolina on July 8. Plaintiff, Defendant, and M.H. began exchanging texts and e-mails wherein Plaintiff attempted to persuade M.H. to return to North Carolina, but M.H. remained in Florida.

¶ 3 Defendant did not return M.H. to Plaintiff, explaining he would not forcibly put M.H. into a car and drive M.H. to the exchange against M.H.'s will. Defendant urged Plaintiff to drive to Florida and talk to M.H. about coming back to North Carolina. On July 31, 2020, Plaintiff filed a Motion for Contempt and an "Ex Parte Motion for Emergency Court", asking the trial court to find Defendant in criminal contempt of court. Although Plaintiff eventually did drive to Florida to speak to M.H. on September 5, 2020, M.H. continued to refuse to return to North Carolina with Plaintiff. The trial court signed an order to show cause against Defendant on August 7, 2020, directing Defendant to appear and show cause why he should not be held in criminal contempt. The criminal contempt hearing was held on September 15, 2020. At the beginning of

the hearing, the parties' attorneys confirmed criminal contempt was the disposition being sought by Plaintiff, and the hearing proceeded under such supposition.

¶ 4 At the conclusion of the hearing, the trial court *sua sponte* adjudicated Defendant to be in civil contempt for violating the Custody Order and immediately ordered Defendant to be taken into custody and jailed until he purged himself of contempt by returning M.H. to her mother. Defendant timely filed a notice of appeal to this Court from the contempt order the next day as well as a motion for emergency stay to the trial court. The trial court denied Defendant's motion to stay on September 21, 2020. On September 24, 2020, Defendant filed a Petition for Writ of Supersedeas with this Court which was granted on October 5, 2020.

¶ 5 Defendant raises several issues on appeal; however, we need not address each issue because on September 12, 2021, M.H. reached eighteen years of age, thus rendering this case moot.[1] Nonetheless in our discretion, we choose to review whether a trial court may issue an order of civil contempt in a criminal contempt hearing. We hold the trial court may not hold an alleged contemnor, who has been notified only of criminal contempt proceedings, in civil contempt.

I. Discussion

A. A Trial Court May Not *Sua Sponte* Order Civil Contempt in a Criminal Contempt Hearing

¶ 6 As a preliminary matter, we note "[q]uestions of statute interpretation are ultimately questions of law for the courts and are reviewed de novo." *In re Summons Issued to Ernst & Young, LLP*, 363 N.C. 612, 616 684 S.E.2d 151, 154 (2009) (citation omitted). N.C. Gen. Stat. § 5A-21(a) defines civil contempt as "[f]ailure to comply with an order of a court." N.C. Gen. Stat. § 5A-21(a) (2021). Criminal contempt is defined as the "[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution." N.C. Gen. Stat. §5A-11(a)(3) (2021). One of the basic purposes "of the Commission in drafting the Chapter on contempt [is] . . . *to draw a sharp distinction* between proceedings for criminal contempt and the proceedings for

1. On appeal, Defendant argues the trial court 1) lacked subject matter jurisdiction to enter civil contempt; 2) erred as a matter of law by determining civil contempt was a lesser form of contempt in comparison to criminal contempt, placing the burden of proof on Defendant, and holding Defendant in civil contempt at the end of a criminal contempt hearing; and 3) violated Defendant's due process rights by finding Defendant in civil contempt after a criminal contempt hearing and without any notice.

civil contempt . . . ." N.C. Gen. Stat. § 5A-1(2021) (Official Commentary) (emphasis added). An alleged contemnor may not be found in "both civil and criminal contempt for the same conduct." *State v. Revels*, 250 N.C. App. 754, 758, 793 S.E.2d 744, 748 (2016). The standards of proof differ between civil and criminal contempt as well. In a civil contempt proceeding, the burden of proof is probable cause, while in a criminal contempt proceeding the burden of proof is beyond a reasonable doubt. N.C. Gen. Stat. § 5A-15(f) (2021); *Cumberland Cty. ex rel. Mitchell v. Manning*, 262 N.C. App. 383, 388, 822 S.E.2d 305, 308 (2018). *See also* N.C. Gen. Stat. § 5A-23(a) (2021).

¶ 7 In the present case, the trial court erred by sua sponte holding Defendant in civil contempt when Defendant had not been given adequate notice of an inquiry into civil contempt. There are three permissible methods for when a civil contempt proceeding can be initiated: 1) by a "motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt[,]" N.C. Gen. Stat. § 5A-23(a1) (2021); 2) "by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt"; or 3) "by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt." § 5A-23(a). "The order or notice must be given [to]" or a "copy of the motion and notice must be served on" the alleged contemnor "*at least five days in advance of the hearing unless good cause is shown*." § 5A-23(a)-(a1) (emphasis added).

¶ 8 In the present case, Defendant operated under the reasonable assumption the hearing was for criminal contempt, and not for civil contempt, based upon the following evidence. The entirety of Plaintiff's "Motion for Contempt and Ex Parte Motion for Emergency Court" never mentioned civil contempt, but only alleged Defendant to be in criminal contempt: "Father is in criminal contempt of Court"; "there is probable cause to believe Father is in Criminal Contempt"; and "Mother prays the Court for the following relief[] . . . Enter an Order finding Father in criminal contempt . . . . That the Father receive, as a punishment for criminal contempt . . . ." The District Court's Order to Show Cause additionally stated Defendant must show cause "why he should not be [held in contempt] or punished for criminal contempt." The District Court's Notice of Domestic Hearing stated the nature of the hearing was criminal contempt and show cause. Even if these documents left a scintilla of doubt whether Defendant was put on notice of civil contempt, both

Defendant and Plaintiff's attorneys confirmed the hearing was for criminal, not civil, contempt:

> [Defendant's Trial Attorney:] Your Honor, this is a criminal contempt matter. It was a motion for criminal contempt, it was a show cause for criminal contempt. There was a notice of hearing for criminal contempt. Criminal contempt burden relies solely on the moving party to present evidence regarding the case . . . .
>
> . . .
>
> [Plaintiff's Trial Attorney:] Your Honor, she's absolutely right . . . I just realized we did ask for criminal contempt . . . .
>
> THE COURT: Okay.

¶ 9 Essentially, at no point was Defendant given any required notice he could be subjected to civil contempt. All evidence indicated Defendant was only alleged to be in criminal contempt. It was only when the trial court judge decided *sua sponte* to hold Defendant in civil contempt at the end of the criminal contempt hearing that Defendant was made aware of the court's inquiry into civil contempt. Section 5A-23(a)-(a1) requires notice of a contempt proceeding to be given to the alleged contemnor at a *minimum five days* prior. § 5A-23(a)-(a1). Defendant clearly was not given the notice required for an inquiry into civil contempt and, thus, the trial court erred in finding Defendant in civil contempt absent notice to the Defendant of the inquiry into civil contempt.

¶ 10 While the trial court's conclusion of law that civil contempt is a lesser form of contempt than criminal contempt may have been appropriate under prior versions of the contempt statute, the change in the statute in 2021 does not support this conclusion. Civil contempt is a distinct form of contempt and is not a lesser form of contempt than criminal contempt. N.C. Gen. Stat. § 5A-12 states a "person held in criminal contempt under this Article *shall not*, for the same conduct, be found in civil contempt under Article 2 of this Chapter, Civil Contempt." N.C. Gen. Stat. § 5A-12(d) (2021) (emphasis added). Similarly, N.C. Gen. Stat. § 5A-23(g) provides a "person who is found in civil contempt under this Article *shall not*, for the same conduct, be found in criminal contempt under Article 1 of this Chapter." N.C. Gen. Stat. § 5A-23(g) (2021) (emphasis added).

¶ 11 In this case, the trial court *sua sponte* held Defendant in civil contempt for the same actions which were the basis of Defendant's criminal contempt actions, reasoning "[c]ivil contempt is a lessor finding than criminal contempt." From the plain language of both Section 5A-12 and 5A-23, our General Assembly intended for civil contempt and criminal contempt to be distinct, separate forms of contempt when the same conduct is concerned. In other words, civil contempt is not a lesser from of contempt than criminal contempt and the trial court erred here in concluding otherwise.

¶ 12 Regardless, we dismiss this case as moot as the trial court's original child custody order does not remain in force. Section 5A-21(a) provides a failure to comply with a court order

> is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order

N.C. Gen. Stat. § 5A-21(a) (2021). Thus, because M.H. has reached the age of maturity, the trial court's child custody order no longer remains in force, and Defendant can no longer be subjected to contempt proceedings for failure to comply with the order.

II. Conclusion

¶ 13 While we recognize the error of the trial court in holding Defendant in civil contempt after conducting a hearing only on criminal contempt, we dismiss this appeal as moot. M.H. has reached the age of maturity, and the court no longer has jurisdiction to enforce the custody order.

DISMISSED.

Judge INMAN concurs by separate opinion.

Judge JACKSON concurs.

INMAN, Judge, concurring.

¶ 14 I concur in the majority's dismissal of this appeal as moot because the parties' child has reached the age of maturity. Because we have dismissed the appeal as moot, however, I would not address the merits of Defendant's challenge to the *sua sponte* civil contempt order. *See Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931) ("It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution . . . to answer moot questions[.]") (citations omitted)); *Matthews v. N.C. Dep't of Transp.*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978) ("The general rule is that an appeal presenting a question which has become moot will be dismissed.") (citation omitted)).

ANGEL MENDEZ, PLAINTIFF
v.
LINDA MENDEZ, DEFENDANT

No. COA21-158

Filed 21 December 2021

1. Child Custody and Support—child support—imputing income—bad faith—hiding income—meritless arguments

In a child support action, the trial court did not err when it refused to impute income to plaintiff-father from his former Department of Defense (DoD) position as a combat instructor where the evidence showed that plaintiff decided to leave the DoD position due to degenerative disc disease, joint disease, chronic sinus disease, and prostate cancer and instead to pursue a law degree. Further, defendant-mother's argument that plaintiff was shielding income—including that plaintiff's bankruptcy documents reflected a different income than what was provided on plaintiff's child support financial affidavit—was meritless.

2. Child Custody and Support—child support—Child Support Guidelines—deviation—motion

In a child support action, the trial court properly excluded expenses for the children's activities where defendant-mother did not move to deviate from the Child Support Guidelines.

3. Child Custody and Support—attorney fees—denied—bad faith—sufficient means to defray expense—no refusal to pay support

In a child support action, the trial court properly denied an award of attorney fees to defendant-mother where she pursued an increase in child support even though she knew that plaintiff-father had been diagnosed with cancer and planned to attend law school, she knew that the action was unlikely to be decided in her favor, she had sufficient means to defray the expense of the action, and there was no evidence that plaintiff had failed to pay the required child support.

Appeal by defendant from order entered 2 September 2020 by Judge Christine T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 17 November 2021.

The Metz Law Firm, PLLC, by Keith B. Metz, for plaintiff-appellee.

Clark-Ford Law PLLC, by Melissa Clark-Ford, for defendant-appellant.

TYSON, Judge.

¶ 1 Defendant, Linda Mendez ("Defendant"), appeals from order modifying child support entered 2 September 2020. We affirm.

I. Background

¶ 2 Plaintiff, Angel Mendez ("Plaintiff"), and Defendant were married in December 2007 and divorced in August 2013. The parties are parents of three children and share custody. Plaintiff paid $2,271.00 in child support each month per order filed 29 December 2015. Defendant's Motion to Modify Child Support was filed December 2018.

¶ 3 Defendant is employed full-time with a monthly gross income of $3,964.00 and provides medical insurance for the minor children. Defendant sought to modify the child support order based upon the changing needs of the children and their enrollment in new activities, namely, music lessons, fencing, and acting classes. Defendant asserted Plaintiff had additional sources of income and requested an award of attorney's fees in the amount of $7,300.00.

¶ 4 As part of the initial child support claim, Plaintiff filed an Amended Child Support Financial Affidavit ("Affidavit") on 13 November 2015. He

affirmed, his income from Custom Gun Rails ("CGR") was $12,049.00 per month, which included the deposits from the United States Department of Defense ("DoD").

¶ 5 Plaintiff had three sources of income simultaneously: contract work as an instructor through DoD, his private business, CGR, and his VA Disability.

¶ 6 Plaintiff's employment with the DoD required him to wear body armor, stand for 12+ hours a day, perform physical activities, and to use firearms. Plaintiff earned a gross annual income of $189,755.00 in 2016, $181,307.93 in 2017, and $204,512.55 in 2018.

¶ 7 Plaintiff's second source of income was from his business, CGR. CGR fabricated custom engraved gun rails. Plaintiff was the only employee. Plaintiff no longer receives any income through CGR. He had sold the machinery to make the engraved gun rails in the summer of 2019. Plaintiff testified he had contributed personal funds to cover CGR's operating expenses.

¶ 8 Plaintiff's third source of income derived from is his VA disability. In January 2019, Plaintiff was diagnosed with prostate cancer. Plaintiff's VA disability rating increased from 10 percent to 60 percent, resulting in an increased monthly payment of $1,515.00.

¶ 9 Plaintiff provided medical records to show his cancer treatment, chronic sinus disease, and his bladder deformity. Plaintiff testified he could no longer physically continue to do the work required of him in the contractor position with the DoD without significant pain from his ailments. Plaintiff testified he planned to begin attending classes at Columbia University School of Law full-time in January 2020, with the ultimate goal of becoming an attorney, and would no longer continue to work as a government contractor for the DoD.

¶ 10 Plaintiff applied for admission to Columbia University School of Law and was accepted on 1 October 2018. Plaintiff decided to postpone his pursuit of a degree from Columbia to focus on his cancer treatment and recovery and intended to begin classes thereafter. Plaintiff testified he intended to pay for school by using an extension of his GI Bill and would continue to be eligible for payment of tuition costs and a Basic Housing Allowance.

¶ 11 Plaintiff filed a petition with the United States Bankruptcy Court for the Northern District of Texas on 4 October 2017. The 2017 Bankruptcy petition reflected gross receipts *before* deductions, as they received in

2017. Plaintiff's Affidavit provides for monthly gross income *after* deductions in 2015.

¶ 12 The trial court concluded Plaintiff's child support payment be reduced to $1,272.00 per month in a modification of child support order signed 2 September 2020. The order required the parties pay equally for the children's uninsured medical expenses. Finally, the court found Defendant had failed to prove Plaintiff was not making adequate payments under the circumstances and denied Defendant's motion for attorney's fees.

II. Jurisdiction

¶ 13 This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2019).

III. Issues

¶ 14 Defendant raises three issues on appeal, whether the trial court erred in refusing to: (1) impute income to Plaintiff from his DoD position; (2) consider as extraordinary expenses the costs of the children's activities; and, (3) award Defendant attorney's fees.

IV. Argument

A. Imputing Plaintiff's Income

1. Bad Faith

¶ 15 **[1]** For modification of child support orders, "our review is limited to a determination [of] whether the trial court abused its discretion." *Johnston Cnty. ex rel. Bugge v. Bugge*, 218 N.C. App. 438, 440, 722 S.E.2d 512, 514 (2012) (citation omitted). "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." *Id.* (citation omitted).

¶ 16 Defendant argues Plaintiff had hidden income in bad faith. When a party acts in a matter which indicates a disregard to a child support obligation, this disregard to the child support obligation is referred to as bad faith. Whether or not a party is acting in bad faith, "the basic issue to be determined is whether, the husband, by reducing his income, [is] primarily motivated by a desire to avoid his reasonable support obligations[.]" *Wachacha v. Wachacha*, 38 N.C. App. 504, 508, 248 S.E.2d 375, 377-78 (1978) (internal citations and quotation marks omitted).

¶ 17 In *Wachacha*, the father left his job as a director of recreation to return to college to complete his undergraduate degree by using his GI

Bill. *Id.* The father failed two classes and withdrew. After withdrawing from school, the father took a position with a construction company, earning less money than as the director of recreation. *Id.* This Court concluded, "[w]e do not think the evidence summarized above is sufficient to support the court's conclusion that the plaintiff-[father's] change of circumstances has voluntarily effected (sic) him in disregard of his marital and parental support obligations." *Id.* at 508, 248 S.E.2d at 378.

¶ 18 Evidence of a voluntary reduction of income alone is not sufficient to support a finding and conclusion of acting in bad faith. The party who has voluntarily reduced their income must be motivated by the desire to avoid his or her child support obligations. *Pataky v. Pataky*, 160 N.C. App. 289, 308, 585 S.E.2d 404, 416 (2003). "[T]his Court has suggested that where a defendant forgoes all employment [to] become a full-time student there may not be bad faith provided he continues to adequately provide for his children." *Id.* at 307, 585 S.E.2d at 416 (citation and internal quotation marks omitted). Unemployment or under employment does not mean a party is acting in bad faith. *Id.*

¶ 19 Like the facts in *Pataky*, Plaintiff was not unemployed by choice, and he continued to work until the start of Spring 2020. Plaintiff intended to leave his job at the DoD and pursue a legal career. Plaintiff testified his position as an instructor for the DoD required 12-hour and extensive physical strains, which took a toll on Plaintiff's body over the course of time, causing certain physical limitations. Plaintiff testified in addition to his prostate cancer diagnosis, he was also diagnosed with degenerative disc disease along his entire spine, and joint diseases in both feet, both ankles, both knees, both hips, and one rib. He presented evidence of chronic sinus disease.

¶ 20 Plaintiff's testimony concerning his physical impairments was supported by and further detailed in Plaintiff's medical records, which were admitted at trial. Plaintiff testified, "my entire spine and my, both of my legs there's just constant pain and tingling and more. So jobs that have to do or that negatively impact that, I can't do."

¶ 21 The trial court found, although Plaintiff was receiving a 60% service disability, this fact did not prohibit Plaintiff from working, but he cannot continue to do the kind of work he was doing as a DoD government contractor. The trial court stated:

> can he leap a tall building in a single bound and scale walls and shoot guns and roll out of tanks and all that, probably not . . . He was a combat . . . instructor, top

> secret in the military, and that is not like being a lawyer or an accountant . . . it makes it different.

¶ 22 Defendant argues that Plaintiff's decision to stop working with the DoD is evidence of bad faith. She claims Plaintiff can continue working in his government contractor position because he was working one month before the start of this trial.

¶ 23 Plaintiff presented evidence tending to show, despite the significant pain he experienced from his disabilities and cancer treatment, he had continued to work until right before the start of his classes at Columbia University and was still willing to provide support for his children. Such actions tend to show Plaintiff's good faith in continuing to provide support. The trial court clearly articulated its findings and conclusions that Plaintiff could not physically continue his DoD employment and was justified in seeking a legal or new career. Defendant's argument that Plaintiff had assumed a reduced income in bad faith is without merit and is overruled.

2. Shielding Income

¶ 24 The standard of review on appeal is whether adequate evidence supports the trial court's findings of fact and whether the conclusions of law are supported, given the facts presented. *Juhnn v. Juhnn*, 242 N.C. App. 58, 61-62, 775 S.E.2d 310, 313 (2015). "An abuse of discretion occurs when the trial court's decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 62, 775 S.E.2d at 313 (citation and internal quotation marks omitted).

¶ 25 This case is distinguishable from the facts in *Juhnn*, wherein this Court affirmed the trial court's ruling finding the defendant attempted to hide income by engaging in a pattern of concealing and underreporting income.

¶ 26 Here, Defendant presented various invoices from 2019, which reflected Plaintiff earned a rate of $710.00 per day for his contract work. Plaintiff contested the invoices as misleading and not accurately reflecting Plaintiff's true income. Plaintiff asserts this gross income which includes reimbursements for lodging, transportation, and meals while stationed overseas.

¶ 27 The trial court concluded the income Plaintiff was earning in December 2019 was similar to what Plaintiff had earned since 2015. The trial court considered all three of Plaintiff's jobs and the invoice submitted by Defendant and found:

> It's about a 70/30 split . . . his daily rate . . . $710 per day rate in 2019. And he said, 'I work about two weeks per month.' I just did the math on that, which makes it $3,550 per week, comes to 26 weeks $92,300, which is remarkably in line with what he's been making over the last four years, if you do the 70/30 thing. Well, not remarkably in line, but somewhat in line. I think he didn't work as much maybe because he had all of these medical things.

¶ 28 Plaintiff testified that between 2011, when he started his company, CGR through 2015, his work as a contractor for the DoD was paid directly to CGR. This explains the large sums of income moving in and out of the CGR account prior to 2016, which Defendant claims is proof of Plaintiff's bad faith. The remaining monies being moved in the CGR account is explained by Plaintiff as business expenses such as ride sharing costs, medical expenses, or tax expenses to the county.

¶ 29 Defendant argues the bankruptcy documents filed in 2017 by Plaintiff reflect a different income than what was provided on Plaintiff's Affidavit filed in 2015. A copy of the bankruptcy petition was identified as an exhibit but never admitted into evidence during trial.

¶ 30 Plaintiff argues the 2017 bankruptcy petition referred to during his testimony reflected gross receipts *before* deductions, as they were in 2017 and compares it to Plaintiff's Affidavit which provides for monthly gross income *after* deductions in 2015. The trial court also had previously made specific findings of Plaintiff's income in 2015 as part of an initial child support order. The Affidavit did not account for Plaintiff's entire yearly earnings in 2015, whereas his 2015 tax returns did.

¶ 31 In consideration of all the evidence presented, and Defendant's extensive cross-examination of Plaintiff regarding his finances, the trial court did not find any bad faith by Plaintiff in the reduction of his income, or that he was hiding his income. Defendant's argument is without merit and is overruled.

B. Children's Activities as Extraordinary Expenses

¶ 32 **[2]** Defendant argues the North Carolina Child Support Guidelines provide extraordinary expenses may be added to the child support obligation, if the court finds they are reasonable, necessary, and in the child's best interest. "The trial court is vested with discretion to make adjustments to the guideline amounts for extraordinary expenses, and the determination of what constitutes such an expense is likewise within its

sound discretion." *Doan v. Doan*, 156 N.C. App. 570, 574, 577 S.E.2d 146, 149 (2003) (citation omitted). "[A]bsent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the non-custodial parent's ability to pay extraordinary expenses." *Balawejder v. Balawejder*, 216 N.C. App. 301, 316–17, 721 S.E.2d 679, 688 (2011) (citation omitted).

¶ 33 After briefly hearing some of Defendant's evidence regarding the minor children's extracurricular activities, the court determined the costs for these activities were not extraordinary expenses under the Guidelines and stated it would hear no further evidence regarding the costs of their activities. The trial court possesses discretion to determine what expense does and does not constitute an extraordinary expense. *Doan*, 156 N.C. App. at 574, 577 S.E.2d at 149.

¶ 34 No evidence presented tended to show any of the children possessed any special needs or significant talent which would require such activities. The trial court chose not to hear evidence of the children's activities, within its discretion.

¶ 35 The determination of the costs of activities was not relevant and did not constitute extraordinary expenses. No abuse its discretion is shown, when the court was under no requirement to consider extraordinary expenses or evidence. Defendant never moved to deviate from the Guidelines. As the reasoning in *Balawejder* points out, the trial court is not required to consider extraordinary expenses, but it can consider in its discretion without such a request. The trial court had no duty to consider the extraordinary expenses. Defendant's argument is overruled.

C. Attorney's Fees

> [T]he court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has *insufficient means to defray the expense of the suit*. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding.

Hudson v. Hudson, 299 N.C. 465, 469, 263 S.E.2d 719, 722 (1980) (citation omitted).

¶ 36 **[3]** Defendant learned that Plaintiff had been diagnosed with cancer in early 2019. Defendant knew of Plaintiff's application and intent to attend

law school. Defendant could reasonably presume any further prosecution of the Motion to Modify by seeking an increase in child support would not be decided in her favor, but it could also result in a reduction of child support. Defendant elected to prosecute the matter instead of dismissing it.

¶ 37 Defendant admitted she had paid her attorney fees in full. Defendant's payments to her attorney for her fees incurred is evidence that she has sufficient funds to defray the expenses. Defendant admits, "After gross, my net is only $2,800 to $2,900, and over half of that has gone to pay my attorney fees." This indicates that Defendant has funds left over after paying her household expenses.

¶ 38 Finally, Defendant's motion to modify was solely for child support. Defendant must also prove that Plaintiff failed to pay support that was adequate under the circumstances. No evidence was presented tending to show Plaintiff had failed to pay the ordered child support, was not currently paying, or did not intend to pay his child support obligation.

¶ 39 The trial court considered Defendant's claims. The trial court made a finding that Plaintiff had been paying his child support obligation, specifically, "the facts are he was 10 percent disabled and didn't have cancer, and was operating and he was doing[,] he was working and paying a nice chunk of child support."

¶ 40 Defendant did not meet her burden in proving she was entitled to an attorney's fee award. Defendant has not shown the refusal to award her attorney's fees was an abuse of discretion. Defendant's argument is overruled.

V. Conclusion

¶ 41 The trial court did not err in refusing to impute Plaintiff's prior income, find he acted in bad faith, or had hidden income. The trial court's discretionary decision to exclude expenses for the children's activities was proper because Defendant did not move to deviate from the Guidelines.

¶ 42 The trial court properly denied an award of attorney fees to Defendant. Defendant failed to meet the required showing to be awarded attorney fees. The findings and conclusions of the trial court are affirmed. *It is so ordered.*

AFFIRMED.

Judges DIETZ and GRIFFIN concur.

ROBERSON v. TRUPOINT BANK

[281 N.C. App. 45, 2021-NCCOA-692]

DAVID RUSSELL ROBERSON, PLAINTIFF
v.
TRUPOINT BANK, DEFENDANT

No. COA21-221

Filed 21 December 2021

1. Fraud—negligent misrepresentation—judgment on the pleadings—denial of loan application for real estate purchase

An order granting a bank's motion for judgment on the pleadings on a real estate investor's negligent misrepresentation claim was affirmed where, based on the bank's assurances that it would approve his loan application, the investor withdrew funds from his IRA account to finance a real estate purchase, the bank denied his loan application, and the investor incurred significant tax penalties when he could not replace the withdrawn funds using the loan. Because the parties never entered a binding loan agreement, the bank did not owe the investor any duty to look out for his interests during negotiations, especially given the investor's experience with similar transactions.

2. Fraud—pleading—particularity—denial of loan application for real estate purchase

An order granting a bank's motion for judgment on the pleadings on a real estate investor's fraud claim was affirmed where, based on the bank's assurances that it would approve his loan application, the investor withdrew funds from his IRA account to finance a real estate purchase, the bank denied his loan application, and the investor incurred significant tax penalties when he could not replace the withdrawn funds using the loan. The investor failed to allege his fraud claim with sufficient particularity (per Civil Procedure Rule 9(b)) where he did not allege when, where, and how defendant made the alleged assurances; why he needed the loan to repay funds into his IRA; or how defendant's statement that the loan "would go through" was a false representation of a material fact rather than a forecast of prospective events.

3. Fraud—justifiable reliance—fraud and negligent misrepresentation—denial of loan application for real estate purchase

An order granting a bank's motion for judgment on the pleadings on a real estate investor's claims for fraud and negligent misrepresentation was affirmed where, based on the bank's assurances that

it would approve his loan application, the investor withdrew funds from his IRA account to finance a real estate purchase, the bank denied his loan application, and the investor incurred significant tax penalties when he could not replace the withdrawn funds using the loan. The investor could not satisfy the "justifiable reliance" element of his claims where he, as an experienced real estate professional and first-time loan applicant with defendant, knew or should have known that no binding loan agreement had been reached, and therefore he could not have reasonably relied on defendant's forecast that the loan "would go through."

Appeal by plaintiff from order entered 4 November 2020 by Judge Marvin P. Pope in Buncombe County Superior Court. Heard in the Court of Appeals 17 November 2021.

Asheville Legal, by Annabelle M. Chambers and Jake A. Snider, and Robinson & Lawing, LLP, by H. Brent Helms, for plaintiff-appellant.

McGuire, Wood & Bissette, PA, by Joseph P. McGuire, for defendant-appellee.

TYSON, Judge.

¶ 1 David Roberson ("Plaintiff") appeals an order by the trial court granting TruPoint Bank's ("Defendant") motion for judgment on the pleadings. We affirm.

I. Background

¶ 2 Plaintiff was self-employed in real estate management. He owned and managed two rental homes in North Carolina and a commercial property located in Alabama. Plaintiff was in the process of purchasing a residential property in Washington, D.C.

¶ 3 Plaintiff approached Defendant to apply for a home equity line of credit ("HELOC") for the Washington D.C. home purchase in early May 2019. Plaintiff withdrew $670,000 from his Individual Retirement Account ("IRA") to fund the purchase of the real property on 9 May 2019, based upon asserted assurances from Defendant's loan officer that the loan would be approved. Plaintiff applied for the loan from Defendant to give himself an option for replacing funds from the IRA withdrawal within the sixty-day grace period. Plaintiff understood that if he did not replace the IRA funds within sixty days, the withdrawal would be

treated as ordinary income, and he would incur substantial tax penalties and liability.

¶ 4 Plaintiff submitted his loan application to Defendant on 13 May 2019. The loan application asserted Plaintiff maintained liquid assets of $930,000 and owned real properties valued at $2,675,000. Plaintiff informed Defendant of the sixty-day deadline and that he would incur a substantial tax consequence if Plaintiff did not timely replace the withdrawn IRA funds.

¶ 5 Defendant's loan officer informed Plaintiff that he had applied for a residential loan on his primary residence, and not technically a HELOC. Two days later, Defendant's loan processor informed Plaintiff that the confusion over the loan he had applied for had been rectified. Defendant advised Plaintiff that its underwriter would not approve the HELOC on 13 June 2019.

¶ 6 Defendant's loan officer offered to make Plaintiff a $670,000 residential mortgage loan on 17 June 2019. Plaintiff declined this loan because the offer purportedly required Plaintiff to commit to the loan within seven hours of receiving the offer and the loan was subject to unwanted conditions.

¶ 7 Defendant informed Plaintiff his HELOC had not closed because of an incomplete loan application and because Defendant did not make HELOC loans in excess of $250,000. Plaintiff brought this action for negligent misrepresentation and fraud to recover the damages he had incurred. The trial court granted Defendant's motion for judgment on the pleadings. Plaintiff appeals.

II. Jurisdiction

Plaintiff's appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issue

¶ 8 Plaintiff argues the trial court erred in granting Defendant's motion for judgment on the pleadings.

IV. Argument

A. Standard of Review

¶ 9 "This Court reviews *de novo* a trial court's ruling on motions for judgment on the pleadings. 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." *N.C. Concrete Finishers, Inc. v. N.C.*

Farm Bureau Mut. Ins. Co., 202 N.C. App. 334, 336-337, 688 S.E.2d. 534, 535 (2010) (citations omitted).

B. Judgment on the Pleadings

¶ 10 Plaintiff's allegations and any permissible inferences thereon must be treated as true and viewed in the light most favorable to the non-moving party. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). "[A]ll contravening assertions in the movant's pleadings are taken as false." *Id.*

¶ 11 If any material issue of fact exists or if defendant is not clearly entitled to judgment as a matter of law, the trial court errs by granting defendant's motion. *Id.* A judgment on the pleadings is final, and each "motion must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits." *Id.*

V. Negligent Misrepresentation

¶ 12 **[1]** "[T]he tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 40, 626 S.E.2d 315, 321 (2006) (citation omitted).

¶ 13 Our Supreme Court clearly stated: "[g]enerally, the home loan process is regarded as an arm's length transaction between parties of equal bargaining power and, absent exceptional circumstances, will not give rise to a fiduciary duty." *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 364, 760 S.E.2d 263, 264 (2014).

¶ 14 "[A] lender is only obligated to perform those duties expressly provided for in the loan agreement to which it is a party." *Camp v. Leonard*, 133 N.C. App. 554, 560, 515 S.E.2d 909, 913 (1999). In the absence of a binding loan agreement, Defendant owes no duty to Plaintiff. *See Lassiter v. Bank of N.C.*, 146 N.C. App. 264, 268, 551 S.E.2d 920, 923 (2001) (lender owed borrower no duty to inspect house being built with loan proceeds); *Perry v. Carolina Builders Corp.*, 128 N.C. App. 143, 150, 493 S.E.2d 814, 818 (1997) (lender owed no duty to ensure loan proceeds were used for a specific purpose in the absence of an express contract provision); *Carlson v. Branch Banking & Trust Co.*, 123 N.C. App. 306, 315, 473 S.E.2d 631, 637 (1996) (defendant bank was entitled to a directed verdict on a noncustomer's claim of the bank's negligent disbursement of loan funds).

¶ 15 Plaintiff was a first-time loan applicant with Defendant and never became a borrower or customer of Defendant. The loan process was a professional business negotiation in which Defendant had no obligation to look out for Plaintiff's interests, especially given that Plaintiff was an experienced real estate investor. Plaintiff argues Defendant informed him he had applied for a residential loan on his primary residence, "and not technically a HELOC," even though he had allegedly made it clear to Defendant he wanted a HELOC. Plaintiff incorrectly presumes Defendant incurred a legal duty to ensure he understood the loan application that he signed. *See Lassiter*, 146 N.C. App. at 268, 551 S.E.2d at 923. *See also Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 204, 130 S.E.2d 281, 284 (1963) (stating "[t]he standard is always the conduct of the reasonably prudent man. The rule is constant, while the degree of care which a reasonably prudent man exercises, or should exercise, varies with the exigencies of the occasion." (citations omitted)).

¶ 16 The loan negotiations did not reach final agreement, and no binding obligation was executed of which an actual borrower might complain. Plaintiff acknowledges any lack of full and fair disclosure by Defendant was corrected during the parties' negotiations. Reviewed in the light most favorable to Plaintiff, Defendant "rectified" any confusion and provided Plaintiff with "an additional document to sign for a HELOC, which [Plaintiff] signed." Upon rectifying its "mistakes," Defendant offered Plaintiff a conventional residential loan for the amount he needed, which Plaintiff declined.

¶ 17 This Court has affirmed entry of summary judgment for a defendant upon a negligent representation claim, after finding no genuine issues of material facts concerning the essential elements of duty of care, breach of duty, and any justifiable reliance. *Jordan v. Earthgrains Cos.*, 155 N.C. App. 762, 766, 576 S.E.2d 336 (2003). There, "the plaintiffs and defendants were not engaged in a business transaction." *Id.* at 768, 576 S.E.2d at 340. There, as here, the plaintiff argued "even if [defendant] was 'under no duty to speak, when he did speak, he was under a duty to give competent information and plaintiffs were justified in relying on [defendant's] statements." *Id.* at 767, 575 S.E.2d at 339.

¶ 18 This Court expressly disagreed with that assertion. The plaintiff in *Jordan* failed to show: (1) defendant was offering plaintiffs "guidance in a business transaction;" (2) the alleged information was false; (3) "defendants had a pecuniary interest in inducing plaintiffs to continue employment;" or, (4) "plaintiffs were justified in relying on the alleged information." *Id.* at 767, 576 S.E.2d at 340. Here, like in *Jordan*, Plaintiff

has failed to allege facts to support his claim for negligent misrepresentation. His arguments are overruled.

VI. Failure to Allege Fraud with Particularity

¶ 19 **[2]** Rule 9(b) of the North Carolina Rules of Civil Procedure requires "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." N.C. Gen. Stat. § 1A-1, Rule 9(b) (2019). "[I]n pleading actual fraud, the particularity requirement is met by alleging time, place[,] and content of the fraudulent representations." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981). Dismissal of a claim for failure to plead with particularity is proper where "no facts whatsoever setting forth the time, place, or specific individuals who purportedly made the misrepresentations[.]" *Coley v. Bank*, 41 N.C. App. 121, 125, 254 S.E.2d 217, 220 (1979).

¶ 20 Plaintiff alleges Defendant assured him on "repeated occasions" that his loan "would go through." He fails to allege when and where those assurances were made. Plaintiff also alleges both Defendant and its loan officer had encouraged him to apply for a $750,000 HELOC. Plaintiff fails to allege when, where and how such encouragement occurred. Such allegations are insufficient to allege fraud with particularity as is required by Rule 9(b). Plaintiff's arguments are overruled.

A. Defendant's Assurances

¶ 21 Plaintiff argues Defendant was negligent in its verbal assurances of the loan amount and timeline. Even broadly construed in the light most favorable to Plaintiff, his complaint fails to allege any specific misrepresentation of a subsisting or ascertainable fact. Defendant's purported assurances that a "loan would go through" relate to prospective events and are insufficient to state a claim for fraud. *See Moore v. Trust Co.*, 30 N.C. App. 390, 391, 226 S.E.2d 833, 835 (1976) ("[m]ere generalities and conclusory allegations of fraud will not suffice."). Plaintiff's claims for negligent misrepresentation have no merit and are overruled.

B. Fraud

¶ 22 Plaintiff's complaint asserts a claim of fraud against Defendant. "The elements of a civil cause of action for fraud are (1) a false representation or concealment of a material fact (2) that is reasonably calculated to deceive (3) made with intent to deceive (4) which does in fact deceive and (5) results in damage to the injured party." *Charlotte Motor Speedway, LLC v. Cnty. of Cabarrus*, 230 N.C. App. 1, 10, 748 S.E.2d 171, 178 (2013) (citation omitted). A claim for fraud may be based either upon an "affirmative misrepresentation of a material fact, or a failure to

disclose a material fact relating to a transaction which the parties had a duty to disclose." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 696, 682 S.E.2d 726 (2009) (citation omitted).

¶ 23 In *Hoyle v. Bagby*, 253 N.C. 778, 781, 117 S.E.2d 760, 762 (1961), our Supreme Court stated, "[t]he promise at the time made was for a future fulfillment. It may have been made in good faith. The promise to pay was not based on any false statement of an existing fact. The complaint falls short of alleging fraud."

¶ 24 Here, "[t]he promise to [loan] was not based on any false statement of an existing fact." *Id.* Plaintiff fails to allege the materiality of a HELOC. There is no allegation of why he required a HELOC to repay funds into his IRA. Plaintiff fails to allege any substantive basis for his rejection of the conventional loan he was offered. He alleges he was given only seven hours to decide whether to accept Defendant's offer and asserts the proposed loan was subject to onerous conditions. Given his past conversations and negotiations with Defendant, Plaintiff fails to allege why he reasonably could not review and commit within seven hours, or what other "onerous conditions" were attached to the loan.

VII. Reliance

¶ 25 **[3]** "[W]here the facts are insufficient as a matter of law to constitute reasonable reliance on the part of the complaining party, the complaint is properly dismissed under Rule 12(b)(6)." *Stunzi v. Medlin Motors, Inc.*, 214 N.C. App. 332, 341, 714 S.E.2d 770, 777 (2011) (citation omitted).

¶ 26 Plaintiff is an experienced real estate professional, who has bought, sold, owned, and financed several properties. Plaintiff owned assets worth several millions of dollars. Plaintiff allegedly relied upon conversations with a lender, with whom he had no previous relationship to make a significant financial decision, before applying for a loan. Plaintiff could not conceivably place reasonable reliance upon a loan officer's forecasts that his "loan would go through" or that it would close by a certain date.

¶ 27 According to Plaintiff, Defendant's assurances that his "loan would go through" were made before he withdrew his IRA funds, but key and essential loan terms remained unresolved, including the length, the interest rate, applicable fees, the repayment schedule, and the other material conditions of the loan. No final agreement or binding commitment had been reached. As an experienced property owner, Plaintiff knew or should have known, the essential material terms of the loan had not been agreed to and no final agreement had been reached. Plaintiff's complaint

fails to show any justifiable reliance as a matter of law. Plaintiff's argument is overruled.

VIII. Conclusion

¶ 28 Plaintiff's allegations show no duty of care owed by Defendant, no fiduciary relationship, no more than verbal assurances of future loan approval, no intent to defraud, and no reasonable reliance as a matter of law. When the allegations are viewed in the light most favorable to Plaintiff, giving him the benefit of all inferences thereon, the trial court's entry of judgment on the pleadings for Defendant on Plaintiff's claims was proper and is affirmed. *It is so ordered.*

AFFIRMED.

Judges DIETZ and GRIFFIN concur.

RURAL EMPOWERMENT ASSOCIATION FOR COMMUNITY HELP, ET AL., PLAINTIFFS
v.
STATE OF NORTH CAROLINA, ET AL., DEFENDANTS

No. COA21-175

Filed 21 December 2021

Constitutional Law—North Carolina—facial challenge—amendments to Right to Farm Act—nuisance liability

Plaintiffs' facial challenges to N.C.G.S. §§ 106-701 and 106-702 (part of the Right to Farm Act, which limits nuisance liability of agricultural and forestry operations as well as the amount of compensatory damages that can be sought under certain nuisance actions) under provisions of the North Carolina Constitution, including the Law of the Land Clause, were overruled. By enacting and amending these laws, the legislature used reasonable means to achieve its purpose of promoting and preserving agriculture and related industries, and did not exceed the scope of its police power. There was no violation of plaintiffs' fundamental right to enjoy their property where they did not assert that an inverse condemnation took place, the laws were general in application and were not improper private or special acts, and the limitation on compensatory damages did not constitute an impairment of the right to trial by jury.

RURAL EMPOWERMENT ASS'N FOR CMTY. HELP v. STATE OF N.C.

[281 N.C. App. 52, 2021-NCCOA-693]

Appeal by plaintiffs from order entered 23 December 2020 by a three-judge panel of Wake County Superior Court appointed by the Chief Justice pursuant to N.C. Gen. Stat. § 1-267.1 (2019). Heard in the Court of Appeals 1 December 2021.

Lawyers' Committee for Civil Rights Under Law, by Elizabeth Haddix and Mark Dorosin, and Patterson Harkavy LLP, by Burton Craige, Narendra K. Ghosh and Christopher A. Brook, for plaintiffs-appellants.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin and Assistant Attorney General Kenzie M. Rakes, for the State.

Phelps Dunbar LLP, by Nathan A. Huff, Jared M. Burtner, W. Thomas Siler, admitted pro hac vice, and Nicholas Morisani admitted pro hac vice, for defendants-appellees Timothy K. Moore and Philip E. Berger.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Christopher G. Smith and David R. Ortiz, and Phillip Jacob Parker, Jr., Secretary & General Counsel North Carolina Farm Bureau Federation, Inc., for defendants-appellants North Carolina Farm Bureau Federation, Inc.

Southern Environmental Law Center, by Blakely E. Hildebrand, Alex J. Hardee, and Chandra T. Taylor, for Environmental Justice Community Action Network, amicus curiae.

Zaytoun Ballew & Taylor, PLLC, by Matthew D. Ballew, for North Carolina Advocates for Justice, amicus curiae.

Tien K. Cheng and Christopher R. McLennan for North Carolina Department of Agriculture and Consumer Services, amicus curiae.

TYSON, Judge.

¶ 1 Rural Empowerment Association for Community Help, North Carolina Environmental Justice Community Action Network, and Waterkeeper Alliance (collectively "Plaintiffs") appeal from an order of a superior court three-judge panel, which granted Defendants' motion to dismiss in favor of the State of North Carolina; Phillip E. Berger; Timothy

K. Moore, in their capacities, respectively, as President *Pro Tempore* of the North Carolina Senate and as Speaker of the North Carolina House of Representatives; and, N.C. Farm Bureau Federation, Inc., Intervenor, (collectively "Defendants"). We affirm.

I. Background

¶ 2 Forty-two years ago in 1979, the North Carolina General Assembly enacted the Right to Farm Act with the stated policy goal to: "[R]educe the loss to the State of its agricultural and forestry resources by limiting the circumstances under which an agricultural or forestry operation may be deemed a nuisance." N.C. Gen. Stat. § 106-700 (2019); *see* 1979 N.C. Sess. Laws ch. 202, § 1. Hundreds of plaintiffs filed nuisance actions against swine farmers in the superior courts in 2013. The General Assembly amended the Right to Farm Act in 2013 by rewriting N.C. Gen. Stat. § 106-701 as:

> **When agricultural and forestry operation, etc., not constituted nuisance by changed conditions in or about the locality outside of the operation.**
>
> (a) No agricultural or forestry operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality outside of the operation *after the operation has been in operation for more than one year*, *when such operation was not a nuisance at the time the operation began*.
>
> (a1) The provisions of subsection (a) of this section shall not apply when the plaintiff demonstrates that the agricultural or forestry operation has undergone a fundamental change. A fundamental change to the operation does not include any of the following:
>
> (1) A change in ownership or size,
>
> (2) An interruption of farming for a period of no more than three years,
>
> (3) Participation in a government-sponsored agricultural program,
>
> (4) Employment of new technology,
>
> (5) A change in the type of agricultural or forestry product produced.

(a2) The provisions of subsection (a) of this section shall not apply whenever a nuisance results from the negligent or improper operation of any agricultural or forestry operation or its appurtenances.

(b) For the purposes of this Article, "agricultural operation" includes, without limitation, any facility for the production for commercial purposes of crops, livestock, poultry, livestock products, or poultry products.

(b1) For the purposes of this Article, "forestry operation" shall mean those activities involved in the growing, managing, and harvesting of trees.

(c) The provisions of subsection (a) shall not affect or defeat the right of any person, firm, or corporation to recover damages for any injuries or damages sustained by him on account of any pollution of, or change in condition of, the waters of any stream or on the account of any overflow of lands of any such person, firm, or corporation.

(d) Any and all ordinances of any unit of local government now in effect or hereafter adopted that would make the operation of any such agricultural or forestry operation or its appurtenances a nuisance or providing for abatement thereof as a nuisance in the circumstance set forth in this section are and shall be null and void; provided, however, that the provisions of this subsection shall not apply whenever a nuisance results from the negligent or improper operation of any such agricultural or forestry operation or any of its appurtenances. Provided further, that the provisions shall not apply whenever a nuisance results from an agricultural or forestry operation located within the corporate limits of any city at the time of enactment hereof.

(e) This section shall not be construed to invalidate any contracts heretofore made but insofar as contracts are concerned, it is only applicable to contracts and agreements to be made in the future.

> (f) In a nuisance action against an agricultural or forestry operation, the court shall award costs and expenses, including reasonable attorneys' fees, to:
>
> (1) The agricultural or forestry operation when the court finds the operation was not a nuisance and the nuisance action was frivolous or malicious; or
>
> (2) The plaintiff when the court finds the agricultural or forestry operation was a nuisance and the operation asserted an affirmative defense in the nuisance action that was frivolous and malicious.

2013 N.C. Sess. Law 314, § 1 (emphasis supplied).

¶ 3 The plaintiffs refiled the nuisance actions in the United States District Court for the Eastern District of North Carolina ("federal district court") in 2014 and added Murphy-Brown, LLC as a defendant. Murphy-Brown is a wholly owned subsidiary of Smithfield Foods Corporation. Murphy-Brown sought to defend the suits before the federal district court under the Right to Farm Act. The federal district court held the Right to Farm Act did not apply. *See In re NC Swine Farm Nuisance Litig.*, 2017 WL 5178038, at *4-5 (E.D.N.C. Nov. 8, 2017) (unpublished). The litigation in the federal district court without the right to farm defense resulted in five jury verdicts in favor of the plaintiffs.

¶ 4 In 2017 and 2018, the General Assembly again amended the Right to Farm Act. *See* An Act to Make Various Changes to the Agricultural Laws, 2018 N.C. Sess. Laws 113, § 10(a) ("S.B. 711"); An Act to Clarify the Remedies Available in Private Nuisance Actions Against Agricultural and Forestry Operations 2017 N.C. Sess. Laws 11 ("H.B. 467").

¶ 5 S.B. 711 was codified as N.C. Gen. Stat. § 106-701, which provides:

> (a) No nuisance action may be filed against an agricultural or forestry operation unless all of the following apply:
>
> (1) The plaintiff is a legal possessor of the real property affected by the conditions alleged to be a nuisance.
>
> (2) The real property affected by the conditions alleged to be a nuisance is located within one half-mile of the source of the activity or structure alleged to be a nuisance.

(3) The action is filed within one year of the establishment of the agricultural or forestry operation or within one year of the operation undergoing a fundamental change.

(a1) For the purposes of subsection (a) of this section, a fundamental change to the operation does not include any of the following:

(1) A change in ownership or size.

(2) An interruption of farming for a period of no more than three years.

(3) Participation in a government-sponsored agricultural program.

(4) Employment of new technology.

(5) A change in the type of agricultural or forestry product produced.

(b) For the purposes of this Article, "agricultural operation" includes, without limitation, any facility for the production for commercial purposes of crops, livestock, poultry, livestock products, or poultry products.

(b1) For the purposes of this Article, "forestry operation" shall mean those activities involved in the growing, managing, and harvesting of trees.

(c) The provisions of subsection (a) shall not affect or defeat the right of any person, firm, or corporation to recover damages for any injuries or damages sustained by him on account of any pollution of, or change in condition of, the waters of any stream or on the account of any overflow of lands of any such person, firm, or corporation.

(d) Any and all ordinances of any unit of local government now in effect or hereafter adopted that would make the operation of any such agricultural or forestry operation or its appurtenances a nuisance or providing for abatement thereof as a nuisance in the circumstance set forth in this section are and shall be null and void. Provided, however, that the

> provisions shall not apply whenever a nuisance results from an agricultural or forestry operation located within the corporate limits of any city at the time of enactment hereof.
>
> (e) This section shall not be construed to invalidate any contracts heretofore made but insofar as contracts are concerned, it is only applicable to contracts and agreements to be made in the future.
>
> (f) In a nuisance action against an agricultural or forestry operation, the court shall award costs and expenses, including reasonable attorneys' fees, to:
>
> > (1)The agricultural or forestry operation when the court finds the operation was not a nuisance and the nuisance action was frivolous or malicious; or
> >
> > (2)The plaintiff when the court finds the agricultural or forestry operation was a nuisance and the operation asserted an affirmative defense in the nuisance action that was frivolous and malicious.

N.C. Gen. Stat. § 106-701 (2019).

¶ 6 H.B. 467 was codified as N.C. Gen. Stat. § 106-702, which provides:

> **Limitations on private nuisance actions against agricultural and forestry operations**
>
> (a) The compensatory damages that may be awarded to a plaintiff for a private nuisance action where the alleged nuisance emanated from an agricultural or forestry operation shall be as follows:
>
> > (1) If the nuisance is a permanent nuisance, compensatory damages shall be measured by the reduction in the fair market value of the plaintiff's property caused by the nuisance, but not to exceed the fair market value of the property.
> >
> > (2) If the nuisance is a temporary nuisance, compensatory damages shall be limited to the diminution of the fair rental value of the plaintiff's property caused by the nuisance.
>
> (a1) A plaintiff may not recover punitive damages for a private nuisance action where the alleged nuisance

> emanated from an agricultural or forestry operation that has not been subject to a criminal conviction or a civil enforcement action taken by a State or federal environmental regulatory agency pursuant to a notice of violation for the conduct alleged to be the source of the nuisance within the three years prior to the first act on which the nuisance action is based.
>
> (b) If any plaintiff or plaintiff's successor in interest brings a subsequent private nuisance action against any agricultural or forestry operation, the combined recovery from all such actions shall not exceed the fair market value of the property at issue. This limitation applies regardless of whether the subsequent action or actions were brought against a different defendant than the preceding action or actions.
>
> (c) This Article applies to any private nuisance claim brought against any party based on that party's contractual or business relationship with an agricultural or forestry operation.
>
> (d) This Article does not apply to any cause of action brought against an agricultural or forestry operation for negligence, trespass, personal injury, strict liability, or other cause of action for tort liability other than nuisance, nor does this Article prohibit or limit any request for injunctive relief that is otherwise available.

N.C. Gen. Stat. § 106-702 (2019).

¶ 7 Plaintiffs' complaint was filed on 19 June 2019 and challenges the facial constitutionality of H.B. 467 and S.B. 711 (collectively "The Amendments"). Defendants moved to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2019) on 1 October 2019. Plaintiffs moved for summary judgment under N.C. Gen. Stat. § 1A-1, Rule 56 (2019). The Wake County Superior Court transferred this case to a three-judge panel pursuant to N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) (2019) and N.C. Gen. Stat. § 1-267.1 (2019).

¶ 8 On 23 December 2020, the three-judge panel granted Defendants' Rule 12(b)(6) motion to dismiss and denied Plaintiffs' summary judgment motion. Plaintiffs appeal.

II. Jurisdiction

¶ 9 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019).

III. Issue

¶ 10 Plaintiffs argue the trial court erred by granting Defendants' Rule 12(b)(6) motion.

IV. Defendants' Rule 12(b)(6) Motion

A. Standard of Review

¶ 11 "A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Kemp v. Spivey*, 166 N.C. App. 456, 461, 602 S.E.2d 686, 690 (2004) (citation and quotation marks omitted). "When considering a [Rule] 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (citation and quotation marks omitted).

¶ 12 "On appeal from a motion to dismiss under Rule 12(b)(6) this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]" *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (ellipses in original) (citation and internal quotation marks omitted). This Court "consider[s] the allegations in the complaint [as] true, construe[s] the complaint liberally, and only reverse[s] the trial court's denial of a motion to dismiss if [the] plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.* (citation omitted).

B. Facial Challenge

¶ 13 "A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel*, 576 U.S. 409, 443, 192 L. Ed. 2d 435, 443 (2015). Facial challenges are "the most difficult challenge to mount" successfully. *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987). "In a facial challenge, the presumption is that the law is constitutional, and a court may not strike it down if it may be upheld on any reasonable ground." *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 539, 571 S.E.2d 52, 61 (2002).

¶ 14 In a facial challenge, "a plaintiff must establish that a law is unconstitutional in all of its applications." *Patel*, 576 U.S. at 418, 192 L. Ed. 2d

at 445 (citation and internal quotation marks omitted). During oral argument, Plaintiffs' counsel conceded their complaint alleges only facial challenges and no as-applied allegations are asserted.

C. Private Property Rights under Law of the Land Clause

¶ 15 Article I, Section 19 of the North Carolina Constitution, the Law of the Land Clause, provides, *inter alia*: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art I, § 19. The Law of the Land Clause has been held to be the equivalent of the Fourteenth Amendment's Due Process Clause in the Constitution of the United States. *See State v. Collins*, 169 N.C. 323, 324, 84 S.E. 1049, 1050 (1950). Plaintiffs argue H.B. 467 and S.B. 711 violate the Law of the Land Clause and assert the statutes facially exceed the scope of the State's police power.

¶ 16 "[A] decision of the United States Supreme Court interpreting the Due Process Clause is persuasive, though, not controlling, authority for interpretation of the Law of the Land Clause." *Evans v. Cowan*, 132 N.C. App. 1, 6, 510 S.E.2d 170, 174 (1999) (citation omitted). Our Supreme Court has expressly "reserved the right to grant Section 19 relief against unreasonable and arbitrary state statutes in circumstances where relief might not be attainable under the Fourteenth Amendment to the United States Constitution." *In re Meads*, 349 N.C. 656, 671, 509 S.E.2d 165, 175 (1998) (citation omitted).

¶ 17 In *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 214, 258 S.E.2d 444, 448-49 (1979), our Supreme Court articulated the analysis to be applied when examining due process challenges to governmental regulations of private property, which are claimed to be an invalid exercise of the State's police power. The Court held: "First, is the object of the legislation within the scope of the police power? Second, considering all the surrounding circumstances and particular facts of the case is the means by which the governmental entity has chosen to regulate reasonable?" *Id.* (citation omitted).

¶ 18 Our Supreme Court examined the role of a court in *Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville*, 308 N.C. 255, 261, 302 S.E.2d 204, 208 (1983), to "determine[] whether the ends sought, *i.e.*, the object of the legislation, is within the scope of the power." The second prong is a two-part inquiry, requiring the court to determine: "(1) Is the statute in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems

appropriate reasonable in degree?" *Id.* at 261-62, 302 S.E.2d at 208 (citation omitted).

¶ 19 Our State's long-asserted interest in promoting and preserving agriculture, forestry, horticulture, livestock, and animal husbandry activities and production within North Carolina clearly rests within the scope of the State's police power. "It is the declared policy of the State to conserve and protect and encourage the development and improvement of its agricultural land and forestland for the production of food, fiber, and other products." N.C. Gen. Stat. § 106-700. The first prong is met. *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208.

¶ 20 Both parts of the second prong in *Responsible Citizens* are also met. H.B. 467 and S.B. 711 are intended to promote agricultural and forestry activities and production in North Carolina by defining and limiting nuisance claims from agricultural, forestry, and related operations. N.C. Gen. Stat. §§ 106-701, 702. "[W]ithin constitutional limits, it is the function of the Legislature, not of the courts, to determine the [public and] economic policy of the State and this Court may not properly declare a statute invalid merely because the Court deems it economically unwise." *Bulova Watch Co. v. Brand Distributors*, 285 N.C. 467, 478, 206 S.E.2d 141, 149 (1974) (citations omitted).

¶ 21 The asserted and purported interference in the statute with the enjoyment of property is reasonable and clearly rests within the General Assembly's enumerated powers. By passage of an act with the signature of the Governor of North Carolina, the General Assembly can modify or amend the common law or amend, replace, or repeal a state statute. *See Pinkham v. Unborn Child. of Jather Pinkham*, 227 N.C. 72, 78, 40 S.E.2d 690, 694 (1946) ("It is said that no person has a vested right in a continuance of the common or statute law. It follows, generally speaking, a right created solely by the statute may be taken away by its repeal or by new legislation." (citation omitted)).

¶ 22 Limiting potential nuisance liability from agricultural, forestry, and related operations helps ensure the State's stated goal to protect agricultural activities in North Carolina and to encourage the availability and continued "production of food, fiber, and other products." N.C. Gen. Stat. § 106-700. Plaintiff's argument is overruled.

D. Fundamental Right to Property

¶ 23 Plaintiffs assert the limitations imposed on a cause of action for nuisance violates their fundamental right to enjoy their property, citing *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 786 S.E.2d 919, 921 (2016).

In *Kirby*, our Supreme Court held the North Carolina Department of Transportation's application of the Roadway Corridor Official Map Act (repealed 2019 N.C. Sess. Laws 35), which placed restrictions on the "plaintiffs' fundamental rights to improve, develop, and subdivide their property for an unlimited period of time[]" constituted "a taking of plaintiffs' elemental property rights by eminent domain." *Kirby*, 368 N.C. at 848, 786 S.E.2d at 921.

¶ 24 The Supreme Court of North Carolina has long recognized the right to the enjoyment of property and the right to judicial review. *See Bayard v. Singleton*, 1 N.C. (Mart.) 5, 9 (1787). Here, unlike *Kirby*, Plaintiffs' have not alleged an inverse condemnation has occurred or any other kind of governmental taking by eminent domain. Plaintiffs assert these statutes facially violates their prospective fundamental right to property, which we above hold are facially constitutional under the Law of the Land Clause and the Due Process clause. Plaintiffs' argument is overruled.

E. Local, Private, or Special Act

¶ 25 Article II, section 24 of the North Carolina Constitution states: "The General Assembly shall not enact any local, private, or special act or resolution: . . . Relating to health, sanitation, and the abatement of nuisances[.]" N.C. Const. art II, § 24. The North Carolina Constitution further provides: "The General Assembly *may enact general laws* regulating matters set out in this Section." *Id.* (emphasis supplied).

¶ 26 Plaintiffs argue the Amendments are private or special laws "relating to health, sanitation, and the abatement of nuisances" in violation of Article II, section 23 of the North Carolina Constitution. "A statute is either 'general' or 'local', there is no middle ground." *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965).

¶ 27 "[N]o exact rule or formula capable of constant application can be devised for determining in every case whether a law is local, private, or special or whether [it is] general." *McIntyre v. Clarkson*, 254 N.C. 510, 517, 119 S.E.2d 888, 893 (1961). Our Supreme Court has adopted the "reasonable classification" test from *McIntyre* to determine whether an act is private or special prohibited by Article II, section 24 or is a general law, which the General Assembly has the constitutional authority to enact. *See Id.* at 517-19, 119 S.E.2d at 893-99.

¶ 28 A special law is "made for individual cases[.]" *Id.* at 517, 119 S.E.2d at 893 (citation omitted). "A private law is one which is confined to particular individuals, associations or corporations." *Id.* (citation omitted).

While, "[g]eneral laws embrace the whole of a subject and are of common interest to the whole State." *Id.* (citation omitted). A law has general applicability, if:

> it applies to and operates uniformly on all the members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law. . . . Classification must be reasonable and germane to the law. It must be based on a reasonable and tangible distinction and operate the same on all parts of the State under the same conditions and circumstances. Classification must not be discriminatory, arbitrary or capricious.

High Point Surplus Co., 264 N.C. at 657, 142 S.E.2d at 702-03 (ellipses in original) (citation and internal quotation marks omitted).

¶ 29 While Plaintiffs assert the Amendments are private protections for the swine industry, the statutes are statewide laws of general applicability to "agricultural and forestry operation[s]." This distinction between agricultural and forestry industries and all other industries satisfies prong one. The second prong is satisfied because of the distinction between agricultural "production of food, fiber, and other products" and forestry and all other industries is germane to The Amendments' stated purpose to preserve and protect the agricultural and forestry activities and production. N.C. Gen. Stat. § 106-700. The Amendments seek to define and ameliorate the consequences that nuisance suits by remote parties pose prospectively to established and essential agricultural and forestry operations. *See id.* Finally, all members of the classifications of agricultural and forestry operations, subject to The Amendments' general terms and applicability, may invoke their protections against suit. *Id.* Plaintiffs' argument is overruled.

F. Right to Trial by Jury

¶ 30 Article I, section 25 of the North Carolina Constitution provides: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolate." N.C. Const. art I, § 25. Plaintiffs argue H.B. 467, which partially limits a jury's ability to award traditional compensatory damages and limits the compensatory damages any successor-in-interest can seek in nuisance actions, removes from the jurors a determination respecting property in violation of Article I, section 25 of the North Carolina Constitution.

¶ 31 Our Supreme Court has long held: "the General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter." *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956).

¶ 32 "The legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 444, 302 S.E.2d 868, 882 (1983). The prior iterations of the Right to Farm statute dating back to 1979 and with the enactment of H.B. 467, the General Assembly has modified the common law and statutory cause of actions for nuisance claims and relevant defenses. As with many other caps on compensation and remedies enacted in other areas of civil tort law, HB 467 did not impair nor abolish the right to a jury trial. Plaintiffs' argument is overruled.

V. Conclusion

¶ 33 The trial court did not err in granting Defendants' Rule 12(b)(6) motion to dismiss. Plaintiffs' facial challenges in their complaint fails to state any legally valid cause of action. Plaintiffs have not met their burden to show no "reasonable ground" exists to support the Amendments. *See Affordable Care*, 153 N.C. App. at 539, 571 S.E.2d at 61.

¶ 34 The Amendments are a valid exercise of legislative and the State's police powers, do not violate the Law of the Land Clause or Due Process, are not a special or private law, and do not deprive a prospective plaintiff of the right to a jury trial. The order of the trial court is affirmed. *It is so ordered.*

AFFIRMED.

Judges GORE and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
ROBIN APPLEWHITE

No. COA20-610

Filed 21 December 2021

1. Constitutional Law—right to counsel—waiver—competency—to stand trial and represent self—harmless error

In a prosecution for human trafficking and promoting prostitution, the trial court did not abuse its discretion by allowing defendant to represent himself despite his various mental conditions, where—based on the court's lengthy discussions with defendant and testimony by the forensic psychiatrist who evaluated him—different judges in two separate competency hearings found defendant competent to stand trial, and therefore defendant was competent to waive counsel and proceed pro se. Further, defendant could not show he was prejudiced by the lack of counsel given the overwhelming evidence of his guilt and because he was allowed to consult stand-by counsel; thus, any error would have been harmless beyond a reasonable doubt.

2. Indictment and Information—sufficiency of indictments—specificity—human trafficking—multiple counts

The trial court properly exercised jurisdiction over defendant's trial for seventeen counts of human trafficking of six different victims, where all seventeen indictments sufficiently asserted each element of the offense within a specific timeframe for each victim. Defendant could not argue on appeal that the indictments were multiplicitous or lacked specific facts that would protect him from double jeopardy where he did not seek greater specificity at trial by moving for a bill of particulars or by requesting a special verdict sheet.

3. Criminal Law—human trafficking—multiple counts per victim—not a continuous offense

In a case of first impression, the trial court did not err by entering judgment against defendant for multiple counts of human trafficking for six different victims—rather than entering judgment for one count per victim—because human trafficking is not one continual offense; rather, under the plain language of the human trafficking statute (N.C.G.S. § 14-43.11), each violation constitutes a separate offense that does not merge.

4. Sentencing—prior record level—calculation—stipulation by silence

The trial court properly sentenced defendant as a prior record level five in a prosecution for human trafficking and promoting prostitution. Defendant did not stipulate to the sentencing worksheet in writing, and he challenged on appeal the use of one of his previous convictions in calculating his prior record level and the classification of another previous conviction as a Class G felony; nevertheless, defendant did not raise either of these objections at the sentencing hearing despite having opportunities to do so and having reviewed and understood the worksheet, as shown by his objections to other portions of it, and therefore his stipulation to the worksheet was inferable from his silence.

Judge ARROWOOD concurring in part and dissenting in part by separate opinion.

Appeal by defendant from judgments entered 5 March 2019 by Judge Thomas H. Lock in Cumberland County Superior Court. Heard in the Court of Appeals 3 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General A. Mercedes Restucha-Klem, for the State.

Michael E. Casterline for defendant-appellant.

TYSON, Judge.

¶ 1 Robin Applewhite ("Defendant") appeals from judgments entered upon a jury's verdicts finding him guilty of twelve counts of human trafficking, eleven counts of promoting prostitution and four counts of conspiracy to promote prostitution and attaining habitual felon status. We find no error.

I. Background

¶ 2 Defendant met several adult women, A.C., H.M., A.B., M.F., J.O. and E.C. between December 2012 and March 2015 (parties agree to permit use of pseudonyms to protect the identity of the victims). Defendant capitalized on the women's addictions to heroin and dire economic circumstances to manipulate them to engage in prostitution arranged *via* online advertisements set up by Defendant and his wife, Samantha

Rivard ("Rivard"). The women gave money paid and received from engaging in sexual acts to Defendant in exchange for heroin, food, transportation, and a place to live.

¶ 3 Defendant withheld drugs, food, sleep and means of communication from the women with family and friends. He locked the women in a hotel room or in the basement of his own home on occasions.

¶ 4 Defendant drove the women across North Carolina, from Fayetteville to Charlotte, Raleigh, Wilmington, and across state lines to Virginia, South Carolina, and Florida, to engage in sexual acts in exchange for money. Rivard posted the women's images on Backpage, an online classified advertising website, to solicit and schedule customers. A.C.'s advertisement was posted at least 197 times in three cities. M.F. was posted 219 times in at least three cities.

¶ 5 In March 2015, J.O. alleged she was forced to perform sexual acts for money against her will, while she was restrained in a basement and after being transported to Charlotte. On 18 March 2015, Defendant was arrested and charged with second-degree kidnapping, human trafficking and sexual servitude. On 2 April 2015, police searched the home located on Cedarwood Avenue in Spring Lake where J.O. alleged she had been held. Rivard was also arrested.

¶ 6 Defendant was indicted on 14 November 2016 for multiple charges of human trafficking, promoting prostitution, and conspiring to promote prostitution against six alleged victims. On 2 January 2018, corresponding habitual felon indictments were issued in each of the previously indicted files. Defendant was also indicted on the following additional charges against alleged victim J.O. for second degree kidnapping and attaining habitual felon status.

A. Competency Hearing

¶ 7 Defendant was ordered to undergo an examination at Central Regional Hospital to determine his capacity to proceed to trial. Dr. Charles Vance, a forensic psychiatrist, conducted an initial forensic interview on 8 September 2016, with a final evaluation dated 10 November 2016. He found Defendant was mentally competent to proceed to trial. On 18 January 2017, Superior Court Judge James Ammons conducted a competency hearing. The court heard Dr. Vance's testimony concerning his evaluation of Defendant and his opinion concluding Defendant understood the charges against him and was competent to stand trial. Defendant was found competent to stand trial.

¶ 8 On 29 January 2019, another hearing on Defendant's capacity was held by Superior Court Judge Thomas Locke. Defendant was represented by counsel. On its own motion, the court received into evidence a report submitted from Dr. Vance dated October 2016. The court engaged in lengthy discussions with Defendant regarding his medical condition, capacity to proceed, and his stated desire to represent himself throughout the hearing. The court entered its findings and conclusion:

> THE COURT: As seen by Dr. Charles Vance at Central Regional Hospital during the period of time between September 14, 2016 and October 5, 2016. That Dr. Vance conducted an extensive examination of the defendant and prepared a nine-page report, that Dr. Vance concluded that the defendant is, quote, quite cynical and mistrustful, closed quote, in that he suffers from an unspecified personality disorder, cocaine use disorder, opiate use disorder, illness anxiety disorder and has some history of malingering but that *Dr. Vance found that Mr. Applewhite's displayed behaviors do not rise to the level of negating his fundamental capacity to proceed to trial*. Dr. Vance rather opined *that Mr. Applewhite demonstrated a good understanding of the nature and object of the proceedings against him and that he likewise comprehended his position in reference to these proceedings*. In fact, Mr. Applewhite does maintain the ability to work with his attorney in a rational and reasonable manner in the preparation of his defense if he so chooses. Dr. Vance further found *that in his opinion Mr. Applewhite was competent*. Based upon this report, based upon the representations of [counsel] . . . he has not questioned the defendant's mental capacity, based upon the Court's observations of the defendant and the state moreover not questioning the defendant's capacity, the Court does find and concludes as a matter of law that the defendant is able to understand the nature and object of the proceedings against him. He is able to comprehend his own situation in reference to the proceedings and he is able to assist in the defense in a rational or reasonable manner in that he does possess the capacity to proceed. (emphasis supplied).

B. Trial

¶ 9 Defendant was represented by several attorneys prior to waiving his right to counsel and choosing to proceed *pro se* to trial.

¶ 10 On the morning of trial on 18 February 2019, and numerous times throughout the pendency of the case, Defendant demanded to represent himself. Defendant waived his right to counsel. The court appointed stand-by counsel.

¶ 11 Defendant filed a motion to continue the trial, stating he did not believe he was mentally competent due to a medical condition which caused an increase in ammonia in his blood to a point where he can become delusional. The trial court considered and determined Defendant was taking his medication and was not actively experiencing delusions. Based on its own observations and interactions with Defendant, the court denied Defendant's motion to continue the trial. The court periodically confirmed Defendant received his medication throughout the trial.

¶ 12 During trial, A.C. testified numerous other women had similar working arrangements with Defendant and Rivard. The couple posted classified ads on Backpage and rented hotel rooms in various cities, including Fayetteville, Greensboro, Raleigh, Charlotte, Wilmington, Jacksonville, Roanoke, Myrtle Beach and Orlando. A.C. testified she relied upon Defendant to supply the heroin she needed to avoid going into withdrawal and for her meals. A.C. testified Defendant might dispense food and drugs generously, or, if he was upset, would withhold them.

¶ 13 H.M. and A.B. testified to having similar experiences with Defendant and Rivard, as A.C. had described. They also testified regarding M.F., her addiction to heroin, and being held by Defendant for acts of sexual servitude. M.F. died before Defendant's trial began.

¶ 14 The jury returned unanimous verdicts and found Defendant guilty of five counts of human trafficking A.C. over a period of two months; two counts of human trafficking H.M over a period of two months; two counts of human trafficking M.F. over a period of one month; and three counts of trafficking A.B. over a period of fifteen months. The jury found Defendant not guilty of two counts of human trafficking E.C. and not guilty of three counts of human trafficking J.O.

¶ 15 The State calculated fourteen prior record points and sentenced Defendant as a prior record level five. The fourteen prior record points were based upon Defendant's four previous felony convictions and two previous Class 1 misdemeanor convictions, which were separate from

the three prior felony convictions used to establish Defendant's habitual felon status.

¶ 16 Defendant was ordered to register as a sex offender and received an active total sentence of 2,880 to 3,744 months. Defendant appeals.

II. Jurisdiction

¶ 17 This appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

III. Issues

¶ 18 Defendant raises four issues on appeal, whether: (1) the trial court abused its discretion in allowing Defendant to represent himself; (2) the trial court lacked subject matter jurisdiction over the human trafficking charges; (3) the trial court erred in entering judgment for multiple counts of human trafficking for each victim; and, (4) the trial court erred in determining Defendant's prior record level.

IV. Argument

A. Defendant's Competency to Represent Himself

¶ 19 **[1]** "[W]here matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *State v. Beck*, 278 N.C. App. 255, 263, 2021-NCCOA-305, ¶ 28, 861 S.E.2d 575, 582 (2021) (citation omitted).

¶ 20 Defendant argues the trial court's statements concluding he had an "absolute right" to represent himself and the court's failure to consider whether Defendant fell into the "gray area" of being competent enough to waive counsel is a mistake of law that requires a new trial.

¶ 21 The Sixth Amendment to the Constitution of the United States gives a criminal defendant the "right to proceed without counsel when he voluntarily and intelligently elects to do so." *Faretta v. California*, 422 U.S. 806, 807, 45 L. Ed. 2d 562, 566 (1975).

¶ 22 Our Supreme Court has considered whether a defendant, who falls within the "borderline competent" or "gray area" of defendants with mental illness, should be precluded from self-representation. *State v. Lane*, 365 N.C. 7, 18, 707 S.E.2d 210, 217 (2011). "Borderline competent" was defined as "defendants who are competent to stand trial[,] but nonetheless lack the capacity to conduct trial proceedings without the assistance of counsel." *Id.* at 19, 707 S.E.2d at 218.

¶ 23 In *Lane*, the defendant insisted on proceeding *pro se* on first-degree murder and statutory rape charges. *Id.* at 18, 707 S.E.2d at 217. During his competency hearing, the court concluded the defendant was largely illiterate, suffered from an anxiety disorder and possible Post Traumatic Stress Disorder, but determined defendant's emotional, psychological, and mental difficulties did not render the defendant incompetent to proceed to trial and to make his own decisions. *Id.* at 16-17, 707 S.E.2d at 216. The defendant requested standby counsel to represent him on the day of trial. *Id.* The defendant was found guilty of first-degree murder and felony murder, first-degree kidnapping, first-degree statutory rape, first-degree statutory sex offense, and indecent liberties. *Id.* at 17, 707 S.E.2d at 217.

¶ 24 Our Supreme Court remanded to the trial court to determine if the defendant fell into the "borderline competent" category. *Id.* at 18, 707 S.E.2d at 217. Upon remand, and based on expert testimony of a psychiatrist and two competency hearings, the trial court found:

> defendant at all times understood the nature and object of the proceedings against him, comprehended his own situation in reference to those proceedings, and was able to assist in his defense in a rational manner, such that any . . . failure regarding his comprehension of his own situation in reference to the proceedings was or would be a result of defendant's willful, volitional failure to consider discovery and the evidence against him.

Id. at 18–19, 707 S.E.2d at 217. Our Supreme Court concluded the defendant received a fair trial, free of prejudicial error. *Id.* at 40, 707 S.E.2d at 230.

¶ 25 The Supreme Court of the United States addressed this issue and held "a defendant who waives his right to the assistance of counsel [does not have to] be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights." *Godinez v. Moran*, 509 U.S. 389, 399, 125 L. Ed. 2d 321 (1993).

¶ 26 Further, "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." *Id.* at 399, 125 L. Ed. 2d at 321. "[T]he trial judge will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a

particular defendant." *Lane*, 365 N.C. at 21, 707 S.E.2d at 219 (quotation marks omitted).

¶ 27 The Supreme Court stated the standard for competency "is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." *Godinez*, 509 U.S. at 396, 125 L. Ed. 2d at 330 (citation and quotation marks omitted).

¶ 28 In *Indiana v. Edwards*, the defendant had three competency hearings and the trial court dealt with a defendant who had been diagnosed with schizophrenia, repeatedly deemed incompetent by four separate disinterested psychiatrists and the court, based upon incoherent writings, delusions, and continuing schizophrenia, such that the State was worried about his ability to proceed *pro se*. *Indiana v. Edwards*, 554 U.S. 164, 167-69, 171 L. Ed. 2d 345, 351-52 (2008). Unlike the defendant in *Edwards*, Defendant here did not have a long-established and documented history of serious mental illness.

¶ 29 Here, the trial court recognized, as the Supreme Court did in *Edwards*, that neither the State could limit representation, nor that Defendant lacked the mental capacity to conduct his own trial. *See Edwards*, 554 U.S. at 173, 171 L. Ed. 2d at 355. *Godinez* not *Edwards* applies to the instant case. Nothing in *Edwards* overrules the holding in *Godinez* that the Constitution of the United States permits a defendant who is competent to stand trial, may also waive his right to counsel and represent himself. *Edwards*, 554 U.S. at 172-174, 171 L. Ed. 2d at 353-55.

¶ 30 The record and the substantial interaction between the court and Defendant shows the court undertook a thorough and realistic account of Defendant's mental capacities and competence before concluding Defendant was competent to waive counsel and to proceed *pro se*. As in *Lane*, separate trial judges held two competency hearings regarding Defendant's mental capacity.

¶ 31 After interacting with Defendant, considering Defendant's medical conditions, testimony from Dr. Vance, and Dr. Vance's forensic psychiatric evaluation of Defendant, two judges ruled Defendant was competent to proceed and to represent himself.

¶ 32 The trial court gave Defendant several opportunities to consider whether he wanted to be represented by counsel, and inquired whether Defendant's decision was being made freely, voluntarily, and intelligently. Defendant demanded to represent himself numerous times.

¶ 33 Even were we to agree the trial court erred in allowing Defendant to represent himself, Defendant has made no showing he was prejudiced by his lack of counsel. Stand-by counsel was available to assist and was consulted to assist Defendant in navigating the proceedings.

¶ 34 Defendant was appointed several attorneys and disagreed with their methods of representation and recommendations. Any error in regard to his lack of representation claims was invited by Defendant. For these reasons, and because Defendant's self-representation had no bearing on this issue, Defendant cannot show prejudice. Further, given the overwhelming evidence against Defendant of criminal activity, any asserted error was harmless beyond a reasonable doubt. The trial court's conclusion that Defendant was competent to stand trial and waive his right to counsel is affirmed.

B. Sufficiency of Indictments

¶ 35 **[2]** Defendant argues the indictments against him are insufficient because they are too general and were drafted to make it unclear of what conduct he was being accused.

¶ 36 The purpose of an indictment is "to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. Creason*, 313 N.C. 122, 130, 326 S.E.2d 24, 29 (1985).

¶ 37 "[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." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). Under the North Carolina Constitution, an indictment is sufficient if it alleges every element of the offense. *See State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953).

¶ 38 Here, Defendant was charged in seventeen indictments with human trafficking of six different victims. The prosecutor charged Defendant with three counts of trafficking J.O. in a five-day period, five counts of trafficking A.C. in a thirteen-month period, two counts of trafficking H.M in a three-month period, two counts of trafficking E.C. in a one-month period, three counts of trafficking A.B. in a sixteen-month period and one count of trafficking M.F. in a thirteen-month period. Each indictment for human trafficking included the following language:

> Between and including [DATE RANGE], in the County named above, the defendant named above unlawfully, willfully, and feloniously did knowingly

> or in reckless disregard of the consequences of the action, did recruit, entice, harbor, transport, provide, or obtain by any means another person [NAME OF VICTIM] with the intent that the other person, [NAME OF VICTIM], be held in sexual servitude. This act was in violation of North Carolina General Statutes Section 14-43.11(a).

¶ 39 N.C. Gen. Stat. § 14-43.11(a)(i) (2019) is unambiguous and defines "human trafficking" as occurring when the perpetrator "knowingly or in reckless disregard of the consequences of the action recruits, entices, harbors, transports, provides, or obtains by any means another person with the intent that the other person be held in involuntary servitude or sexual servitude." The language used in the indictments in this case tracks the language of the statute word for word.

¶ 40 The indictments allege every element of the offense within a specific timeframe for each separate victim. *See Greer*, 238 N.C. at 327, 77 S.E.2d at 919. The indictments clearly allege the crimes of which Defendant was being charged and gave him notice to prepare and assert his defense. *See Creason*, 313 N.C. at 130, 326 S.E.2d at 29.

¶ 41 Defendant does not identify any essential element of human trafficking omitted in his indictments. He alleges the indictments fail to specify facts that will protect him from double jeopardy, or, alternatively, that the indictments are multiplicitous. "If Defendant required greater specificity, he could have moved for a bill of particulars under N.C. Gen. Stat. § 15A-925 (2019) and/or for a special verdict sheet under N.C. Gen. Stat. § 15A-1340.16 (2019)." *State v. Flow*, 277 N.C. App. 289, 304, 2021-NCCOA-183 ¶ 70, 859 S.E.2d 224, 233 (2021). Defendant failed to move for either clarification here.

¶ 42 The State's case provided an in-depth explanation of how it arrived at the indictments charged against Defendant. The prosecutor took into consideration the victims' statements and evidence available when Defendant was charged with seventeen counts of human trafficking. These generalizations are risks prosecutors take in cases, as in illicit drug sales or child sex crimes, where multiple offenses may occur and continue for long periods of time.

¶ 43 Upon a later claim for double jeopardy, which issue is not before us, the burden would be on the State to find and present new evidence for other crimes not alleged here. Defendant's argument the indictments are insufficient is without merit and overruled.

C. Human Trafficking as a Separate Offense

1. Standard of Review

¶ 44 Whether convictions are part of one continuing transaction such that the multiple convictions violate double jeopardy, a motion to dismiss preserves the issue for appellate review. *State v. Calvino*, 179 N.C. App. 219, 632 S.E.2d 839 (2006). This issue is preserved for review by Defendant's motion to dismiss for insufficient evidence. In reviewing the trial court's denial of a motion to dismiss, this Court determines whether substantial evidence of each essential element of the offense is admitted, when the evidence is reviewed in the light most favorable to the State. *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990).

2. Separate or Continuous

¶ 45 **[3]** N.C. Gen. Stat. § 14-43.11 states:

> (a) A person commits the offense of human trafficking when that person (i) knowingly or in reckless disregard of the consequences of the action recruits, *entices*, *harbors*, transports, provides, or obtains by any means another person with the intent that the other person be held in involuntary servitude or sexual servitude or (ii) willfully or in reckless disregard of the consequences of the action causes a minor to be held in involuntary servitude or sexual servitude.
>
> (b) A person who violates this section is guilty of a Class C felony if the victim of the offense is an adult. A person who violates this section is guilty of a Class B2 felony if the victim of the offense is a minor.
>
> (c) *Each violation of this section constitutes a separate offense and shall not merge with any other offense.*

N.C. Gen. Stat. § 14-43.11(a)-(c) (2019) (emphasis supplied).

¶ 46 Defendant argues the General Assembly did not intend to punish an offender multiple times for what he asserts is the same continuing crime by allowing a prosecutor to charge countless offenses for each separate act an offender took in order to hold a victim in sexual servitude. Defendant's and the dissent's interpretation of the statute disregards the words "entice" and "harbor" and would result in perpetrators exploiting victims for multiple acts, in multiple times and places, regardless

of the length of the timeframe over which the crimes occurred as long as the Defendant's illegal actions and control over the victim were "continuous."

¶ 47 Whether Defendant's actions violate the elements of the statute is ultimately a matter of fact for the jury to determine. The jury acquitted Defendant on five counts of human trafficking of J.O. and E.C. Sufficient evidence was presented to the jury to enable it to unanimously reach its verdicts with care and discernment as between the evidence presented of various charges and multiple victims.

¶ 48 The statute and intent of the General Assembly are clear. Defendant's arguments asserting human trafficking is a continual offense, analogous to kidnapping without a separate asportation, and may only be charged as one crime for each victim is without merit and overruled.

3. Substantial Evidence

¶ 49 Defendant acknowledges the plain language of the human trafficking statute specifically indicates each violation constitutes a separate offense and does not merge. N.C. Gen. Stat. § 14-43.11(c). He argues what is not clear is what facts must coalesce to constitute each violation.

¶ 50 "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "[T]he question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. . . . the jury [is] to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty." *State v. Poole*, 24 N.C. App. 381, 384, 210 S.E.2d 529, 530 (1975) (citations and quotation marks omitted).

¶ 51 Here, three victims and Rivard testified how Defendant controlled the women with heroin, advertised them through multiple solicitations on online message boards, and required them to perform multiple sexual acts with customers for money in exchange for drugs, food, transportation, and shelter. All three women testified Defendant had kept the victims in his home or in hotel rooms and drove them to a number of cities for them to be held in sexual subjugation and insisted they communicate with every customer. These victims also corroborated the testimony of other victims, despite the fact that many of them had not previously met. Viewed in a light most favorable to the State, Defendant has presented nothing to warrant reversal of the trial court's denial of Defendant's motion to dismiss.

¶ 52 Whether sufficient evidence supports each conviction of human trafficking is for a jury to decide upon its review of the duly-admitted evidence and the demeanor and credibility of the witnesses, properly instructed on the applicable laws. The trial court's denial of Defendant's motion to dismiss is affirmed.

D. Prior Record Level

1. Standard of Review

¶ 53 "The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review 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." *State v. Green*, 266 N.C. App. 382, 385, 831 S.E.2d 611, 614 (2019) (internal citations and quotation marks omitted).

2. Stipulation

¶ 54 **[4]** Defendant argues his 1994 possession of drug paraphernalia conviction should not have been used in determining his prior record level. When assessing a sentence imposed by the trial court, the standard of review is to determine "whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Sanders*, 225 N.C. App. 227, 228, 736 S.E.2d 238, 239 (2013).

¶ 55 Each of a defendant's prior convictions, proven by a preponderance of the evidence, is assigned points, which are used to calculate the prior record level of a felony offender. *See* N.C. Gen Stat. §15A-1340.14 (2019). Proof of a prior conviction can be established by, "(1) a stipulation of the parties," or "(4) [a]ny other method found by the court to be reliable." N.C. Gen. Stat. § 15A-1340.14(f)(1),(4) (2019). "[A] defendant need not make an affirmative statement to stipulate to his . . . prior record level . . . particularly if [he] had an opportunity to object to the stipulation in question but failed to do so." *State v. Alexander*, 359 N.C. 824, 829, 616 S.E.2d 914, 918 (2005).

¶ 56 In *State v. Boyd*, a *pro se* defendant made no comment from which this Court could infer his stipulation to his prior record. *State v. Boyd*, 200 N.C. App. 97, 104, 682 S.E.2d 463, 468 (2009). While the court reviewed defendant's worksheet, the defendant asked, "What does that mean?" *Id.* The defendant clearly did not understand the prior record worksheet, let alone stipulate to it. This Court compared the defendant in *Boyd* with the defendant in *State v. Alexander*. In *Alexander*, the defendant's counsel recognized the defendant had no prior convictions to point to, so counsel was aware of the record and there was nothing to object to. *Alexander*, 359 N.C. at 830, 616 S.E. 2d at 918.

¶ 57 Here, the State presented the sentencing worksheet and orally stated it had found Defendant to have accrued a total of fourteen points, making him "level five for felony sentencing purposes." In response, Defendant asserted his reason for not signing the stipulation was the State implied he would be a record four or five, and Defendant thought he would be a level four. Defendant contested he was a level five because of the misdemeanor convictions. Defendant then addressed the points given for the convictions of injury to real property and possession of drug paraphernalia, and not the felon possessing a firearm charge. Defendant reviewed and understood the prior record worksheet sufficiently to engage with the court on some former charges, while not addressing others.

¶ 58 After the State presented its evidence, the trial judge asked Defendant if there was "any evidence of other showing [Defendant] wish[ed] to make for purposes of sentencing." After conferring with standby counsel, the trial judge offered Defendant an opportunity to say, "anything at all . . . regarding sentencing." Defendant did not question nor address the State's calculation of points.

¶ 59 While Defendant may not have "stipulated" to the worksheet itself in writing, Defendant failed to object to the classification of the felony firearm possession as a Class G felony each time he was presented an opportunity. Defendant's argument is more in line with the defendant in *Alexander*. Defendant reviewed and understood the prior record worksheet, and he objected to portions of it. *See Alexander*, 359 N.C. at 830, 616 S.E. 2d at 918. By his silence, Defendant cannot now contest the remaining convictions to calculate his prior record level. Defendant's argument is overruled.

3. Prejudice or Substantially Similar

¶ 60 Defendant argues the State did not prove substantial similarity between the federal and state offenses of a felon in possession of a firearm and the firearm charge was improperly classified as a Class G felony. Defendant argues because the timeframe the crimes against A.B. and M.F. occurred is after 1 December 2014, when N.C. Gen. Stat. § 90-113.22A went into effect, the State is required to prove the Defendant's possession of drug paraphernalia conviction was related to a controlled substance other than marijuana.

¶ 61 Whether the State has to prove a paraphernalia conviction does not involve marijuana paraphernalia is controlled by *State v. Green*, 266 N.C. App. 382, 831 S.E.2d 611, (2019). In *Green*, the defendant contended the trial court erred in classifying a 1994 paraphernalia conviction as a

Class 1 misdemeanor because the State did not prove the paraphernalia conviction was unrelated to marijuana. *Id.* at 388, 831 S.E. 2d at 616. The governing statute for the crime of paraphernalia only had one classification at the time the defendant's conviction but was "subsequently divided . . . into two different classifications depending on the type of drug paraphernalia possessed." *Id.*

¶ 62 Here, similar to the analysis for the Class G federal firearm conviction, Defendant was made aware of the State's intention to use the 1994 paraphernalia conviction in calculating his prior record level, as it was listed on the same sentencing sheet as the Class G federal firearm conviction. Defendant acknowledged "possession of drug paraphernalia . . . [is] a misdemeanor."

¶ 63 The trial court responded the paraphernalia conviction "is noted as a misdemeanor on the worksheet," to which Defendant responded, "Yes, Your Honor." Defendant indicated from his understanding of the charge he "contest[s] that [he is] a level five." The trial court provided Defendant an opportunity to confer with standby counsel, stated Defendant will "have the opportunity to offer evidence" for his contention that he was not a prior record level five. Defendant chose not to do so.

¶ 64 As noted above, a defendant may concede to a conviction through silence in some circumstances. *See Alexander*, 359 N.C. at 828-29, 616 S.E.2d at 917-18. "Defendant—as the person most familiar with the facts surrounding his offense—stipulated that his [prior] conviction was classified as a Class 1 misdemeanor. Thus, Defendant was stipulating that the facts underlying his conviction justify that classification." *Green*, 266 N.C. App at 388, 831 S.E.2d at 616 (citations and internal quotation marks omitted).

¶ 65 By not objecting to the inclusion of the paraphernalia conviction when given an opportunity, and by not presenting any evidence to support his contention, Defendant left the trial court without a means to determine the validity of his contention. The trial court's classification of Defendant's 1994 possession of drug paraphernalia conviction as a Class 1 misdemeanor and inclusion on the worksheet was proper for purposes of determining Defendant's prior record level. Defendant has failed to show any error in the trial court's determination of his prior record level. His argument is overruled.

V. Conclusion

¶ 66 Defendant was competent to waive counsel, to stand trial, and proceed *pro se*. The indictments sufficiently asserted each element of the

charged crimes. Human trafficking is statutorily defined as a separate offense for each instance and the statute expressly provides the offenses do not merge.

¶ 67 The trial court did not err in sentencing. Defendant received a fair trial, free from prejudicial error he preserved or asserted. We find no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judge DIETZ concurs.

Judge ARROWOOD concurs in part and dissents in part by separate opinion.

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

¶ 68 I respectfully dissent from the majority's opinion that the trial court properly convicted defendant of multiple counts per victim of human trafficking. In what is an issue of first impression for our Courts, the majority has ruled that a violation of North Carolina's human trafficking statute does not constitute a continuing offense. However, our precedent—specifically, past issues of first impression addressing statutory construction—clearly instructs that, where a criminal statute does not define a unit of prosecution, a violation thereof should be treated as a continuing offense.

¶ 69 Here, I do not dispute that defendant is guilty of human trafficking violations, nor do I dispute that the facts on the Record paint a chilling and horrifying picture for each of the alleged victims. However, as I will discuss in more detail as follows, the State has failed to show defendant should be convicted on multiple counts of human trafficking per victim, as opposed to a single, continuing count per victim.

¶ 70 Additionally, in this specific case, convicting defendant of one count of human trafficking per victim[1] would have the effect of reducing defendant's prison sentence from a term of 240-to-312 years to a term of 160-to-208 years—in other words, it would leave undisturbed the fact that defendant will spend the rest of his natural life in prison.

---

1. Specifically, the four victims the jury found defendant had trafficked: A.C., H.M., A.B., and M.F.

¶ 71 Thus, I would remand this case with instruction to vacate all but one count of trafficking per victim. I concur in the result with the majority's opinion with regard to the remaining issues on appeal.

¶ 72 Defendant was indicted on 17 counts of human trafficking involving six victims in violation of N.C. Gen. Stat. § 14-43.11, which in pertinent part provides:

> (a) A person commits the offense of human trafficking when that person . . . knowingly or in reckless disregard of the consequences of the action recruits, entices, harbors, transports, provides, or obtains by any means another person with the intent that the other person be held in involuntary servitude or sexual servitude . . . .
>
> (b) A person who violates this section is guilty of a Class C felony if the victim of the offense is an adult. . . .
>
> (c) Each violation of this section constitutes a separate offense and shall not merge with any other offense.

N.C. Gen. Stat. § 14-43.11 (2019)

¶ 73 Each indictment under which defendant was convicted was a short form indictment alleging that from Date A to Date B (these dates usually being over a several-month period and with same dates on each of multiple indictments for each victim) defendant "did recruit, entice, harbor, transport, provide or obtain by any means another person, [the victim,] with intent that the other person, [the same victim], be held in sexual servitude."

¶ 74 During the charge conference at trial, the trial court initiated a discussion of whether the violation of human trafficking law constituted a continuing offense:

> It appears to the Court by my count that [defendant] is charged with a total of 17 counts of human trafficking, basically one in each of the case file numbers 16 CRS 2685 through 16 CRS 2701.
>
> . . . .
>
> I mean, the same dates of offense are alleged with each particular woman. Help me understand why

> human trafficking is not simply a continuing offense. To be more specific, why there should not simply be one human trafficking charge with regard to each of the alleged victims, each woman?

¶ 75 To this, the State replied, reading from subsection (c) of N.C. Gen. Stat. § 14-43.11:

> So, every violation of this section constitutes a separate offense and shall not merge with any other offense. . . . So, every single act the [d]efendant committed is a separate offense. So, when I sat down through the process of deciding what to indict, every time the [d]efendant drove one of the victims or his co-[d]efendant drove one of the victims to a different location, posted them on Backpage, did one of these other things, that was yet another offense of human trafficking.

¶ 76 The trial court continued: "How am I to distinguish and how is the jury to distinguish each of these alleged acts involving [J.O.], or [A.C.], or so forth?" The State then explained how it had created "a list" in which it illustrated how certain events corresponded to specific acts. The State also claimed it had, though it was not required to do so, "limited tremendously unnecessarily" the number of charges against defendant, further claiming it "could have indicted 250 counts . . . under the [human trafficking] statute." The State explained it had "alleged the things in the statute or in the indictment as appropriate" and "laid it out so [the State] ha[d] a guide" that it "intended to go through with the jury. This defendant with the victim did these three things he's charged with."

¶ 77 The trial court requested to see the State's list. After the trial court obtained the State's list, and following discussions between the State and the trial court about the prosecutor's shorthand notes on the State's list, the trial court stated:

> But it still seems to me this jury is going to be extremely confused if the Court does not help the jury distinguish between these various counts of human trafficking in some fashion. And I cannot do it by the dates here since the same dates are alleged -- same range of dates for each count.
>
> . . . .

> [I]t's also the Court's job to make sure that the jury understands the instructions and understands the charges the jury has to consider. So, I go back to my original question.
>
> . . . .
>
> How do I distinguish so that the jury understands, among these various charges of human trafficking with regard to these victims. That each of the alleged victims have more than one human trafficking charge involved?

¶ 78 The State replied:

> I legally don't think you have to. I legally think -- and if -- I may be completely overestimating my ability to impart to the jury what I intend to impart to the jury is let's say a victim has three counts of human trafficking. If you believe this [d]efendant did one of these three things -- any of the ways that human trafficking could be done based on the evidence you heard, you can find him guilty of those three counts of human trafficking.

¶ 79 After a brief recess, the trial court, stated:

> Accordingly, the State will submit each of the trafficking offenses -- human trafficking offenses charged as to each female. So, that means, of course, Madam Clerk that there will be . . . three trafficking offenses with regard to [J.O.], five with regard to [A.C.], two with regard to [H.M.], two with regard to [E.C.], three with regard to [A.B.], two with regard to [M.F.].

¶ 80 During the State's closing argument, one of the prosecutors stated as follows:

> Human trafficking. . . . You are going to hear words like recruit, entice, harbor, transport, obtain by any means. All of those things, that one act, is a separate act of human trafficking. Let's take one of the -- any of the victims.
>
> You have a recruitment conversation, come work for me, join the team. I can give you good heroin. I can give you a place to stay. That is an act of human

> trafficking, to recruit another person for this purpose. That's one thing that you can do. To transport is another thing that you can do. This is why we talk about specific acts that were done by [defendant] with the victims and what they did to do his operation.
>
> Every time he put a girl in a car and drove them to Raleigh that would be transportation. That was an act of human trafficking, because it was for the purpose of sex for money and coercion was used. We will talk about those in a second. But every single time he put one of these girls in the car to do this business, that was an act of human trafficking.
>
> . . . .
>
> Every single act is a separate act of human trafficking. Do they recruit or do any of these things to work as a prostitute and there is coercion? Now, coercion can come in two forms in this case. Coercion -- as you understand it, threats of force, know [sic] violent acts, slapping somebody around, you're going to go in this room and do this thing. To be certain those are acts of coercion. But another way coercion can be proven in the State of North Carolina is by the delivery of a controlled substance, period.
>
> So, what human trafficking boils down to are these three things, that he committed one of these acts: recruiting, enticing, harboring, transporting, providing, obtaining person for the purposes of prostitution, and delivery of controlled substances. I think about the evidence and as you heard from each of the victims and put those two things together, every time one of these acts is committed that's another human trafficking count.

¶ 81 Then, the State went on to discuss the victims. As the Record shows, as follows, the State does not individualize each human trafficking charge, as it had told the trial court it would do. In fact, the State does not elucidate or distinguish between the charges per victim at all.

¶ 82 First, the State discussed the charges involving J.O. as an example of what the jurors should expect to find on the verdict sheets; the State

did not address the charges of human trafficking or the events involving J.O. specifically.

¶ 83 Then the State discussed the trafficking charges involving A.C.:

> [T]hey're going to have five different pieces of paper with [A.C.] as the victim.
>
> . . . .
>
> So, when you start your conversation and this kind of gets into the obnoxious part, you're going to go, we heard so much. We heard so much. He did so many things with [A.C.]. You're right. He did. So, what do you do with that? Now, as an example with [A.C.], you can traffic by transportation for example, right? And there are going to be five counts of human trafficking. If you believe that he transported her or [co-defendant] did so and they were working together, five times, and the other elements are met, you're done. Check the block and those are five counts of human trafficking.
>
> . . . .
>
> And here's the interesting thing. If five of you think that he transported her five times and seven of you think that he enticed her five times, you don't have to agree, as long as each of you agree that he did each of the things -- he did one of the things. You don't have to -- we don't have to prove that he transported and enticed and did all these things. We just have to prove one of those things, that first count. So, it's incredibly simple if it kind of boils down to that and you don't have to agree as to which one, on each offense. You just don't.
>
> So, when you start your discussions, you're going to have those conversations. Well, how many times do you think he enticed her, or he harbored her or he transported her, I mean, you're already done. You've done all three of those things. That's three right there. Did he transport her more than twice? Sure. Did he harbor her? Every day. Every day she was prostituting and he was harboring her, giving her a place to stay that he was paying for, that's human trafficking.

¶ 84 Regarding the charges involving H.M., the State stated:

> [Y]ou're not going to have a hard time finding that he transported her twice to different cities and that he harbored her or that he recruited her. Just a conversation he had before she started working for him is trafficking. He had that initial recruitment conversation, hey get on the team, come work for me. Maybe he had another one later. And so he recruited and he transported, and he enticed her to make money as a prostitute and for buying her drugs to do so.

¶ 85 Next, the State discussed E.C. and A.B.:

> [E.C.], you didn't see, but you heard about. There are going to be two different counts with her. . . . [E.C.], she wasn't there for long. That's why you will only have two counts. [A.B.] testified you are going to have these different counts as well. Again, it starts with a case number. You're going to have those three human trafficking, promotion of prostitution, and conspiracy is the first count. And then you're going to have -- on the other. The same thing. She told you the story. She told you how everything worked.

¶ 86 This was the extent of the State's addressing the various counts of human trafficking to the jury.

¶ 87 At the close of all evidence, the trial court instructed the jury on the human trafficking charges as follows:

> [D]efendant has been charged with 17 counts of human trafficking involving sexual servitude. Three counts of this offense pertain to [J.O.], five counts to [A.C.], two counts to [H.M.], two counts to [E.C.], three counts to [A.B.], and two counts to [M.F.]. The counts are distinguished on the verdict sheets by the names of the alleged victims of human trafficking and by the dates of the alleged offenses. You will find these names and dates on the upper right-hand corner of the verdict sheets beneath the file numbers. You are to return a separate verdict as to each count. For you to find the defendant guilty of any count of human trafficking, you must be convinced beyond a reasonable doubt of the defendant's guilt of that count.

The verdict sheets provided to the jury merely distinguished between victims, as the individual charges presented the same date range in the "upper right-hand corner" per victim, not per count.[2]

¶ 88 The jury ultimately returned a verdict of guilty on a total of 12 counts: five counts of human trafficking A.C. from 1 December 2012 through 31 January 2013; two counts for H.M. from 1 January 2014 through 30 March 2014; three for A.B., one from 1 January 2014 through 30 August 2015, unlike in the indictments involving her, and the other two from 1 January 2014 through 30 April 2015, matching the indictments; and two for M.F. from 1 March 2014 through 30 April 2015.

¶ 89 Defendant now argues on appeal that the trial court erred in entering judgment for multiple counts of human trafficking for each victim and contends instead that his human trafficking violations constitute a single, continuing offense per victim.

¶ 90 "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." *In re Redmond*, 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).

¶ 91 "A continuing offense . . . is a breach of the criminal law not terminated by a single act or fact, but which subsists for a definite period and is intended to cover or apply to successive similar obligations or occurrences." *State v. Maloney*, 253 N.C. App. 563, 571, 801 S.E.2d 656, 661 (2017) (quotation marks omitted) (alteration in original) (quoting *State v. Johnson*, 212 N.C. 566, 570, 194 S.E. 319, 322 (1937)). "For example," as I shall discuss in more detail later, "kidnapping is a continuing offense that lasts from the time of initial confinement until the victim regains free will[.]" *Id.*, 801 S.E.2d at 662 (citation omitted).

¶ 92 Although, as discussed above, this is an issue of first impression for our Courts, our Courts have otherwise dealt with statutory construction under similar circumstances. In *State v. Smith*, for example, our Supreme Court addressed the issue of the allowed unit of prosecution

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2. With the exception of the three charges involving A.B., in which one, as I discuss in the following paragraph, does not match the date range provided in the corresponding indictments.

for violations of N.C. Gen. Stat. § 14-190.1; this, at the time, was an issue of first impression. *State v. Smith*, 323 N.C. 439, 440-41, 373 S.E.2d 435, 436-37 (1988).

¶ 93 At that time, N.C. Gen. Stat. § 14-190.1, which criminalizes distribution of obscene literature, provided:

> It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity. A person, firm or corporation disseminates obscenity within the meaning of this article if he or it:
>
> (1) sells, delivers or provides or offers or agrees to sell, deliver or provide, any obscene writing, picture, record or other representation or embodiment of the obscene; or
>
> . . . .
>
> (3) publishes, exhibits or otherwise makes available anything obscene; or
>
> (4) exhibits, presents, rents, sells, delivers, or provides, or offers or agrees to exhibit, present, rent or to provide: any obscene still or motion picture, film, film strip or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication of the obscene.

Id. at 440-41, 373 S.E.2d at 436 (quoting N.C. Gen. Stat. § 14-190.1 (1986 & Cum. Supp. 1987)).

¶ 94 Reading the statute on its face, the Supreme Court noted: "The statute makes no differentiation of offenses based upon the quantity of the obscene items disseminated." *Id.* at 441, 373 S.E.2d at 436 (citation omitted). Thus, the issue before the Supreme Court was whether the Court of Appeals erred by affirming the trial court's conviction of defendant for three "separate offenses arising out of the dissemination of" two magazines and one film in the same transaction. *Id.* at 440, 373 S.E.2d at 436.

¶ 95 In its analysis, our Supreme Court cited *Bell v. United States*, stating: "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses when we have no more to go on than

the present case furnishes." *Id.* at 442, 373 S.E.2d at 437 (quoting *Bell v. United States*, 349 U.S. 81, 84, 99 L. Ed. 905, 910-11 (1955)).

¶ 96 Applying *Bell*, our Supreme Court concluded: "until the General Assembly unambiguously declares a contrary intent, we should assume that a single sale in contravention of [N.C. Gen. Stat.] § 14-190.1 does not spawn multiple indictments." *Id.* at 444, 373 S.E.2d at 438 (citation and quotation marks omitted). It further stated: "This construction of the statute is in accord with the general rule in North Carolina that statutes creating criminal offenses must be strictly construed *against the State*." *Id.* (emphasis added) (citing *State v. Hageman*, 307 N.C. 1, 9, 296 S.E.2d 433, 438 (1982); *State v. Ross*, 272 N.C. 67, 157 S.E.2d 712 (1967)).

¶ 97 Accordingly, the Supreme Court concluded, because the defendant had sold three items containing obscene literature in a single transaction, he could only be found guilty of one count in violation of N.C. Gen. Stat. § 14-190.1. *Id.* It thus remanded the case to the Court of Appeals to further remand to the trial court. *Id.*

¶ 98 Addressing another issue of first impression, our Supreme Court recently applied *Smith* in *State v. Conley*, 374 N.C. 209, 839 S.E.2d 805 (2020). There, the Supreme Court addressed the proper unit of prosecution under N.C. Gen. Stat. § 14-269.2(b), which prohibits the possession of firearms on school property. *Conley*, 374 at 212, 839 S.E.2d at 807. The defendant in question had been "convicted and sentenced on five separate counts for violation of the statute based on an incident in which he was discovered on the grounds of a school in possession of five guns." *Id.* at 209, 839 S.E.2d at 806.

¶ 99 N.C. Gen. Stat. § 14-269.2(b) provides: "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. Gen. Stat. § 14-269.2(b) (2019).

¶ 100 Citing its prior opinion in *Smith*, our Supreme Court reasoned:

> Although the facts in *Smith* are distinguishable from those of the present case and the convictions there arose under a different statute than the one presently before us, we are nevertheless compelled to apply the same legal principles that we applied in *Smith* in interpreting N.C.[Gen. Stat.] § 14-269.2(b). Because it is clear that N.C. [Gen. Stat.] § 14-269.2(b) shares a

> parallel structure with the statute at issue in *Smith*, our rationale for applying the rule of lenity in that case applies equally here.

Conley, 374 N.C. at 214, 839 S.E.2d at 808.

¶ 101 So, "[d]ue to the statute's failure to clearly express the General Assembly's intent as to the allowable unit of prosecution, [the Supreme Court] determined that this ambiguity should be resolved in favor of lenity toward the defendant." *Id.* at 213, 839 S.E.2d at 808 (citation omitted). Accordingly, the Supreme Court, bound by *Smith*, concluded that the defendant could be convicted of "only a single violation of this statute[,]" as opposed to five. *Id.* at 217, 839 S.E.2d at 810.

¶ 102 Our Court has also applied *Smith*. In *State v. Howell*, presenting yet another issue of first impression for our Courts, we addressed the unit of prosecution for violations of child pornography statutes. *State v. Howell*, 169 N.C. App. 58, 609 S.E.2d 417 (2005). There, "a jury [had] convicted [the] defendant of 43 counts of third-degree sexual exploitation of a minor." *Id.* at 59, 609 S.E.2d at 418. On appeal, the "defendant contend[ed] that the charges against him were multiplicitous. [The] [d]efendant assert[ed] that the possession of photos on a single hard drive constitute[d] only one offense or, in the alternative, no more than five separate counts, one for each downloaded zip file." *Id.* at 61, 609 S.E.2d at 419.

¶ 103 At the time, the applicable statute provided: "A person commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity." *Id.* (quoting N.C. Gen. Stat. § 14-190.17A(a) (2000)). We observed:

> N.C. [Gen. Stat.] § 14-190.13 (2000) defines "material" as: "Pictures, drawings, video recordings, films or other visual depictions or representations but not material consisting entirely of written words." [The] [d]efendant suggest[ed] that because the definition of "material" specifies items in the plural, the photographs found on his computer constitute only a single charge.

Id. (citation omitted).

¶ 104 In our reasoning, we distinguished *Smith* by the use of the words "a" versus "any" in legislation:

> In *Smith*, the [Supreme] Court held that a single sale of multiple pornographic magazines could not yield multiple convictions. However, *Smith* is also easily distinguished from this case, as it involved the defendant's conviction under N.C. [Gen. Stat.] § 14-190.1(a), for intentionally disseminating obscenity. The statute involved here, N.C. [Gen. Stat.] § 14-190.17A(a), differs from the one in *Smith* in two important ways. First, although enacted at the same time and under the same bill as N.C. [Gen. Stat.] § 14-190.17A(a), the statute in *Smith* makes it illegal to sell "*any* obscene writing, picture or other representation or embodiment of the obscene." The [Supreme] Court reasoned that this language, using "any" rather than "a," failed to indicate a "clear expression of legislative intent to punish separately and cumulatively for *each and every* obscene item." By contrast, in N.C. [Gen. Stat.] § 14-190.17A(a), the legislature chose to use the term "a" visual depiction, thus indicating a different intent.

Id. at 63, 609 S.E.2d at 420 (citations omitted) (emphases in original).

¶ 105 Accordingly, "defendant's multiple convictions [we]re consistent with the language and intent of the child pornography statutes and d[id] not violate his right to be free from double jeopardy." *Id.* at 64, 609 S.E.2d at 421.

¶ 106 Our Courts have also addressed similar issues of statutory construction with respect to cases involving kidnapping. For example, in *State v. White*, the defendant at issue "was charged with armed robbery, two counts of first degree rape, three counts of first degree sexual offense and three counts of first degree kidnapping." *State v. White*, 127 N.C. App. 565, 569, 492 S.E.2d 48, 50 (1997). With respect to the kidnapping charges,

> [t]he first count of kidnapping charged defendant with confining the victim in his vehicle at [an] intersection . . . for the purpose of facilitating the commission of robbery and not releasing her in a safe place. The second count of kidnapping charged defendant with removing the victim from the intersection to a park for the purpose of facilitating the commission of rape or sexual offenses and sexually assaulting the victim and not releasing her in a safe place. The third

> count of kidnapping charged defendant with removing the victim from the park to [another man]'s residence for the purpose of facilitating the commission of rape or sexual offenses and sexually assaulting the victim and not releasing her in a safe place.

Id. "On appeal, defendant first contends the trial court erred by denying his motion to submit only a single count of kidnapping to the jury. Defendant argues that the kidnapping was a single, continuing offense." *Id.*

¶ 107 At the time, the applicable kidnapping statute provided:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.
>
> . . . .
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

Id. at 570, 492 S.E.2d at 51 (alterations in original) (quoting N.C. Gen. Stat. § 14-39 (1993)).

¶ 108 This Court noted that "N.C. Gen. Stat. § 14-39 contains no express language delineating each act of confinement, restraint or removal during a kidnapping as a separate unit of prosecution." *Id.* Then, applying *Smith*, we stated: "Our Supreme Court has held that, if the General Assembly fails to establish with clarity the precise unit of prosecution for a particular crime, the statute defining such crime must be strictly construed against the State." *Id.* (citing *Smith*, 323 N.C. at 444, 373 S.E.2d at 438).

¶ 109 We then reasoned:

> If we interpret N.C. Gen. Stat. § 14-39 to mean that each place of confinement or each act of asportation occurring during a kidnapping constitutes a separate unit of prosecution, the State would then be authorized to divide a single act of confinement into as many counts of kidnapping as the prosecutor could devise. . . . Surely this is not what the General Assembly intended. Common sense dictates that *the offense of kidnapping should encompass the entire period of a victim's confinement from the time of the initial act of restraint or confinement until the victim's free will is regained.*

Id. at 570-71, 492 S.E.2d at 51 (emphasis added).

¶ 110 "We therefore h[e]ld that the offense of kidnapping under N.C. Gen. Stat. § 14-39 is a single continuing offense, lasting from the time of the initial unlawful confinement, restraint or removal until the victim regains his or her free will." *Id.* at 571, 492 S.E.2d at 51. Thus, we concluded the defendant had committed one act of kidnapping, beginning when the victim was removed from her vehicle until she was released in a motel parking lot. *Id.*, 492 S.E.2d at 52.

¶ 111 Again, current North Carolina human trafficking laws, as they pertain to adult victims, state:

> (a) A person commits the offense of human trafficking when that person . . . knowingly or in reckless disregard of the consequences of the action recruits, entices, harbors, transports, provides, or obtains by any means another person with the intent that the other person be held in involuntary servitude or sexual servitude . . . .

> (b) A person who violates this section is guilty of a Class C felony if the victim of the offense is an adult. . . .
>
> (c) Each violation of this section constitutes a separate offense and shall not merge with any other offense.

N.C. Gen. Stat. § 14-43.11.

¶ 112 Per *Howell* and *Conley*, our human trafficking statute is clear in its use of the word "another" in subsection (a) as it pertains to the victim: the law intends to protect individual victims from human trafficking, and, read in conjunction with subsection (c), anyone in violation thereof will, at a minimum, face charges for each victim affected. Additionally, much like the laws at issue in *Howell* and *Conley*, our human trafficking statute is also silent on its intended unit of prosecution. Although the majority insists subsection (c) of this statute is clear and controlling here, it does not illustrate how or when a violation constitutes "a separate offense" and does not provide the conditions under which one violation ends and another begins.

¶ 113 Furthermore, here, the Record throughout does not shed light as to why defendant was, or should be, convicted of 12 counts of human trafficking.

¶ 114 First, defendant was indicted on: three counts of human trafficking involving J.O., all occurring "between and including March 12, 2015 to March 16, 2015"; five counts involving A.C. "between and including December 1, 2012 through January 31, 2013"; two counts involving H.M. "between and including January 1[,] 2014 to March 30, 2014"; two counts involving E.C. "between and including July 1, 2013 through August 5, 2013"; three counts involving A.B. "between and including January 1, 2014 to April 30, 2015"; and two counts involving M.F. "between and including March 1, 2014 to April 30, 2015[.]" This was the extent of the detail provided in the indictments for each count.

¶ 115 In fact, the indictments do not give any indication as to which of the multiple actions prohibited under N.C. Gen. Stat. § 14-43.11—recruiting, enticing, harboring, transporting, providing, or obtaining—are covered by each indictment or when any specific act of trafficking commenced or concluded, as we are provided the same date range for multiple counts for each victim. In addition, although the victims' testimonies may well have supported separate and distinct crimes of trafficking, the

indictments are not drawn in such a way as to differentiate the separate and distinct crimes that could have been charged.[3]

¶ 116 Nonetheless, defendant was found guilty of: five counts of human trafficking involving A.C. from 1 December 2012 through 31 January 2013; two counts involving H.M. from 1 January 2014 through 30 March 2014; three involving A.B., one from 1 January 2014 through 30 August 2015 and the other two from 1 January 2014 through 30 April 2015; and two involving M.F. from 1 March 2014 through 30 April 2015. Again, nowhere within the Record or the State's arguments at trial is it shown that defendant committed each and every one of these violations in each and every timeframe as listed in the jury verdicts.

¶ 117 In summary, neither the indictments, the State's closing argument at trial, the jury instructions, nor the jury verdict sheets distinguish between the individual counts of human trafficking upon which defendant was ultimately convicted.

¶ 118 Furthermore, despite the fact that the State insists it distinguished the various charges in its own notes, and despite its reasoning that "every single time [defendant] put one of these girls in the car to do this business, that was an act of human trafficking[,]" there is nothing before us, and thus nothing before the jury at trial, to show this. In fact, even though, during its closing statement, the State correctly informed the jury that any act listed in N.C. Gen. Stat. § 14-43.11—recruit, entice, harbor,

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3. In other words, these indictments do not specify what defendant did under N.C. Gen. Stat. § 14-43.11 to spur each indictment. This is especially interesting when compared and contrasted with, for example, the manner in which the State generally prosecutes drug trafficking violations. *See*, *e.g.*, N.C. Gen. Stat. § 90-95 (2019) (making it unlawful to "manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance; . . . create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;. . . [or] possess a controlled substance"); *State v. Williams*, 2021-NCCOA-263, ¶¶ 3-4 (unpublished) (in which the defendant was indicted under N.C. Gen. Stat. § 90-95 on counts of, among others, trafficking opium or heroin by possession; trafficking opium or heroin by transportation; trafficking opium or heroin by manufacture; and possession with intent to manufacture, sell, or deliver heroin); *State v. Surratt*, 2021-NCCOA-407, ¶ 3 (in which the defendant was indicted on, among others, "one charge of possession with intent to manufacture, sell, and deliver a controlled substance, namely cocaine . . . ; [and] one charge of sale and delivery of a controlled substance, namely cocaine[.]"); *State v. McMillan*, 272 N.C. App. 378, 381, 846 S.E.2d 575, 578 (2020) ("Defendant was . . . indicted o[n] Trafficking in Cocaine by Possession, [and] PWISD Cocaine[.]"); *State v. Coleman*, 271 N.C. App. 91, 93, 842 S.E.2d 631, 633 (2020) ("Defendant was indicted for possession with intent to manufacture, sell, deliver hydrocodone; selling and delivering hydrocodone[;] possession with intent to manufacture, sell, deliver alprazolam; and selling and delivering alprazolam for the 1 February 2016 transactions. Defendant was indicted for two counts of trafficking opium for the transactions on 4 February and 5 February 2016.").

transport, provide, or obtain—constitutes a commission of human trafficking, the State did not show the 12 exact and specific instances—five, two, three, and two per victim, respectively—in which defendant enticed, harbored, transported, provided, or obtained the victims.

¶ 119 On the contrary, as reflected by the swaths of time listed in the indictments and jury verdicts, and as confirmed by the victims' testimonies, the Record tends to show that defendant trafficked each victim over an extended period of time per victim. With nothing before us tending to prove defendant should be found guilty of 12 counts of human trafficking, the number 12 here is nothing other than arbitrary.

¶ 120 Though the majority insists its holding is necessary to avoid convicting future perpetrators who commit multiple violations of a single continuing offense, the majority's opinion provides the State an unfettered license to prosecute a defendant on as many counts as it wishes without actually distinguishing the counts—a result that starkly contrasts with "the general rule in North Carolina that statutes creating criminal offenses must be strictly construed *against the State*." *Smith*, 323 N.C. at 444, 373 S.E.2d at 438 (emphasis added).

¶ 121 "If we interpret N.C. Gen. Stat. § 14-[43.11] to mean that each" act "occurring during a [human trafficking] constitutes a separate unit of prosecution, the State would then be authorized to divide a single act of confinement into as many counts of [human trafficking] as the prosecutor could devise." *See White*, 127 N.C. App. at 570, 492 S.E.2d at 51. Rather, "[c]ommon sense dictates that the offense of [human trafficking] should encompass the entire period of a victim's" being held in involuntary or sexual servitude "from the time of the initial act of" recruiting, enticing, harboring, transporting, providing, or obtaining begins "until the victim's free will is regained." *See id.* at 571, 492 S.E.2d at 51.

¶ 122 As egregious and grotesque as defendant's actions have been, which the majority reiterates and which I do not dispute, the severity thereof does not inform the Court as to why defendant was found guilty of 12 counts of human trafficking or why defendant could not be charged with a single, continuing offense per victim; it certainly does not provide guidance as to the prosecution of future human trafficking violations. In fact, the majority's holding may trigger the exact opposite of its desired effect: by allowing the State not to distinguish between each count, the State could successfully charge a perpetrator with fewer counts of human trafficking than the evidence tends to show.

¶ 123 Defendant was charged for 12 counts of human trafficking without the State asserting what each count was, and the Record before us was

not instructive. Though this is an issue of first impression, the pattern established by our Courts' precedent is clear. "Although the facts" in the above-cited cases "are distinguishable from those of the present case and the convictions there arose under . . . different statute[s,]" I am "compelled to apply the same legal principles" therein. *See Conley*, 374 N.C. at 214, 839 S.E.2d at 808. "Because it is clear that N.C. [Gen. Stat.] § 14-[43.11] shares a parallel structure with the[se] statute[s] . . . *our rationale for applying the rule of lenity in th*[*ose*] *case*[*s*] *applies equally here*." *See id.* (emphasis added).

¶ 124 Because this is a case of first impression, I believe it is appropriate to review how other jurisdictions have treated similar issues. While such cases are not binding, and the manner in which our Supreme Court has interpreted the other criminal statutes detailed above are of much greater weight in this case, I believe other jurisdictions can many times be instructive in how we view similar situations. Our research has not revealed many cases on how to interpret human trafficking statutes; however, the New Mexico Court of Appeals has addressed the issue of determining the unit of prosecution in a substantially similar human trafficking statute.

¶ 125 The New Mexico human trafficking statute in pertinent part provides:

> A. Human trafficking consists of a person knowingly:
>
> (1) recruiting, soliciting, enticing, transporting or obtaining by any means another person with the intent or knowledge that force, fraud or coercion will be used to subject the person to labor, services or commercial sexual activity[.]
>
> . . . .
>
> D. Prosecution pursuant to this section shall not prevent prosecution pursuant to any other provision of the law when the conduct also constitutes a violation of that other provision.

N.M. Stat. § 30-52-1 (2019).

¶ 126 In *State v. Carson*, the defendant "was convicted of two counts of human trafficking involving the same victim . . . between January 24, 2013, and February 7, 2013, during their first trip to Albuquerque, and again between February 17, 2013, and February 22, 2013, during their

second trip to Albuquerque." 2020-NMCA-015, ¶ 36, 460 P.3d 54, *cert. denied*, 2020-NMCERT-____ (No. S-1-SC-38128, Feb. 6, 2020). After conducting a "six-factor" inquiry, the Court of Appeals of New Mexico concluded the defendant's acts "were not sufficiently distinct to support two separate counts of human trafficking for the same victim . . . ." *Id.* ¶¶ 34, 42. "If there [are] not sufficient indicia of distinctiveness to separate the defendant's acts, we apply the rule of lenity[,] . . . invoking the presumption that the Legislature did not intend to create separately punishable offenses." *Id.* ¶ 42. (citation and quotation marks omitted) (some alterations in original).

¶ 127 Accordingly, having reviewed the Record, North Carolina case law, and having surveyed how other jurisdictions treat the unit of prosecution in similar human trafficking statutes, I would remand this case for the trial court to vacate the multiple charges related to each victim and to leave intact a conviction of one count of human trafficking of A.C., H.M., A.B., and M.F., respectively.

STATE OF NORTH CAROLINA
v.
WILLIAM JOSEPH BARBER, Defendant

No. COA20-268

Filed 21 December 2021

1. Jurisdiction—superior court—over misdemeanor—statement of charges—amendment to previous indictment

The superior court division had jurisdiction over a second-degree trespassing case even though it was not heard first in district court and where the prosecutor proceeded pursuant to a misdemeanor statement of charges rather than the previously-served indictment that followed a presentment. Pursuant to the reasoning in *State v. Capp*, 374 N.C. 621 (2020), the statement of charges effectively acted as an amendment to the indictment (where both documents alleged the same crime, and where a minor alteration in the statement of charges did not substantially alter the nature of the charge), under which the superior court otherwise had jurisdiction to hear the case.

2. Constitutional Law—First Amendment—legislative building visitor rules—reasonableness of restrictions

In a prosecution for second-degree trespassing where defendant conducted a protest in the legislature building and remained there after being asked to leave by an officer, defendant's constitutional right to free speech was not implicated where he was not removed due to the content of his speech, but for violating the legislature's content-neutral visitor rules prohibiting disruptive noise and behavior. Even if the First Amendment was implicated, the interior of the legislative building was a non-public forum; the visitor rules were reasonable regarding the time, place, and manner of restrictions; and the rules served a significant interest by allowing legislative functions to continue without disruption.

3. Criminal Law—jury instructions—second-degree trespass—"without authorization"

In a prosecution for second-degree trespass based on defendant having conducted a loud protest in the legislature building, even if the trial court erred by not altering the pattern jury instruction to use defendant's requested language that his entering or remaining in the building after being asked to leave was "without legal right" instead of "without authorization," the error had no effect on the outcome of the trial and was therefore not prejudicial.

Judge INMAN concurring in part and concurring in the result in part by separate opinion.

Appeal by Defendant from judgment entered 6 June 2019 by Judge Stephan R. Futrell in Wake County Superior Court. Heard in the Court of Appeals 11 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin, for the State.

C. Scott Holmes, Irving Joyner, and Malcolm Ray Hunter, Jr., for the Defendant.

DILLON, Judge.

¶ 1 Defendant was convicted in superior court of second-degree trespass by a jury for refusing to leave the office area of the North Carolina General Assembly when told by security personnel to do so. We

conclude that the superior court had jurisdiction over the matter and that Defendant received a fair trial, free from reversible error.

I. Background

¶ 2 Defendant was charged with second-degree trespass, a misdemeanor, for refusing to leave the General Assembly complex when told to do so by an officer.

¶ 3 The State's evidence tended to show as follows:

¶ 4 Defendant led a group of approximately fifty (50) people through the General Assembly office complex, protesting the inaction by our legislature to implement certain health care policy. The protest, which included "call and response" chants led by Defendant, triggered complaints from legislative staff.

¶ 5 Under the rules governing the legislative complex, visitors "may not disturb or act in a manner that will imminently disturb the General Assembly[.]"[1] Disruptive visitors are told to stop their behavior, and if they refuse, they are asked to leave immediately. The rules warn, "A knowing violation of these rules is a Class 1 misdemeanor under G.S. 120-32.1(b)."[2]

¶ 6 In accordance with these rules, the General Assembly's Police Chief repeatedly told Defendant and the group he was leading to lower their noise level, or they would be subject to arrest. The Police Chief then specifically told Defendant to stop leading the chants and leave. Defendant, however, did not leave, and the protest continued in a manner that proceeded to disturb the work of legislative staff. Accordingly, Defendant was charged with trespass.

¶ 7 Defendant was never tried in our district court division. Rather, he was tried, in the first instance, by a jury in our superior court division on the sole charge of second-degree trespass. The jury returned a guilty verdict, and the trial court entered judgment accordingly. Defendant timely appealed.

II. Analysis

¶ 8 Defendant makes several arguments on appeal, which we address in turn.

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1. Rules of State Legislative Building and Legislative Office Building Adopted by the Legislative Service Commission, Restated 15 May 2014, at 2.

2. *Id.* at 6.

A. Subject Matter Jurisdiction of the Superior Court

¶ 9 **[1]** Defendant argues that our superior court division lacked jurisdiction to try him for a misdemeanor charge because the charging document upon which the State proceeded was not an indictment returned by the grand jury, but rather a misdemeanor statement of charges drawn up by the prosecutor.

¶ 10 A defendant may properly raise the issue of subject matter jurisdiction at any time, even for the first time on appeal. *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006). Challenges based on subject matter jurisdiction are reviewed *de novo*. *In re A.L.L.*, 376 N.C. 99, 101, 852 S.E.2d 1, 4 (2020).

¶ 11 Here, Defendant was indicted by the grand jury for second-degree trespass. Specifically, the grand jury issued a "presentment" directing the prosecutor to investigate the matter after hearing testimony from the legislative officer who had cited Defendant. A month later, the prosecutor sought the indictment, which was returned by the grand jury and served on Defendant.

¶ 12 However, on the eve of trial, the prosecutor prepared and served on Defendant a different charging document, called a "misdemeanor statement of charges." This document charged Defendant with essentially the same crime as had been charged in the indictment. The State proceeded with the trespassing prosecution pursuant to the statement of charges document rather than the indictment.

¶ 13 Defendant makes a compelling argument on appeal that the procedure followed by the prosecutor was improper, an argument that may have been a winning one based on the case law cited. However, we must take note of a decision from our Supreme Court handed down last year, the reasoning of which compels us to conclude that Defendant was properly tried in our superior court division.

¶ 14 Our district court division generally has "exclusive, original jurisdiction" to try misdemeanors. N.C. Gen. Stat. § 7A-272(a) (2017). Our superior court division generally hears misdemeanor prosecution, in the exercise of a defendant's right to a trial *de novo*, only after a defendant has been found guilty of the charge in the district court division. *Id.* § 7A-271(a)(5).

¶ 15 However, there are limited situations where our superior court division may hear a misdemeanor charge without first being a trial in the district court. For instance, relevant to our analysis here, a defendant may be tried for a misdemeanor in superior court in the first instance

"[w]hen the charge is initiated by presentment," *Id.* § 7A-721(a)(2), which is followed by an indictment.

> A presentment is a written accusation by a grand jury, made on its own motion and filed with a superior court, charging a person, or two or more persons jointly, with the commission of one or more criminal offenses. A presentment does not institute criminal proceedings against any person, but the district attorney is obligated to investigate the factual background of every presentment returned in his district and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so.

N.C. Gen. Stat. § 15A-641(c) (2017).

¶ 16 As stated above, this procedure—presentment by the grand jury followed by an indictment—was followed here. However, the prosecutor then decided to proceed pursuant to an entirely different charging document, the misdemeanor statement of charges. There is statutory authority to proceed on a misdemeanor charge in superior court when hearing the matter *de novo* from a conviction in district court. However, our superior court does not have *original* jurisdiction to try a misdemeanor charged in a statement of charges. *See* N.C. Gen. Stat. § 7A-271(a) (outlining superior court's jurisdiction to hear misdemeanor cases).

¶ 17 The question before us is whether it was fatal that the prosecution proceeded pursuant to the statement of charges, where the superior court otherwise had jurisdiction to proceed on the indictment that followed the presentment.

¶ 18 Defendant contends that our Court's jurisprudence, specifically *State v. Wall*, 235 N.C. App. 196, 760 S.E.2d 386 (2014), compels us to conclude that the superior court lacked jurisdiction to proceed against Defendant for second-degree trespassing pursuant to a "statement of charges," notwithstanding that Defendant was properly indicted by a grand jury for the same offense. The reasoning in *Wall* does seem to support Defendant's position as explained below. Defendant's argument perhaps would have been a winning one until last year. However, we conclude that this issue is controlled by the reasoning of our Supreme Court's more recent opinion in *State v. Capps*, 374 N.C. 621, 843 S.E.2d 167 (2020).

¶ 19 Our 2014 decision in *Wall* relies on *State v. Killian*, 61 N.C. App. 155, 300 S.E.2d 257 (1983). In *Killian*, the defendant was tried in district court pursuant to a pleading, known as a "warrant," that charged him with a certain misdemeanor. He appealed his conviction to the superior court for a trial *de novo*. Since the superior court was not exercising *original* jurisdiction (as the defendant had already been convicted in our district court division), it was appropriate for our superior court to proceed pursuant to the original warrant. *Id.* at 158, 300 S.E.2d at 259. However, rather than trying him for the same charge, the prosecutor in *Killian* proceeded pursuant to a "statement of charges" pleading that charged the defendant for a different crime than the one alleged in the warrant. *Id.* at 155, 300 S.E.2d at 258.

¶ 20 Our Court in *Killian* held that the superior court had no jurisdiction to proceed on the statement of charges, as it alleged a crime *different from* the crime alleged in the original warrant:

> "Because [the crime charged] is a misdemeanor, the district court had exclusive, original jurisdiction of the new offense. G.S. 7A-272(a). Until defendant was tried and convicted in district court and appealed to superior court for trial *de novo*, the superior court had no jurisdiction [and] is derivative and arises only upon an appeal from a conviction of the misdemeanor in district court[.] The superior court thus had no jurisdiction to try defendant for the new offense alleged in the statement [of charges], and the conviction accordingly must be reversed.

Id. at 158, 300 S.E.2d at 259 (citation and quotation omitted).

¶ 21 Thirty-one years later, in 2014, our Court decided *Wall*, the case relied upon by Defendant. *Wall* involved procedural facts similar to *Killian*, except in *Wall*, the prosecution issued a statement of charges prior to the trial *de novo* that charged the same crime (resisting a public officer) as charged in the magistrate's order, the charging document in the district court trial. *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388. Specifically, the magistrate's order used in the district court prosecution charged the defendant with "resisting a public officer, § 14-223"; and the statement of charges used in the trial *de novo* also charged the defendant with violating "§ 14-223." *Id.* at 198, 760 S.E.2d at 387.

¶ 22 The defendant in *Wall* argued that "the superior court lacked subject matter jurisdiction to try her on the misdemeanor statement of charges filed in superior court . . . because defendant was tried and convicted

on a magistrate's order in district court[,]" notwithstanding both documents alleged the same crime. *Id.* 198, 760 S.E.2d at 387. We agreed with the defendant's argument, specifically holding that this procedure was improper because:

> "[T]he State cannot "amend" a magistrate's order by filing a misdemeanor statement of charges. Doing so would change the nature of the original pleading entirely.
>
> * * *
>
> Thus, the superior court had no jurisdiction to try defendant for the new offense alleged in the statement of charges. Defendant's conviction must be vacated.

Id. at 199-200, 760 S.E.2d at 388.

¶ 23 Here, Defendant argues that the reasoning in *Wall* controls. His argument is as follows: While there may have been an appropriate charging document that would have conferred jurisdiction in the superior court division, any jurisdiction was lost when the prosecutor proceeded under a different charging document disallowed by our General Statutes. And jurisdiction cannot be found by treating the statement of charges as a mere amendment to the appropriate charging document.

¶ 24 We, however, must take note of a case decided by our Supreme Court last year, a case cited by neither party. In *State v. Capps*, 374 N.C. 621, 843 S.E.2d 167 (2020), our Supreme Court essentially determined that a statement of charges may be treated as an amendment to the appropriate charging document.

¶ 25 In *Capps*, the defendant was convicted of a misdemeanor in district court pursuant to a warrant, a charging document allowed in district court prosecutions. *Id.* at 622, 843 S.E.2d at 168. While the matter was before the superior court in a trial *de novo*, the prosecutor filed a statement of charges that parroted the allegations contained in the original warrant, with one minor exception—the name of the victim whose property was stolen was changed from "Loves Truck Stop" to "Love's Travel Stops & Country Stores, Inc." *Id.* at 623, 843 S.E.2d at 168.

¶ 26 The defendant appealed, "arguing for the first time that the superior court lacked jurisdiction to try the misdemeanor[s] under the statement of charges." *Id.* 624, 843 S.E.2d at 169. Our Supreme Court, however, held that proceeding under the statement of charges was appropriate

under two different theories. The theory relevant to this present matter is that the statement of charges was essentially "an amendment in substance" to the warrant. *Id.* at 627, 843 S.E.2d at 170. And since our General Statutes allowed for the warrant to be amended by reciting the proper name of the corporate victim rather than its trade name, the "amendment" was appropriate, notwithstanding that the amendment was drafted on a "statement of charges" form. *Id.* at 627, 843 S.E.2d at 170.

¶ 27 Of course, it could be argued that *Capps* is inapposite to the present case because, though our General Statutes allow for warrants to be amended, they specifically prohibit indictments from being amended by the prosecutor. *See* N.C. Gen. Stat. § 15A-923(e) ("A bill of indictment may not be amended."). However, our Supreme Court has "interpreted prohibited amendments to mean any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. Abraham*, 338 N.C. 315, 340, 451 S.E.2d 131, 144 (1994) (internal marks omitted). Accordingly, amendments to indictments that do not "substantially alter the charge" are permissible. *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994). This is because a minor change does not defeat the purpose of the indictment "to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused[.]" *State v. Coker*, 312 N.C. 432, 437, 323 S.E.2d 343, 347 (1984).

¶ 28 Following the logic of *Capps*, we must conclude that the superior court properly had jurisdiction to proceed on the misdemeanor trespass charge. The presentment and subsequent indictment alleged that Defendant remained on "the premises [of] the North Carolina General Assembly, in the Legislative Building located at 16 W. Jones St., Raleigh[.]" The statement of charges contained similar language except that it described the location as "the premises of the State of North Carolina, the Legislative Building located at 16 W. Jones St. Raleigh[.]" As the premises in each is described as "the Legislative Building" with the address of "16 W. Jones St., Raleigh," we do not see how the change from "the premises of the North Carolina General Assembly" to "the premises of the State of North Carolina" constituted a substantial alteration. Defendant was not denied his right to be informed of the nature of the crime for which he was accused.

¶ 29 In sum, the superior court had original jurisdiction to proceed with the misdemeanor charge where the matter was initiated by a presentment followed by an indictment. N.C. Gen. Stat. § 7A-271(a)(2). The statement of charges drafted by the prosecutor may be treated as an amendment to the original charging document rather than a new charging document.

Capps, 374 N.C. at 627, 843 S.E.2d at 170. An amendment to an indictment is permissible so long as the amendment does not substantially change the nature of the charge as alleged in the indictment. *Brinson*, 337 N.C. at 767, 448 S.E.2d at 824. The amendment to the indictment in this case, as stated in the statement of charges, did not substantially alter the nature of the charge against Defendant. Therefore, the amendment was permitted, and the superior court had jurisdiction to proceed.

B. Free Speech

¶ 30 **[2]** Defendant argues that his First Amendment rights were implicated, and therefore, the trial court erred by disallowing certain evidence that went to prove that assertion. We disagree.

¶ 31 This issue concerns whether free speech protections are implicated when a defendant is charged with trespass for violating viewpoint neutral, conduct-based rules. "To resolve this issue, we must first decide whether [defendant exhibited] speech protected by the First Amendment, for, if it is not, we need go no further." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985)

¶ 32 The right to free speech and assembly, though "fundamental rights" are "not in their nature absolute." *State v. Dobbins*, 277 N.C. 484, 498, 457 (1971) (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis J, concurring)). "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *State v. Wiggins*, 272 N.C. 147, 159, 158 S.E.2d 37, 46 (1967) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

¶ 33 We conclude that the First Amendment is not implicated in the conduct for which Defendant was charged. This is not a case about free speech—it is a case about loud speech. Defendant was not expelled from the General Assembly for the content of his words. He was removed for their volume.

¶ 34 Indeed, the text of the General Assembly's visitor rules does not speak to the nature or content of a visitor's speech; they are solely conduct based. Specifically, the rules disallow "visitors who disturb" and prohibit unruly behavior, such as making noises that impair others' ability to engage in conversation or impeding others' movement.

¶ 35 Further, even if Defendant's First Amendment rights were implicated, we conclude that his rights were not violated as a matter of law. The visitor rules at issue are reasonable "time, place, and manner" restrictions.

¶ 36 The United States Supreme Court has recognized that "[t]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government," *Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981), and that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

¶ 37 Moreover, "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius*, 473 U.S. 788 at 799-800.

¶ 38 The United States Supreme Court has recognized that government property is either a public forum, which can be limited or unlimited in nature, or a non-public forum. *Id.* at 799-800.

¶ 39 We hold that the interior of the General Assembly is not an unlimited public forum. Although important speech is conducted within the building, the building is not a quintessential community venue, such as a public street, sidewalk, or park. *See United States v. Grace*, 461 U.S. 171, 180 (1983) (holding that while the interior of the Supreme Court building may not be a public forum, the sidewalk abutting the courthouse is a public forum). The interior of the General Assembly complex is comparable to a courthouse in this regard. Certainly, while citizens are free to visit the General Assembly and communicate with members and staff, the government may prohibit loud, boisterous conduct on a content-neutral basis that would affect the ability of members and staff to carry on legislative functions.

¶ 40 Also comparable to the General Assembly, we note that the inside of the United States Capitol has been held to be a non-public forum, *see Bynum v. United States Capitol Police Bd.*, 93 F. Supp. 2d 50, 56, 200 (D. D.C. 2000). But even if our General Assembly building can be characterized as a limited public forum, the General Assembly would still be allowed to enforce rules limiting the volume of visitor speech in the office areas where staff carry on the work of our legislative branch. *See Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (holding that civil rights protestors have the right to hold a silent vigil in a racially segregated library but may not make a speech in the quiet portions of the library).

¶ 41 Our own Supreme Court has recognized that content-neutral time, place, or manner restrictions "are subjected to a less demanding but still rigorous form of intermediate scrutiny," where "[t]he government must

prove that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *State v. Bishop*, 368 N.C. 869, 874-875, 787 S.E.2d 814, 818, (2016) (citing *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)).

¶ 42 We conclude that the legislative rules serve a significant interest of limiting loud disruptions and that Defendant has various other channels to make his concerns known and to otherwise engage in protests of legislative policies. Accordingly, we conclude that Defendant's First Amendment rights were not violated by the application of the legislative rules that support his conviction.[3]

C. Jury Instructions

¶ 43 **[3]** Finally, Defendant argues that a portion of the jury instructions was misleading. Specifically, Defendant challenges the instruction describing one of the elements of second-degree trespass as that Defendant entered or remained on the premises of another "without authorization." N.C.P.I.-Crim. 214.31A (2017). Though a standard jury instruction, Defendant argues that the word "authorization" should have been replaced with "legal right."

¶ 44 Assuming *arguendo* that the court erred by not making this minor alteration, we conclude that the error had no effect on the outcome of the trial. *See State v. Green*, 258 N.C. App. 87, 93, 811 S.E.2d 666, 670 (2018) ("An error in jury instructions is prejudicial when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached[.]").

III. Conclusion

¶ 45 We conclude that the superior court had jurisdiction over this matter and that Defendant had a fair trial, free from reversible error.

NO ERROR.

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3. Defendant makes other arguments concerning the implication of his First Amendment rights. For instance, Defendant contends that the legislative rules are unconstitutional "as applied" in his case; that the jury should have been instructed on the "constitutional" elements of trespass as applied in his case; and that the prosecution violated his rights under our state constitution to instruct his representatives. However, as we have concluded that Defendant's conviction stems from his conduct (unrelated to the content of his speech) and that his First Amendment rights were not otherwise violated, we conclude that Defendant has failed to show reversible error with respect to these other arguments.

Judge CARPENTER concurs.

Judge INMAN concurs in part and concurs in the result in part.

INMAN, Judge, concurring in part and concurring in the result in part.

¶ 46 I concur fully in the majority's holdings that: (1) the misdemeanor statement of charges did not deprive the trial court of jurisdiction in light of *State v. Capps*, 374 N.C. 621, 843 S.E.2d 167 (2020); and (2) Defendant has not shown prejudicial error in the trial court's denial of his request to alter the jury instruction on trespass. I also concur in the majority's ultimate holding that Defendant's conviction is not subject to reversal on First Amendment grounds, but I write separately because I believe resolution of that issue requires a different analysis.

I. Conduct v. Expression

¶ 47 The majority treats its determination that the Building Rule[1] regulates conduct as dispositive of Defendant's First Amendment argument. But a law or regulation that principally concerns itself with conduct may also burden speech and be subject to First Amendment protections. *See, e.g.*, *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 297, 749 S.E.2d 429, 435 (2012) ("[O]ur determination that the primary target of this regulation is conduct rather than speech does not neatly end the inquiry. Because regulations that legitimately restrict conduct may still unduly burden speech rights, we must carefully evaluate the plaintiffs' assertions that the speech at issue here implicates the First Amendment."). Such incidental burdens are subject to judicial review under the test announced in *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment

1. The specific rule at issue is Rule III.C.2. of the Rules of State Legislative Building and Legislative Office Building Adopted by the Legislative Services Commission, Restated 15 May 2014. For clarity and ease of reading, I refer to Rule III.C.2. as the "Building Rule" and the entire set of rules as the "Building Rules."

> freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377, 20 L. Ed. 2d at 680. *See also Hest*, 366 N.C. at 300, 749 S.E.2d at 437 (noting that "courts have traditionally applied the test from . . . *O'Brien*" to regulations aimed at conduct that incidentally burden speech). And the *O'Brien* test is, at bottom, largely indistinguishable from the time, place, and manner restriction test applicable to content-neutral restrictions on speech. *See Clark v. Cmty. for Creative Non-Violenc*e, 468 U.S. 288, 298, 82 L. Ed. 2d 221, 230 (1984) (noting that the *O'Brien* test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions").

¶ 48 Applying *O'Brien* to this case, whether the Building Rule is characterized as primarily regulating conduct that incidentally burdens speech (as intimated by the majority) or as a time, place, and manner restriction (as contended by Defendant), it is subject to similar intermediate scrutiny under the First Amendment. *See, e.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386, 145 L. Ed. 2d 886, 897 (2000) (describing the *O'Brien* test as "intermediate scrutiny" alongside "the similar standard applicable to merely time, place, and manner restrictions").

¶ 49 In my view, the Building Rule places at least an incidental burden on speech, as it explicitly includes "singing, clapping, shouting, [and] playing instruments" as "nonexclusive examples of behaviors that may disturb the General Assembly." If a city noise ordinance that "forbids deliberately noisy or diversionary activity that disrupts or is about to disrupt normal school activities," *Grayned v. City of Rockford*, 408 U.S. 104, 110-11, 33 L. Ed. 2d 222, 229 (1972), is subject to intermediate First Amendment scrutiny as a time, place, and manner restriction on expression, *id.* at 115-17, 33 L. Ed. 2d at 231-33, it is hard to discern how the Building Rule is not also a time, place, and manner restriction subject to the same level of First Amendment review.

II. Forum Analysis

¶ 50 That the Building Rule at issue here involves a content-neutral time, place, and manner restriction also leads me to conclude that the hallway in which Defendant was arrested is a designated public forum, if not a traditional public forum.[2] To identify a designated public forum, we

2. The majority holds that the hallway where Defendant was arrested is not an "unlimited public forum." I understand the majority to mean that the hallway is not a "traditional public forum" or a "designated public forum" as those terms are used in First Amendment caselaw. *See Willis v. Town of Marshall, N.C.*, 426 F.3d 251, 264 n.6 (4th Cir. 2005) ("In the context of a First Amendment claim, the phrase 'public forum' is a term

must "look[] to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum," while also considering "the nature of the property and its compatibility with expressive activity." *Cornelius v. NAACP Legal Defense Educ. Fund, Inc.*, 473 U.S. 788, 802, 87 L. Ed. 2d 567, 580 (1985).

¶ 51 As the Building Rules are written, visitors are allowed to speak in the hallway where Defendant was arrested *about anything and to anyone*; the only limitation is that the speech fit within content-neutral restrictions tracking the intermediate scrutiny test applicable to public fora.[3] In other words, the General Assembly allows, by policy, any and all speech that falls within a content-neutral time, place, and manner restriction—the precise type of restriction permitted in either a traditional or designated public forum. The Chief of the North Carolina General Assembly Police Department testified:

> [W]hen I'm at various protest rallies, advocacy days, the content of what people are saying has no bearing on my actions. . . . What you're saying, what you're advocating for or what you're protesting against, or what you're protesting for has absolutely no bearing on my decisions or my directions or my instructions to my officers, and it would be improper and illegal if it did.

¶ 52 Nor does open public discussion conflict with the nature of the State Legislative Building. If it did, the General Assembly presumably would have chosen a more restrictive policy than a content-neutral time, place, and manner restriction when, "[t]o make visitors feel welcome and at the same time to make it possible for the General Assembly to function effectively," it adopted the Building Rules. Indeed, the State Legislative Building may be the *most* appropriate location for open public discourse in light of *both* these aims. *See Reilly v. Noel*, 384 F. Supp. 741, 747 (D.R.I. 1974) ("[T]here is no more appropriate place for citizens to express their views on issues of social and political significance and to communicate

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of art, as are 'limited public forum,' designated 'public forum,' and 'non-public forum.' " (citations omitted)); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46, 74 L. Ed. 2d 794, 804-05 (1983) (defining and distinguishing between traditional public fora and designated public fora).

3. Building Rule III.C.4. also prohibits signs on handsticks, signs affixed to the Legislative Complex, and signs that are used to disturb the General Assembly. This regulation, too, is a content-neutral regulation on the manner of speech.

their feelings to their elected representatives than at the State Capitol." (citations omitted)); *Women Strike for Peace v. Morton*, 472 F.2d 1273, 1287 (D.C. Cir. 1972) ("There is an unmistakable symbolic significance in demonstrating [as close as possible to the seat of government] which, while not easily quantifiable, is of undoubted importance in the constitutional balance."); *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 178-79, 50 L. Ed. 2d 376, 387 (1976) (Brennan, J., concurring) ("[W]hen . . . a government body has either by its own decision or under statutory command, determined to open its decisionmaking processes to public view and participation . . . the state body has created a public forum dedicated to the expression of views by the general public."). Based on stated policy, practice, and the State Legislative Building's purposes, Defendant has shown that the office hallway[4] has been "opened for use by the public as a place for expressive activity," *Perry Educ. Ass'n*, 460 U.S. at 45, 74 L. Ed. 2d at 805, and, to the extent it was not traditionally a public forum,[5] it has been intentionally designated as such. In short, I would hold that Defendant had every right to engage in protected speech in the hallway of the Legislative Building subject to reasonable time, place, and manner restrictions that comport with the First Amendment.

III. As-Applied Challenge and Jury Instruction on Constitutional Elements of Trespass

¶ 53 Though I diverge from the majority's analysis of Defendant's First Amendment argument, I concur in its ultimate conclusion that Defendant's constitutional rights were not violated by the trespass conviction. The Building Rule Defendant violated is a reasonable time, place, and manner restriction that survives intermediate scrutiny.[6] It is not meaningfully different from the content-neutral noise ordinance that was upheld as a reasonable time, place, and manner restriction by the United States Supreme Court in *Grayned*, 408 U.S. at 116-21, 33 L. Ed. 2d

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4. This analysis applies to the hallways and other areas of the Legislative Building that are generally accessible to the public during business hours; this appeal does not involve the offices of General Assembly members and their staff.

5. "In general, the grounds and buildings of state and federal capitol complexes and similar buildings have consistently been held to be public fora." *ACT-UP v. Walp*, 755 F. Supp. 1281, 1287 (M.D. Pa. 1991) (citations omitted).

6. Because I believe the hallway at issue to be a public forum and the Building Rule to be a time, place, and manner restriction subject to intermediate scrutiny, I do not join in the majority's analysis treating the hallway as a limited public forum. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470, 172 L. Ed. 2d 853, 863 (2009) (holding that regulations in limited public forums are constitutional if they "are reasonable and viewpoint neutral").

at 231-35, and Defendant has not argued to this Court that the Building Rule fails to meet this standard.[7] Defendant's as-applied argument fails.

¶ 54 I also conclude that Defendant's prosecution did not violate his rights under Article I, Section 12 of the North Carolina Constitution "to instruct [his] representatives, and to apply to the General Assembly for redress of grievances." To the extent that this argument is encompassed by Defendant's underlying First Amendment challenge, it fails alongside that as-applied claim. *See State v. Frinks*, 284 N.C. 472, 485, 201 S.E.2d 858, 866-67 (1974) (holding a defendant's First Amendment and Article I, Section 12 challenges to his prosecution for violating a parade ordinance failed because the ordinance complied with the First Amendment). Defendant cites no North Carolina caselaw interpreting or applying Article I, Section 12 of the North Carolina Constitution. We have held that the right to instruct "reflect[s] a right of the people to 'teach' or 'advise' their representatives, . . . [and] protects the ability of the people to contact their elected representatives and convey their views about the decisions those representatives are tasked with making on their behalf." *Common Cause v. Forest*, 269 N.C. App. 387, 392-93, 838 S.E.2d 668, 673 (2020). But I am not convinced that Defendant's rights under Article I, Section 12 were violated because he was prohibited from exercising his petition rights in his preferred manner. For example, Defendant could have: (1) continued to instruct and petition the General Assembly within the reasonable time, place, and manner restrictions imposed by the Building Rules, including by lowering the volume of his voice and urging his supporters to do the same; (2) distributed a letter, petition, or other writing to legislative offices by mail, facsimile, or email; (3) addressed representatives personally in another public setting outside the Legislative Building; (4) contacted legislative offices by phone; or (5) hired a lobbyist to speak with legislators.[8] *Cf. Clark*, 468 U.S. at 293, 82 L. Ed. 2d at 227 (holding reasonable time, place, and manner restrictions are constitutional "provided that they are justified without reference to the content of the

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7. Defendant conceded at oral argument that a rule prohibiting disruptions to allow persons to work is a reasonable time, place, and manner restriction.

8. Room numbers, telephone numbers, and email addresses for all members of the General Assembly are accessible to the public on the General Assembly's website. *Contact Info*, North Carolina General Assembly, *available at* https://www.ncleg.gov/About/ContactInfo (last visited December 12, 2021). Registered lobbyists may be identified through the Secretary of State's website. *North Carolina Secretary of State Lobbying Compliance Search*, North Carolina Secretary of State, *available at* https://www.sosnc.gov/online_services/search/by_title/_lobbying (last visited December 12, 2021).

regulated speech, that they are narrowly tailored to serve a significant governmental interest, *and that they leave open ample alternative channels for communication of the information*" (emphasis added)); *Pell v. Procunier*, 417 U.S. 817, 827-28, 41 L. Ed. 2d 495, 504-05 (1974) (holding inmates' First Amendment rights, including the right to petition the government for a redress of grievances, was not violated by a reasonable time, place, and manner restriction "in light of the alternative channels of communication that are open to prison inmates"). Absent caselaw applying Article I, Section 12 in the manner requested by Defendant and expanding it to invalidate regulations that are constitutional under the First Amendment, I agree with the majority's determination that Defendant's as-applied challenge under the North Carolina Constitution fails.

¶ 55 Defendant also argues that the trial court erred in failing to instruct the jury to find necessary "constitutional facts" on the "constitutional elements" of the trespass charge, namely, whether Defendant violated a reasonable time, place, and manner restriction by demonstrating so loudly as to disrupt the work of the General Assembly within the meaning of the Building Rule. But Defendant's trial counsel did not argue that such an instruction was constitutionally required. And while trial counsel did request an amendment to the jury instruction on trespass to distinguish that Defendant must be found to have been in the Legislative Building "without legal right" instead of "without authorization" to be guilty, he did not ground this argument in First Amendment or other constitutional concerns. Defendant's constitutional jury instruction argument—raised for the first time on appeal—is not preserved for review given trial counsel's failure to distinctly argue those grounds below. *See Marketplace Antique Mall, Inc. v. Lewis*, 163 N.C. App. 596, 601, 594 S.E.2d 121, 125 (2004) ("As a review of the transcript reveals that plaintiffs did not object to the jury instructions on the bases contended in their brief, these issues were not preserved for appeal and are therefore not properly before this Court." (citation omitted)); N.C. R. App. P. 10(a)(2) (2021) ("A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection.").

¶ 56 Although Defendant did preserve his challenge to the jury instruction on state law grounds, I concur with the majority's conclusion that he has failed to show prejudice. Defendant's trial counsel argued the factual question of whether Defendant violated the Building Rule to

the jury despite his unsuccessful request to alter the jury instruction on trespass. He repeatedly contended in closing that the State had failed to show Defendant was loud enough to cause a disturbance in violation of the Building Rule. Likewise, the prosecutor argued in closing that the "without authorization" element of trespass was satisfied because "there are rules . . . that govern what behavior is allowed in that building when a member of the general public enters. He violated those rules, and at the point that he violated those rules he lost his authority to stay there."

¶ 57 For the reasons stated herein, I concur in the result reached by the majority regarding Defendant's First Amendment and related arguments. I concur fully in the remainder of the majority opinion.

STATE OF NORTH CAROLINA
v.
JEREMIE LAMAR BRYANT

No. COA21-129

Filed 21 December 2021

Constitutional Law—effective assistance of counsel—admission of element of charge—informed consent

Where defense counsel, during opening statements, admitted to elements of the charged offenses arising from a videotaped controlled drug purchase in which defendant handed a clear baggie of heroin to an informant in exchange for money, to the extent that defense counsel's admissions triggered the requirements of *State v. Harbison*, 315 N.C. 175 (1985), the trial court made an adequate post-admission inquiry of defendant to ensure that defendant had knowingly and voluntarily consented to those admissions.

Appeal by Defendant from Judgment entered 6 March 2020 by Judge Joshua W. Willey, Jr., in Craven County Superior Court. Heard in the Court of Appeals 20 October 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Forrest P. Fallanca, for the State.

Aberle & Wall, by A Brennan Aberle, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Jeremie Lamar Bryant (Defendant) appeals from Judgment entered upon a jury finding him guilty of one count each of Sale of Heroin, Possession with Intent to Sell or Distribute Heroin, and Possession of Drug Paraphernalia and Defendant's guilty plea to attaining Habitual-Felon Status. The Record reflects the following:

¶ 2 On 13 November 2018, a Craven County Grand Jury indicted Defendant on one count each of felony Possession with Intent to Sell or Deliver (PWISD) Heroin and Possession of Drug Paraphernalia (18 CRS 50854). On 11 February 2019, Defendant was indicted for having attained Habitual-Felon Status (19 CRS 161), and on 5 August 2019, Defendant was indicted for one count of felony Sale of Heroin (19 CRS 550). All of these charges stemmed from Defendant's alleged actions on 5 January 2017. On that date, the New Bern Police Department set up a "controlled purchase" of narcotics through an informant from a person known as Daniel Cox (Cox). Cox told the informant to meet him at the Beaver Creek Apartment Complex. Police had placed two body cameras on the informant and gave him 80 dollars to purchase heroin. Video of the incident showed when the informant arrived at the apartment complex, Defendant came out of a residence, handed the informant a clear plastic baggie containing heroin, and took money from the informant. The informant could see Cox in the doorway of the residence from which Defendant had exited prior to the exchange.

¶ 3 Defendant's case came on for trial on 4 March 2020 in Craven County Superior Court. The State elected not to give opening remarks to the jury. Defense counsel did give opening remarks; however, neither party moved for complete recordation. Therefore, there is no transcript of defense counsel's opening remarks. However, before either side presented evidence to the jury, the State expressed concerns with defense counsel's opening remarks:

> [The State]: Your Honor, during the opening statement Attorney Bettis made reference to -- or gave statements that tends to indicate his client has either admitted guilt to a certain extent about possessing it, or what have you. There were some portions that would, I think, tend to lean toward admissions about his client, and based on Harrison. So I think we need to make sure that the defendant is consenting to the

fact that Attorney Bettis made those statements on his behalf. I believe what I recall hearing was something along the lines of, he did it but he didn't intend to do it, is how I can best categorize it. Under Harrison that would be plain error, unless this defendant consented to those statements being made on his behalf. And I think what will have to happen, Your Honor would need to put on the record that this defendant consented to Attorney Bettis making those comments to the jurors.

[Defense Counsel]: And I will say that my statements were something along the lines of, Ms. Chekesha has a videotape that she's going to show you, and it's going to show my client on there doing what Ms. Chekesha is alleging to do, but I don't think we -- we admitted anything. But in order to admit a crime, you'd have to admit both elements of the crime, not just one element of the crime, and it's not a crime. He didn't admit to a crime if he didn't admit to both elements of it.

[The State]: Not a -- well, certainly I think I heard an admission to one particular element, and I certainly heard an admission that he was a prior convicted felon, which would be the second portion of all that, even to the extent that the felonies were read out or told to the jurors.

[Defense Counsel]: Your Honor, I did do this with my client at length. We've gone over this hour after hour in preparation to -- to -- to -- I mean, you can stand up right now --

¶ 4 The trial court held the following colloquy with Defendant:

THE COURT: Well, I'm going to -- Mr. Bryant, are you able to hear me?

THE DEFENDANT: Yes, sir.

THE COURT: Can you understand me?

THE DEFENDANT: Yes, sir.

THE COURT: You are charged with the offenses of possession, intent to sell and deliver controlled

substance, heroin, possession, intent to use drug paraphernalia, sale of a controlled substance, heroin, and with being a habitual felon. To one of the things, I believe -- you don't have a copy of the Pattern Jury Instructions, do you?

[The State]: I do, Your Honor. Which are you looking for? All of them?

THE COURT: Yes. (Handed documents to Court.)

THE COURT: One of the charges, possession with intent to sell -- with intent to sell or deliver a controlled substance, in this case cocaine, to prove that, the State would have to prove --

[The State]: Heroin, Judge.

THE COURT: Heroin. I'm sorry. To prove that offense, the State would have to prove two elements. The first is that you knowingly possessed the controlled substance, and the second is that you intended to sell or deliver. Now, I was not aware that your attorney would make any admissions during the opening statement until he did so. But as I understood his opening statement, he admitted that you possessed the controlled substance, but -- which is one of the things the State would have to prove, have to prove you knowingly did it with the intent to sell or deliver. So he's admitted at least a portion of what the State would need to prove with respect to that offense. You're also charged -- well, he stated, You'll see evidence or see a video that will show Mr. Bryant approaching someone and delivering a substance to them and the substance was a controlled substance. Again the State must prove that you knowingly delivered or sold the substance to the buyer of this -- of the other person. So in the opening, at least the way I interpreted it, there was at least an admission that you had possessed something, that you delivered to, I guess it was an informant.

[The State]: Yes, sir.

THE COURT: And do you understand that?

THE DEFENDANT: I do.

THE COURT: Do you understand that during opening, your attorney admitted at least some of the things that the State would need to prove to convict you?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Was that something that you and he had discussed beforehand?

THE DEFENDANT: Yeah.

THE COURT: Did he have your permission to make those admissions?

THE DEFENDANT: Yes. Yes.

THE COURT: Now, you are also charged with being a habitual felon, and generally it's a bifurcated trial or a bifurcated hearing, and the jury is not aware of that charge until after they convict the defendant of some -- some felony offense. On that charge, when we got to that, what the State would have to prove is that you had had three prior felony convictions. Now, again, during opening Mr. Bettis spoke at length about your prior record and the fact that you had made some mistakes in the past and in fact had been convicted out -- my recollection is he specifically went through the -- the -- the felonies about which you -- of which you'd been convicted. Had you and he discussed the fact that those admissions would be made?

THE DEFENDANT: Yes. Yes.

THE COURT: And were the admissions made with your consent?

THE DEFENDANT: Yes.

THE COURT: Any other inquiry you'd like the Court to make, Ms. Hukins?

[Prosecutor]: No, sir.

THE COURT: Okay. I think that covers it.

> [The State]: Thank you.
>
> [Defense Counsel]: Just for the record?
>
> THE COURT: Yes, sir.
>
> [Defense Counsel]: We've been discussing this -- we've been discussing his trial at length. We had him in the office and had long conversations, and this is a part of trial strategy that we think is in his best interest.

¶ 5 The jury found Defendant guilty of Sale of Heroin, PWISD Heroin, and Possession of Drug Paraphernalia. After the jury's verdict, Defendant pled guilty to having attained Habitual-Felon Status as evidenced by his Transcript of Plea. On 6 March 2020, the trial court entered a Judgment and Commitment with the charges in 18 CRS 50854 and 19 CRS 161 and 550 consolidated under 19 CRS 550 and sentenced Defendant to 88 to 118 months imprisonment. On 17 March 2020, Defendant filed written Notice of Appeal from the trial court's 6 March 2020 Judgment to this Court.

Issue

¶ 6 The sole issue on appeal is whether, to the extent defense trial counsel's admissions during opening statements of the existence of elements of the charged offenses triggered the requirement the trial court inquire of Defendant as to Defendant's consent to those admissions, the trial court made an adequate inquiry of Defendant pursuant to *State v. Harbison*.

Analysis

¶ 7 As a threshold matter, the State contends the Record is insufficient for this Court to conduct meaningful appellate review because the transcript does not include defense counsel's opening remarks. "This Court's review on appeal is limited to what is in the record or in the designated verbatim transcript of proceedings. Rule 9(a), N.C. Rules App. Proc. An appellate court cannot assume or speculate that there was prejudicial error when none appears on the record before it." *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254 (1985) (citing *State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983)). "[A] defendant's counsel's statement must be viewed in context to determine whether the statement was, in fact, a concession of defendant's guilt of a crime, . . . or amounted to a *lapsus linguae*." *State v. Mills*, 205 N.C. App. 577, 587, 696 S.E.2d 742, 748-49 (2010) (citations omitted).

¶ 8 Although the transcript does not include defense counsel's opening remarks, the transcript does include counsels' colloquy with the trial court discussing and characterizing defense counsel's statements during opening remarks. The transcript also includes the trial court's colloquy with Defendant where the trial court asked Defendant whether he consented to defense counsel's admissions. Therefore, the Record is sufficient for this Court to review whether defense counsel's statements constituted admissions of guilt, and the trial court erred in allowing the trial to continue, in light of defense counsel's statements, without further inquiry. *See State v. Harbison*, 315 N.C. 175, 178, 337 S.E.2d 504, 506 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986) (holding, although there was no transcript of counsel's closing remarks, the record was sufficient where the trial court based its denial of defendant's motion on the contents of the motion and answers to interrogatories submitted with the motion).

¶ 9 Defendant argues defense counsel's statements constituted admissions of guilt and that, because the trial court did not make "an adequate *Harbison* inquiry" as to whether Defendant consented to these statements, Defendant was denied effective assistance of counsel. We review whether a defendant was denied effective assistance of counsel de novo. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citation omitted). "To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). However, "when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507. "[A] criminal defendant suffers a per se violation of his constitutional right to effective assistance of counsel when his counsel concedes the defendant's guilt to the jury without his prior consent." *State v. McAllister*, 375 N.C. 455, 456, 847 S.E.2d 711, 712 (2020) (citing *Harbison*, 315 N.C. 175, 337 S.E.2d 504).

¶ 10 Defendant contends defense counsel "admitted to almost every element of every crime charged as well as habitual felon status in front of the jury during opening statements" triggering a *Harbison* inquiry. Thus, we first must determine if defense counsel's statements were in fact admissions triggering *Harbison*. *State v. Maniego*, 163 N.C. App. 676, 683, 594 S.E.2d 242, 246 (2004) (citation omitted). We first note the facts in this case are distinguishable from the facts in *Harbison*. In *Harbison*,

defense counsel expressly told the jury to find the defendant guilty of manslaughter and not first-degree murder. 315 N.C. at 178, 337 S.E.2d at 506. Here, defense counsel stated he did not admit Defendant's guilt in any crime.

¶ 11 Moreover: "Admission by defense counsel of an element of a crime charged, while still maintaining the defendant's innocence, does not necessarily amount to a *Harbison* error." *State v. Wilson*, 236 N.C. App. 472, 476, 762 S.E.2d 894, 897 (2014) (citation omitted). In *State v. Fisher*, the defendant was convicted of first-degree murder. 318 N.C. 512, 516, 350 S.E.2d. 334, 337 (1986). During closing remarks, defense counsel stated: "[s]econd[-]degree [murder] is the unlawful killing of a human being with no premeditation and no deliberation but with malice, illwill. You heard [the defendant] testify, there was malice there. . . ." *Id.* at 533, 350 S.E.2d at 346. On appeal, the North Carolina Supreme Court held: "Although counsel stated there was malice, he did not admit guilt, as he told the jury that they could find the defendant not guilty. . . . [Therefore,] this case does not fall with the *Harbison* line of cases[.]" *Id.*

¶ 12 The Record, here, shows defense trial counsel characterized his opening remarks as: "[The State] has a videotape . . . and it's going to show my client on there doing what [the State] is alleging"—handing a baggie containing heroin to the informant—but that counsel did not "think we admitted anything." Counsel further asserted: "But in order to admit a crime, you'd have to admit both elements, not just one element of the crime . . . . He didn't admit to a crime if he didn't admit to both elements." The State argued it "heard an admission to one particular element, and . . . an admission that he was a prior convicted felon[.]" The State did not challenge defense counsel's characterization of his opening statements. *Harbison*, 315 N.C. at 178, 337 S.E.2d at 506.

¶ 13 Sale of Heroin and PWISD Heroin are specific intent crimes requiring the State to prove the defendant intended to sell or deliver heroin. *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985) ("It is the *intent* of the defendant [to sell or deliver] that is the gravamen of the offense."). Defense counsel explained to the trial court: "We've been discussing this -- we've been discussing his trial at length. We had him in the office and had long conversations, and this is a part of trial strategy that we think is in his best interest." Indeed, Defendant testified at trial that he, in fact, did take the baggie containing heroin to the informant as a favor to Cox, but he did not know the substance in the baggie was heroin, and he never intended to sell heroin during that exchange. Thus, Defendant maintained although he may have committed the acts in question, he did not have the requisite intent to convict on these charges.

Therefore, as to the Sale of Heroin and PWISD Heroin charges, defense counsel did not admit Defendant's guilt because defense counsel did not admit Defendant intended to sell or deliver the heroin. *See Wilson*, 236 N.C. App. at 478, 762 S.E.2d at 898 (holding defense counsel's admission the defendant pointed a gun at a person with the intent to kill was not an admission of attempted first-degree murder with which the defendant was charged).

¶ 14 However, a *Harbison* violation is not limited to cases where defense counsel expressly admits to the defendant's guilt of a specific charged offense: "*Harbison* should instead be applied more broadly so as to also encompass situations in which defense counsel impliedly concedes his client's guilt without prior authorization." *McAllister*, 375 N.C. at 473, 847 S.E.2d at 722. Defense counsel's statements could have been admissions to Defendant possessing drug paraphernalia. N.C. Gen. Stat. § 90-113.22 provides: "It is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia . . . ." N.C. Gen. Stat. § 90-113.22 (2019). Evidence of mere possession without further incriminating evidence is insufficient to satisfy the statute's intent requirement. *State v. Hedgecoe*, 106 N.C. App. 157, 164, 415 S.E.2d 777, 781 (1992) (citing *State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1989)). Here, Defendant testified he exchanged the baggie for money and that he thought the substance may have been "hash." Thus, Defendant testified to other incriminating circumstances that may have been sufficient to satisfy the intent requirement for Possession of Drug Paraphernalia.

¶ 15 Moreover, the North Carolina Supreme Court has held that counsel's admission of a lesser-included charge also triggers *Harbison*. *State v. Matthews*, 358 N.C. 102, 109, 591 S.E.2d 535, 540-41 (2004) (finding per se ineffective assistance of counsel where defense counsel conceded defendant's guilt to second-degree murder, a lesser-included offense, without defendant's permission). "[P]ossession of [narcotics] is an element, and therefore a lesser included offense, of possession with intent to manufacture, sell, or deliver [narcotics]." *State v. Turner*, 168 N.C. App. 152, 159, 607 S.E.2d 19, 24 (2005).

¶ 16 Here, Defendant testified at trial that he did not know the substance he handed to the informant was heroin. When a defendant presents evidence the defendant did not know the substance the defendant possessed was a controlled substance, the State must prove beyond a reasonable doubt the defendant did know the substance was that controlled substance. 1 N.C.P.I.-Crim. 260.15 n.2 (June 2014). Although, based on this Record, defense counsel may not have expressly admitted to Defendant knowingly possessing heroin, counsel's statements

implicated a lesser-included offense possibly triggering *Harbison*. However, even assuming these statements were, in fact, admissions of possession of drug paraphernalia and lesser-included drug possession offenses under *Harbison*, the trial court's inquiry into Defendant's prior consent was adequate.

¶ 17 Defendant contends the trial court's colloquy with Defendant as to whether Defendant consented to defense counsel's remarks was insufficient under *Harbison* because the trial court did not discuss the State's burden of proof applicable to all the charges—specifically, the trial court did not discuss the State's burden in the Possession of Drug Paraphernalia charge. Although "an on-the-record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt during closing argument," our courts have "also declined to define such a colloquy as the sole measurement of consent.' " *McAllister*, 375 N.C. at 477, 847 S.E.2d at 724 (citation and quotation marks omitted). We have previously held that a trial court's colloquy with a defendant after defense counsel's opening statements admitting to lesser crimes was adequate under *Harbison*. *State v. Johnson*, 161 N.C. App. 68, 77-78, 587 S.E.2d 445, 451 (2003).

¶ 18 Indeed, *State v. Johnson* presents an analogous situation to this case. In *Johnson*, the defendant was charged with murdering three people, among other charges. *Id.* at 70, 587 S.E.2d at 447. During opening remarks, defense counsel admitted that the defendant killed three people, but that he did so without premeditation or deliberation but because he was in a drunken rage. *Id.* at 71, 587 S.E.2d at 448. The trial court addressed the defendant stating:

> THE COURT: . . . [Y]ou have heard what [defense counsel] just said. Have ya'll previously discussed that before he made his opening statements?
>
> THE DEFENDANT: Yes, sir, we did.
>
> THE COURT: And did he have your permission and authority to make that opening statement to the jury?
>
> THE DEFENDANT: Yes, sir, he did.
>
> THE COURT: You consent to that now?
>
> THE DEFENDANT: Yes, sir.

Id. at 77, 587 S.E.2d at 451. The trial court did not discuss the individual elements and the State's burden with the defendant. We held that "on

the unique facts of this case . . . the trial court's inquiry was adequate to establish that defendant had previously consented to his counsel's concession that he was present and had fired the shots that killed three people[.]" *Id.* at 77-78, 587 S.E.2d at 451. Thus, upon proper facts, a trial court's inquiry as to whether the defendant consented to defense counsel's opening remarks generally may be sufficient under *Harbison*. *See id.*

¶ 19 Here, although the trial court did not specifically address the elements of Possession of Drug Paraphernalia and the State's burden in proving this charge, the trial court did go into detail with respect to the other charges. Moreover, the trial court asked Defendant whether he was aware defense counsel admitted "at least some of the things that the State would need to prove to convict" Defendant. Defendant acknowledged that he did understand. The trial court also asked whether Defendant had discussed these statements before trial and whether defense counsel had Defendant's "permission to make those admissions[.]" Defendant answered in the affirmative. Therefore, although the better practice may have been for defense counsel to make a record of Defendant's consent prior to making these opening statements, the trial court conducted an adequate inquiry after the fact under *Harbison* to establish a record of Defendant's consent to these admissions. *Id.*

¶ 20 Defendant also argues defense counsel admitted Defendant's guilt in the predicate felonies required to convict him of attaining Habitual-Felon Status. However, the trial court also addressed these admissions in its colloquy with Defendant by acknowledging defense counsel admitted to the existence of each of the prior felony convictions and inquiring of Defendant whether trial counsel had previously discussed those admissions and whether Defendant consented to those admissions. Defendant again responded they had discussed those admissions and Defendant consented to those admissions. Thus, on the facts of this case, the trial court made an adequate inquiry as to Defendant's consent consistent with *Harbison*. Moreover, after Defendant was convicted of the drug charges in this case, Defendant pled guilty—as evidenced by Defendant's Transcript of Plea—to having attained Habitual-Felon Status, and, before accepting the plea, the trial court conducted the required inquiry as to the voluntariness of Defendant's plea.

¶ 21 Therefore, we conclude to the extent defense trial counsel's admissions in opening statements triggered *Harbison*, the trial court's colloquy with Defendant in this case was adequate to ascertain Defendant's

consent to those admissions. Consequently, Defendant was not per se denied effective assistance of counsel.[1]

Conclusion

¶ 22 Accordingly, for the foregoing reasons, we conclude there was no error at trial and affirm the Judgment.

NO ERROR.

Judges DILLON and DIETZ concur.

STATE OF NORTH CAROLINA
v.
ALEXANDER MICHAEL CRISP

No. COA20-882

Filed 21 December 2021

1. Criminal Law—jury instruction—defense of accident—second-degree murder

In a second-degree murder prosecution arising from a heated argument between defendant and his girlfriend, there was no plain error where the trial court did not instruct the jury on the defense of accident. The evidence, when viewed in the light most favorable to defendant, did not indicate that defendant accidentally shot his girlfriend but instead suggested that his girlfriend (accidentally or intentionally) shot herself while he was in another room.

2. Sentencing—second-degree murder—general verdict—malice theory—no ambiguity

The trial court properly sentenced defendant in a second-degree murder prosecution as a Class B1 felon, where there was no evidence of depraved-heart malice—the only malice theory used to classify second-degree murder as a B2 offense—and therefore the jury's general verdict of guilty was not ambiguous.

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1. Defendant requests, if we reject his *Harbison* argument, that in the alternative, we preserve his future right to bring a Motion for Appropriate Relief arguing he received ineffective assistance of counsel. Our decision here is limited to whether Defendant received per se ineffective assistance of counsel under *Harbison*. We express no opinion on any other bases Defendant might have for a future Motion for Appropriate Relief.

Appeal by Defendant from judgment entered 16 September 2019 by Judge Alan Z. Thornburg in Swain County Superior Court. Heard in the Court of Appeals 22 September 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Marissa K. Jensen, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Alexander Crisp appeals from a judgment entered upon a jury verdict of guilty of second-degree murder. Defendant argues that the trial court plainly erred by omitting a jury instruction on the defense of accident. Defendant also argues that the trial court erred by sentencing him as a Class B1 felon because the jury's verdict was ambiguous in light of evidence that Defendant acted with a depraved heart. Because there was insufficient evidence to support an accident instruction and there was no evidence to support a depraved-heart theory of malice, we discern no error.

I. Procedural History

¶ 2 Defendant was indicted for first-degree murder on 10 March 2014. Defendant was tried before a jury from 29 July to 16 September 2019. The jury found Defendant guilty of second-degree murder. The trial court sentenced Defendant, as a Class B1 felon with a prior record level of II, to 221 to 278 months in prison with credit for time served in pretrial confinement. Defendant timely gave written notice of appeal.

II. Factual Background

¶ 3 In February 2014, Defendant, his girlfriend Summer Lynn Johnson, and their seven-month-old daughter were living in a trailer on the property of Defendant's parents. Defendant's parents, Michael Crisp and Andrea Crisp ("Mr. Crisp" and "Mrs. Crisp") lived in a home nearby on the same property.

¶ 4 The evidence at trial tended to show the following: On the morning of 19 February 2014, Defendant, Johnson, and their daughter were the only persons in the trailer. Between 5:30 and 6:00 am, Defendant was asleep on the couch and woke to Johnson "yelling at [him] to wake up." When Defendant saw their daughter "crawling down the hallway right through the kitchen," Defendant picked her up and began to make

her a bottle. Defendant estimated that he and Johnson were up for 30 to 40 minutes and continued to argue, "yell[ing] back and forth" and "confront[ing] each other."

¶ 5 During the argument, Johnson suffered a gunshot wound to her left eye. Defendant called 911 at 6:19 am. After the 911 dispatcher instructed him to perform CPR, Defendant ended the call and called his parents' home phone to reach his mother, who knew CPR. Defendant's parents both ran to the trailer, where they saw Defendant at the back door. Mrs. Crisp heard Defendant yell, "She shot herself in the eye." Mrs. Crisp entered the trailer and began to perform CPR on Johnson.

¶ 6 Two ambulances arrived at the trailer at 6:29 am. Paramedics and EMTs entered the trailer, went to the back bedroom where Johnson was laying, and directed Mrs. Crisp to discontinue CPR. The paramedics and EMTs noticed Defendant racking the slide of a pistol and requested that he put the gun down. The paramedics and EMTs' attempts to resuscitate Johnson were unsuccessful and Johnson was pronounced dead at 6:40 am.

¶ 7 At trial, the State's theory was that Johnson was planning to leave Defendant, the argument between Defendant and Johnson escalated, and Defendant intentionally shot Johnson. Defendant's theory was that Johnson shot herself either accidentally or intentionally. Defendant testified that he was not in the bedroom and did not fire the gun. Likewise, multiple witnesses testified that Defendant stated that he was outside the bedroom when the gun fired.

III. Discussion

A. Accident Instruction

¶ 8 **[1]** Defendant argues that the trial court plainly erred by failing to instruct the jury on the defense of accident.

¶ 9 A party may not make the trial court's omission of a jury instruction "the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection[.]" N.C. R. App. P. 10(a)(2). Defendant neither requested an instruction on the defense of accident nor objected to the trial court's omission of such an instruction. However, because Defendant "specifically and distinctly" contends that the trial court's omission of an accident instruction amounted to plain error, we will review this issue for plain error. N.C. R. App. P. 10(a)(4); *State v. Smith*, 362 N.C. 583, 596, 669 S.E.2d 299, 308 (2008) (reviewing jury instructions for plain error where defendant failed to object at trial).

¶ 10 "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show 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.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

¶ 11 A trial court must

> instruct the jury on all of the substantive features of a case. This is a duty which arises notwithstanding the absence of a request by one of the parties for a particular instruction. All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon.

Id. at 381, 368 S.E.2d at 617 (citations omitted). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *State v. Mercer*, 373 N.C. 459, 464, 838 S.E.2d 359, 363 (2020) (quotation marks and citations omitted).

¶ 12 The defense of accident "is not an affirmative defense, but acts to negate the *mens rea* element of homicide." *State v. Lytton*, 319 N.C. 422, 425-26, 355 S.E.2d 485, 487 (1987) (citations omitted). "A killing will be excused as an accident when it is unintentional and when the perpetrator, in doing the homicidal act, did so without wrongful purpose or criminal negligence while engaged in a lawful enterprise." *State v. Riddick*, 340 N.C. 338, 342, 457 S.E.2d 728, 731 (1995) (citation omitted). "The defense of accident is triggered in factual situations where a defendant, without premeditation, intent, or culpable negligence, commits acts which bring about the death of another." *Id.* (quotation marks and citations omitted).

¶ 13 The evidence in the present case, when viewed in the light most favorable to Defendant, did not warrant an instruction on the defense of accident. To the contrary, when viewed in the light most favorable to Defendant, the evidence suggested that Defendant was not in the bedroom and did not shoot the gun: The dispatcher who fielded the 911 call from Defendant noted in the call log that Defendant "advised . . . that someone had shot themselves in the eye accidentally with his .22 pistol[.]" Thomas Simmons, one of the paramedics who responded to the scene, testified that Defendant "made a comment that the gun

wasn't supposed to go off, that she grabbed for the gun and it just went off[.]" Steven Howell, another paramedic, testified that he overheard Defendant state that "he couldn't believe there had been a bullet in the chamber. He couldn't believe that it was loaded." Howell further testified that Defendant stated that "during the argument . . . [Johnson] grabbed the barrel" and "stated several times that she would kill herself, that she would put a bullet in her head."

¶ 14 Mr. Crisp testified that after he arrived at the trailer, Defendant was crying and said that "[h]e didn't know what happened" and "couldn't figure out what happened." Mr. Crisp was within earshot of Defendant's conversation with Sergeant Dennis Elliott of the Swain County Sheriffs' Department. Mr. Crisp testified that he heard Defendant say to Elliott

> that Summer threatened to shoot [Defendant] in the head. . . . He said that he was fixing a bottle at the kitchen sink and . . . [h]e started back into the bedroom and he heard a pop or heard something and saw a small flash, and he thought that maybe she had shot into the wall.

¶ 15 Mr. Crisp further testified that he heard Defendant say "that he wasn't even to the bedroom" when he heard the pop and saw the flash. Mr. Crisp also testified that he watched Defendant walk with Elliott down the hallway, Defendant "showed [Elliott] how far down the hall he had gotten," and Defendant "stopped before going in the door of the bedroom and said, I got right about here and I heard a pop and a flash." At trial, Mr. Crisp listened to the portion of the 911 call recorded after he arrived at the scene and testified that Defendant stated that the gun was "[h]alf cocked, and it fell off the dresser or something and shot her in the F'ing eye" or was "on f[***]ing half cocked. It moved on the table and shot her in the f[***]ing eye."

¶ 16 Mrs. Crisp testified that when she arrived at the trailer, she heard Defendant screaming that Johnson had "shot herself in the eye" and Defendant stated, "I don't know if she grabbed the barrel of the gun and it went off. I don't know what happened." Mrs. Crisp also testified that Defendant stated, "I don't know how she did this. I don't want people to think Summer committed suicide. I don't know what happened." Mrs. Crisp further testified that while she was in the trailer, Defendant

> was crying. He was saying he didn't know what happened. He said they had been arguing[;] that [Defendant's daughter] had gotten up and wanted a bottle; that Summer called him a piece of S dad and

> he called her a piece of S mom; and he was trying to figure out what could have happened. He said that he was in the kitchen fixing a bottle and that he heard a pop and may have seen a flash and that he was trying to figure out what happened.

Mrs. Crisp indicated that, while she was performing CPR on Johnson, she "saw [Defendant] move what [she] thought was a gun" near Johnson's lap.

¶ 17 Elliott testified that Defendant denied having had an altercation with Johnson during which he "grabbed the gun and pointed it at [Johnson,] and she grabbed the end of the barrel and the gun accidentally went off." Elliott testified that instead, Defendant stated that his daughter was

> in his arms. The argument got heated enough to where . . . [Johnson] told him she'd just get a gun and blow his brains out.
>
> [Defendant] stated he took off running with the baby into the kitchen, got into the kitchen area, turned back around and told her, "Then do it. Just shoot me. Just shoot me." And as he started back towards the bedroom, he heard a pop. He walked into the bedroom and found [Johnson] laying in the bedroom floor.

Elliott also stated that Defendant said that he found the gun between Johnson's legs and that Defendant did not know how Johnson got the gun.

¶ 18 At trial, Defendant repeatedly denied that he shot Johnson, that he was in the room when the shooting occurred, or that he saw how the fatal shot occurred. According to Defendant, during the argument on the morning of 19 February

> [Johnson] screamed back the "I'll put a bullet in your head" thing. That was just a blank statement that she would just say. It's just something she wanted to get off her chest. It's just something she wanted to say. . . .
>
> And so me and [my daughter] go to walk down the hallway. I said, "Well, do it then." I made it to about right at the doorway, I'd say, within a couple of steps to the doorway. And the lights were off and everything and it was relatively loud, but there was a pop or the snap. And you could see a flash and almost

> instantly there was this smell in the room. I guess it was the smell of blood, smell of lead or powder.

Defendant testified numerous times that he did not have the gun that morning until he took it out of Johnson's lap after his mother had begun to perform CPR.

¶ 19 Defendant also repeatedly testified that he was unsure of how Johnson suffered the fatal shot. Defendant testified that on the morning of the shooting:

> I was just trying to figure out what happened. I mean a million things were running through my mind like, [h]ow did this happen? And so like I told mom, maybe she picked up the gun muzzle first and it just went off. I'm not saying that's what happened. That's what I thought could have happened.
>
> And I said, you know, maybe it fell off the dresser and went off. Not once did I say that's what happened. That's what I thought could have happened. Because that was what I was going to do, I was going to sit there and figure it out. I wanted to know what happened.
>
> To this day I don't know what happened. I will never know what happened. I didn't see it happen. I never said I saw it happen. But almost instantly I wanted to know what happened. I wanted to figure it out.

Defendant expressly rejected the possibility that he "could have been in a fight and [he] could have grabbed the gun and it could have gone off accident[ally]."

¶ 20 The foregoing evidence, when viewed in the light most favorable to Defendant, does not suggest that he perpetrated the shooting and "did so without wrongful purpose or criminal negligence while engaged in a lawful enterprise." *Riddick*, 340 N.C. at 342, 457 S.E.2d at 731 (citation omitted).

¶ 21 Defendant argues that the 911 call introduced by the State, in which he characterized the shooting as accidental, supported an accident instruction. But at trial, Defendant explained that he was attempting to inform the 911 dispatcher that Johnson had accidentally shot herself, not that he had accidentally shot Johnson. After listening to the call, Defendant testified as follows:

> Q. Now, when you say accidental discharge, what are you referring to?
>
> A. Well, I've always felt like, you know, on her part it was an accident. I never wanted to believe it was intentional. I still don't want to believe it's intentional.
>
> . . .
>
> So when I said accidental discharge that's because when I saw her last 10 minutes before me and [my daughter] got to the door and heard the pop, she did not have the gun in her hand. She was standing behind the bed the last time I saw her.

Moreover, the dispatcher noted in the call log that Defendant "advised . . . that someone had shot themselves in the eye accidentally with his .22 pistol," not that Defendant reported he had accidentally shot someone. The 911 call was therefore not sufficient evidence to entitle Defendant to an instruction on accident.

¶ 22 Defendant also argues that testimony by Dennis McGaha, an informant for the State, supported an instruction on accident. McGaha testified that he was incarcerated with Defendant in the Swain County Detention Center in February and March of 2014. McGaha testified that:

> [Defendant] told me what caliber pistol it was of the gun that went off and hit her. He was telling me that they argued and stuff beforehand, that this wasn't the first time that a gun had been involved in things between them in a heated matter and that there was a child in the home . . . while it was happening.
>
> . . . .
>
> He said that they were both kind of wrestling over the gun and that it went off. I mean his hands was on the gun the same as hers, and that he was holding the baby.
>
> . . . .
>
> And that that day he just said that they was wrestling over - - they was arguing over the baby, who was going to take off with the baby and drugs. One of them was doing drugs and one of them wasn't, something like that is what he said. And just things happened and the gun went off. . . .

¶ 23 Defendant's own testimony that he was not in the bedroom and did not fire the gun contradicted McGaha's testimony. Defendant strenuously denied that he spoke with McGaha about the shooting and sought to impeach McGaha's credibility. Defendant may not rely on McGaha's testimony, which he flatly contradicted and extensively impeached, to contend that he was entitled to an instruction on a theory he personally disclaimed at trial. *See State v. Henderson*, 64 N.C. App. 536, 540-41, 307 S.E.2d 846, 849 (1983) ("[A]s a practical matter, it is important to note that the defense of coercion or duress was not raised by the defendant, but by a State's witness . . . [whose] credibility was severely impeached by the defendant . . . .").

¶ 24 Defendant argues that he is permitted to rely on inconsistent defenses. This argument is without merit. Defendant cannot simultaneously deny that he committed the shooting and claim that he accidentally committed the shooting. *Cf. State v. Keller*, 374 N.C. 637, 647, 843 S.E.2d 58, 65-66 (2020) (A defendant who "claims he has not done an act" is not entitled to an entrapment instruction because he cannot simultaneously "claim that the government induced him to do that act."); *see also State v. Peterson*, 24 N.C. App. 404, 408-09, 210 S.E.2d 883, 886 (1975) (trial court did not err by instructing jury that self-defense was inapplicable where the defense was inconsistent with defendant's testimony and otherwise unsupported by the evidence).

¶ 25 The evidence, when viewed in the light most favorable to Defendant, does not suggest that Defendant "commit[ed] acts which [brought] about the death of" Johnson. *Riddick*, 340 N.C. at 342, 457 S.E.2d at 731 (quotation marks and citations omitted). Because there was not sufficient evidence to entitle Defendant to an instruction on the defense of accident, the trial court did not err by omitting an instruction on that defense.

B. Sentencing

¶ 26 **[2]** Defendant next argues that the jury's verdict of guilty of second-degree murder was ambiguous for sentencing purposes because there was evidence that would support sentencing as either a Class B1 or a Class B2 felony conviction. Defendant contends that this Court should therefore vacate Defendant's sentence and remand for resentencing as a Class B2 felony. We disagree.

¶ 27 "Second-degree murder is defined as (1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation." *State v. Arrington*, 371 N.C. 518, 523, 819 S.E.2d 329, 332 (2018) (quotation marks and citation omitted).

> Malice may be shown in at least three different ways: (1) actual malice, meaning hatred, ill-will or spite; (2) an inherently dangerous act done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief; or (3) that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.

Id. (quotation marks and citations omitted). "The second type of malice [is] commonly referred to as 'depraved-heart' malice[.]" *State v. Fuller*, 138 N.C. App. 481, 484, 531 S.E.2d 861, 864 (2000) (citation omitted).

¶ 28 "[T]he crime of second-degree murder has two potential classifications, B1 and B2, depending on the facts of the murder." *Arrington*, 371 N.C. at 522, 819 S.E.2d at 332. While second-degree murder is generally classified as a B1 offense, it is classified as a B2 offense where depraved heart malice is used prove the offense. N.C. Gen. Stat. § 14-17(b) (2019).

¶ 29 A jury need not specify which theory of malice was the basis of its verdict finding a defendant guilty of second-degree murder. *State v. Lail*, 251 N.C. App. 463, 471, 795 S.E.2d 401, 408 (2016).

> [I]n a situation where no evidence is presented that would support a finding that an accused acted with depraved-heart malice, specification of malice theory would not provide clarity for sentencing purposes; it would be inferred from a general verdict that the jury found the accused guilty of B1 second-degree murder.

Id. However, "a general verdict would be ambiguous for sentencing purposes where the jury is charged on second-degree murder and presented with evidence that may allow them to find that either B2 depraved-heart malice or another B1 malice theory existed." *Id.* at 475, 795 S.E.2d at 411.

¶ 30 Here, the jury's verdict was not ambiguous because there was no evidence in support of depraved-heart malice. Defendant contends that this case is analogous to *State v. Mosley*, 256 N.C. App. 148, 806 S.E.2d 365 (2017), but Defendant's reliance is misplaced. There,

> defendant testified that as he was arguing with the victim, he was holding the rifle with his finger on the trigger and without the safety on. Defendant stated this was how he always handled the rifle—finger on the trigger and no safety. Defendant testified that

> in this instance, the gun went off when the victim grabbed the barrel of the rifle and he pushed her away. There was also testimony about the safety on the rifle and testimony from a firearm expert that "[y]ou would never teach anyone to have their finger on the trigger until they are ready to fire."

Id. at 152-53, 806 S.E.2d at 368. This Court noted that reckless use of a deadly weapon constitutes depraved-heart malice and held that this was sufficient evidence from which the jury could have found depraved-heart malice. *Id.*

¶ 31 Here, by contrast, Defendant argues that the jury could have found depraved heart malice based on (1) Defendant's testimony that he left the gun on the nightstand with the safety off and an empty chamber; (2) Simmons' testimony that Defendant "made a comment that the gun wasn't supposed to go off," and "that [Johnson] grabbed for the gun and it just went off"; (3) Howell's testimony that Defendant "stated that sometime during the argument [Johnson] grabbed the barrel"; and (4) McGaha's testimony. Evidence that Defendant left an empty-chambered gun unattended, or that Johnson grabbed the gun, which Defendant maintains he did not use and believed was unloaded, is insufficient to show that Defendant committed "an inherently dangerous act . . . so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief[.]" *Arrington*, 371 N.C. at 523, 819 S.E.2d at 332 (quotation marks and citation omitted).

¶ 32 The evidence tending to show Defendant's guilt supported only B1 theories of malice and the jury was instructed only on those theories. Although the jury returned a general verdict convicting Defendant of second-degree murder, it is apparent from the evidence presented and instructions given that the jury, by their verdict, found Defendant guilty of B1 second-degree murder. The trial court did not err by sentencing Defendant as a Class B1 felon.

¶ 33 Defendant argues in the alternative that the trial court plainly erred by failing to instruct the jury on the definition of depraved-heart malice. But for the same reasons that there was insufficient evidence from which the jury could have found depraved-heart malice, there was insufficient evidence to warrant an instruction on depraved-heart malice. The trial court did not err by omitting an instruction on depraved-heart malice.

IV. Conclusion

¶ 34 The evidence admitted at trial, viewed in the light most favorable to Defendant, did not warrant an instruction on the defense of accident. Because there was not sufficient evidence of depraved-heart malice, the jury's verdict of second-degree murder was not ambiguous for sentencing purposes, and the trial court did not err by sentencing Defendant as a Class B1 felon.

NO ERROR.

Judges DILLON and WOOD concur.

STATE OF NORTH CAROLINA
v.
MICHAEL CONNOR LAMP, DEFENDANT

No. COA20-323

Filed 21 December 2021

Sexual Offenders—failure to register—incorrect address provided—evidence of deceptive intent

Where a reasonable juror could infer from the evidence that defendant, a registered sex offender, intended to deceive the sheriff's office by listing the wrong apartment building number on a change of information form, there was sufficient evidence of willful misrepresentation to send to the jury the offense of failure to register as a sex offender under N.C.G.S. § 14-208.11(a)(4) (submission of information under false pretenses).

Judge DILLON dissenting.

Appeal by Defendant from judgment entered 19 December 2019 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 24 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Deborah M. Greene, for the State.

Mark L. Hayes for the Defendant.

JACKSON, Judge.

¶ 1 Michael Connor Lamp ("Defendant") appeals from a judgment entered upon a jury verdict finding him guilty of failing to register as a sex offender and his stipulation that he attained the status of a habitual felon. We hold that Defendant has failed to demonstrate reversible error.

I. Background

¶ 2 In 1999, Defendant was charged with second-degree rape. In exchange for pleading guilty to second-degree kidnapping (instead of rape), Defendant received a sentence of 21 to 26 months of supervised probation. The sentencing court found that the offense was a reportable conviction involving a minor under N.C. Gen. Stat. § 14-208.6, and ordered that Defendant register as a sex offender.

¶ 3 On 25 June 2019, Defendant executed a Sex Offender Change of Information Form and submitted it to the Iredell County Sheriff's Office. On the form, Defendant represented that his address was 1010 Foxcroft Lane, Building 604, Apartment A6, in Statesville, North Carolina, from 21 June 2019 until 25 June 2019. Defendant had previously been registered as homeless, and he also signed the homeless log at the Sheriff's Office on 25 June 2019, in addition to executing the change of address form, indicating that as of 25 June 2019, he was once again homeless.

¶ 4 At trial, H. Daelhouser, the property manager for the apartments on Foxcroft Lane, testified that Defendant was not a tenant of the apartments. However, Ms. Daelhouser did have occasion to meet Defendant on 25 June 2019 at Building 602, Apartment A6. Ms. Daelhouser went to check on Apartment A6 in Building 602 that day. Although Defendant was not on the lease, he answered the door. Ms. Daelhouser informed him that an eviction had proceeded to the point that the locks were going to be changed the following morning. Defendant replied that he knew, and that he would be gone by then.

¶ 5 The next day, Deputy Cody James visited Building 604, Apartment A6—the address Defendant had provided—attempting to verify that Defendant lived there. The gentleman who answered the door was not Defendant, and he told Deputy James that Defendant did not live there. Deputy James learned during her visit that Building 602, Apartment A6, and Building 604, Apartment A6, are adjacent to one another, and while they are separate buildings, they are adjoined by a breezeway.

¶ 6 On 9 September 2019, Defendant was indicted for submitting false information to the Iredell County Sheriff's Office that he was required

to submit as a sex offender and for knowingly residing within 1000 feet of a public school. Specifically, he was charged with "submitting 1010 Foxcroft Lane, Building 604, Apartment A6, Statesville[,] as his residence when, in fact, he did not reside there[,]" and with "knowingly resid[ing] within 1000 feet of . . . Statesville Montessori School, a public school[.]" He was also indicted for attaining the status of a habitual felon.

¶ 7 The matter came on for trial before the Honorable Joseph N. Crosswhite in Iredell County Superior Court on 17 December 2019. The State elected not to proceed on the charge of knowingly residing within 1000 feet of a public school. Judge Crosswhite presided over a two-day trial. Defendant moved at the close of the State's evidence to dismiss the charge for violation of N.C. Gen. Stat. § 14-208.11(a)(4) on the ground that the evidence of his intent to deceive anyone by submitting false information about his whereabouts on 25 June 2019 was insufficient. The trial court denied the motion. Defendant chose not to present evidence and once again moved to dismiss the charge.

¶ 8 The jury's deliberations went into a third day, with the jury returning a verdict of guilty on the substantive offense and Defendant stipulating to attaining the status of a habitual felon after the jury returned its verdict. The trial court determined Defendant to be a prior record level five offender, and sentenced him to 101 to 134 months in prison

¶ 9 Defendant entered notice of appeal in open court.

II. Analysis

¶ 10 In his sole argument on appeal, Defendant contends that the trial court erred in denying his motion to dismiss because the evidence was insufficient that he provided an incorrect address to the Sheriff's Office, or that any address he provided was provided willfully, with deceptive intent. We disagree.

A. Standard of Review

> When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the

> State, and the State receives the benefit of every reasonable inference supported by that evidence. The defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when it is consistent with the State's evidence, the defendant's evidence may be used to explain or clarify that offered by the State. Additionally, a substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight, which is a matter for the jury. Thus, if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.
>
> The test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both. Where the State's evidence of the defendant's guilt is circumstantial, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.

State v. White, 261 N.C. App. 506, 510, 820 S.E.2d 116, 119-20 (2018) (internal marks and citations omitted).

B. Misrepresentations Are Circumstantial Evidence of Deceptive Intent

¶ 11 North Carolina General Statute § 14-208.11(a)(4) "is a part of North Carolina's Sex Offender Registration Act ("the Act"), codified at N.C. Gen. Stat. § 14-208.5 *et seq.*" *State v. Pressley*, 235 N.C. App. 613, 616, 762 S.E.2d 374, 376 (2014). N.C. Gen. Stat. § 14-208.11(a)(4) prohibits "[a] person required . . . to register [as a sex offender] [from] willfully . . . [f]org[ing] or submit[ting] under false pretenses the information or verification notices required under" the Act. N.C. Gen. Stat. § 14-208.11(a)(4) (2019). Section 14-208.11(a)(4) thus "criminalizes the provision of false or misleading information on forms submitted pursuant to the Act[,]" *Pressley*, 235 N.C. App. at 617, 762 S.E.2d at 377, and violation of § 14-208.11(a)(4) is a Class F felony, N.C. Gen. Stat. § 14-208.11(a)(4). "[A] person is guilty of submitting information under false pretenses

[under § 14-208.11(a)(4)] if the person (1) stands convicted of a sexual offense requiring him to register as a sexual offender and (2) submits information under false pretenses to the sexual offender registry." *State v. Parks*, 147 N.C. App. 485, 489, 556 S.E.2d 20, 23 (2001).

> The clear and unambiguous purpose of the Act is "to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article."

Pressley, 235 N.C. App. at 617, 762 S.E.2d at 377 (quoting N.C. Gen. Stat. § 14-208.5).

¶ 12 A false pretense has been defined as "an untrue representation . . . calculated and intended to deceive." *Parks*, 147 N.C. App. at 489, 556 S.E.2d at 23. Generally speaking, "the false pretense need not come through spoken words, but instead may be by act or conduct." *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001) (citation omitted). Deceptive intent is seldom proven by direct evidence, and therefore, must ordinarily be inferred from the circumstances. *State v. Bennett*, 84 N.C. App. 689, 691, 353 S.E.2d 690, 692 (1987). Likewise, "willfulness is a mental state . . . [that] often must be inferred from the surrounding circumstances rather than proven through direct evidence." *State v. Crockett*, 238 N.C. App. 96, 106, 767 S.E.2d 78, 85 (2014). "In determining the absence or presence of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged." *State v. Braswell*, 225 N.C. App. 734, 740, 738 S.E.2d 229, 233 (2013) (internal marks and citation omitted).

¶ 13 Inconsistencies in the record evidence before the trial court when denying Defendant's motion to dismiss created ambiguities susceptible of different, conflicting interpretations—triable issues of fact the court correctly ruled should be submitted to the jury to answer by its verdict. The evidence before the trial court included: (1) on 25 June 2019, Defendant represented both that he resided at 1010 Foxcroft Lane, Building 604, Apartment A6, and that he was homeless—two things that could not both be true; (2) that very same day, Defendant was seen at

Building 602, Apartment A6, not Building 604, Apartment A6, where he represented to the Sheriff's Office he resided, suggesting that he did not, in fact, reside in Building 604 despite representing that he did (but which could also tend to show that he resided in neither place, and was homeless on 25 June 2019); and (3) on 26 June 2019, an occupant of the apartment where Defendant claimed he lived informed a deputy that Defendant did not live there. We hold that a reasonable juror could have inferred from the evidence that Defendant willfully misrepresented to the Sheriff's Office that he lived in Apartment A6 of Building 604 on 25 June 2019.

¶ 14 When a person is required to register as a sex offender, providing an incorrect address on the forms used by the Sheriff's Office to record and monitor compliance with the requirement to register is a misrepresentation that constitutes circumstantial evidence of deceptive intent, as well as the mental state of willfulness. *See Pressley*, 235 N.C. App. at 617, 762 S.E.2d at 377; *Crockett*, 238 N.C. App. at 106, 767 S.E.2d at 85. On a motion to dismiss at the close of the State's evidence, this evidence qualifies as substantial evidence "to support a finding that the offense charged has been committed and that the defendant committed it . . . [because] [t]he test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both." *White*, 261 N.C. App. at 510, 820 S.E.2d at 120 (internal marks and citations omitted). While this evidence of Defendant's willful state of mind and deceptive intent was circumstantial, deceptive intent is seldom proven by direct evidence, *Bennett*, 84 N.C. App. at 691, 353 S.E.2d at 692, and willfulness too "often must be inferred from the surrounding circumstances rather than proven through direct evidence[,]" *Crockett*, 238 N.C. App. at 106, 767 S.E.2d at 85. Altogether, "a reasonable inference of [D]efendant's guilt may be drawn from the[se] circumstances." *White*, 261 N.C. App. at 510, 820 S.E.2d at 120. The jury also heard directly from Deputy James that she believed the Defendant was trying to trick her and avoid supervision by providing an incorrect address. The jury also heard of a potential motive that by providing an address on 25 June 2019, this gave Defendant an excuse from signing the homeless log on 21 June 2019 and 24 June 2019. Accordingly, viewing the evidence in the light most favorable to the State, and giving the State the benefit of every reasonable inference arising from the evidence, as we must on review of the denial of a motion to dismiss, *see id.*, we hold that the evidence that Defendant was guilty of violating N.C. Gen. Stat. § 14-208.11(a)(4) by submitting false information about his whereabouts to the Iredell County Sheriff's Office on 25 June 2019 was sufficient to go to the jury.

III. Conclusion

¶ 15 We therefore hold that Defendant has failed to demonstrate any error.

NO ERROR.

Judge INMAN concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

¶ 16 In 1999, Defendant pleaded guilty to attempted kidnapping of a minor for conduct he engaged in when he himself was 17 years of age. Based on this conviction, he was required to register as a sex offender. He has not been charged for committing any sex offense since. In any event, twenty years after his attempted kidnapping conviction, Defendant was indicted and convicted by a jury for misregistering willfully, under false pretenses his place of residence for a certain five-day period in June 2019. For this crime and for attaining habitual felon status, he was sentenced to a term of imprisonment exceeding eight years.

¶ 17 On appeal, he argues that his motion to dismiss should have been granted. It is our duty on appeal to sustain the jury's verdict *so long as* the evidence presented supported a reasonable inference of their findings, even if we, as judges, would have reached a different verdict. In this case, though, while one can reasonably infer from the State's evidence that Defendant provided an incorrect address and perhaps did so intentionally, I cannot find any way from which it could be reasonably inferred that Defendant's misreport was done willfully and under false pretenses.

¶ 18 In other words, as explained below, while one could have *suspicions* why Defendant might have misreported his address for the five-day period in question, the State's evidence simply does not create a *reasonable inference* explaining Defendant's illicit purpose or how his misreport could have possibly deceived the Sheriff's Office or anyone else. Therefore, in *this* case before us, I believe it is our duty to reverse the judgment, as I believe the trial court should have granted Defendant's motion to dismiss at the close of the State's evidence. I, therefore, respectfully dissent.

Analysis

¶ 19 Section 14-208.11(a) of our General Statutes enumerates ten different ways the State can show that a sex offender has unlawfully failed to properly register his place of residence. In this case, the State chose to indict Defendant under subsection (4) of that statute.

¶ 20 Subsection (4) proscribes the misreporting by a convicted sex offender of his place of residence, but only if done so "willfully" and "under false pretense." N.C. Gen. Stat. § 14-208.11(a)(4). In other words, it is not enough for the State to produce evidence showing that Defendant registered a false address or even that he did so *knowingly*. Rather, as explained below, it is the State's burden to produce evidence that raises at least "a reasonable inference" that Defendant acted *willfully*, *under false pretenses*, that is, evidence from which the illicit purpose motivating Defendant to misreport can be reasonably inferred. *See Kinlaw v. Willetts*, 259 N.C. 597, 604, 131 S.E.2d 351, 355 (1963) ("To carry [a] case to the jury the [party with the burden of proof] must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts.").

¶ 21 Our Supreme Court has held that the word "willfully" as used in a criminal statute means "something more than an intention to commit the offense. It implies committing the offense *purposely and designedly in violation of law*." *State v. Stephenson*, 218 N.C. 263, 264, 10 S.E.2d 819, 823 (1940) (concluding evidence was insufficient that the defendant's acted willfully in making a misrepresentation) (emphasis added). And "[w]illfulness is an essential element which the fact-finder must determine, *often by inference*." *State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 226 (2009) (citing *Stephenson*) (emphasis added).

¶ 22 The phrase "false pretenses" is similar to "willful." Our Court, construing subsection (4) of Section 14-208.11(a), has held that "false pretenses occurs when one makes an untrue representation to another that is *calculated and intended to deceive*." *State v. Parks*, 147 N.C. App. 485, 489, 556 S.E.2d 20, 23 (2001) (emphasis added). "False pretenses" has been similarly defined by our Supreme Court in the context of other criminal statutes. For instance, interpreting Section 14-100 which proscribes obtaining property by false pretenses, our Supreme Court defined a false pretense as a misrepresentation which "is calculated to mislead, and does mislead[.]" *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001) (quoting *State v. Dixon*, 101 N.C. 741, 742-43, 7 S.E. 870, 871 (1888)).

¶ 23 Here, the indictment alleges that on Tuesday, 25 June 2019, Defendant misreported to the Sheriff's Office that he had moved into Building 604, Unit 6A of a particular apartment complex the previous Friday, 21 June, and that he did so willfully, under false pretenses. Again, while the State put on evidence from which it could be reasonably inferred that he, in fact, did not live in Building 604 (but rather in Building 602), I cannot understand how one could reasonably infer from that evidence that Defendant misreported for some illicit purpose or, otherwise, in an attempt to deceive the Sheriff's Office. I have considered the motive argued by the State and other possible motives suggested by the majority and otherwise that Defendant may have had. But, as explained below, the State's evidence simply falls short of creating a reasonable inference as to any of these motives/purposes.

1. The evidence does not create a reasonable inference that Defendant misreported for the purpose of avoiding supervision by the Sheriff's Office.

¶ 24 The State's main theory at trial and on appeal regarding Defendant's willfulness/false pretense motive was that Defendant misreported his address *for the purpose of avoiding supervision* by the Sheriff's Office. In its brief, the State explains that Defendant—knowing that the Sheriff's Office would be aware that the occupants of Building *602*, Apt. A6 were being evicted, as it was that Office's duty to execute on the eviction—lied about his address (by reporting Building 604 as his address) to avoid having to report every other day as a homeless offender, stating as follows:

> The Iredell County Sheriff's Office was evicting the occupants of 602-A6 on 26 June 2019. [The deputy] testified that Defendant's behavior led him to believe that Defendant did not want to be supervised. By providing 604-A6 as his address, Defendant could continue to avoid having to report to the Sheriff's Office three times a week to sign in as homeless.

In other words, Defendant misreported to deceive the Sheriff's Office into thinking that he was living in Building 604 indefinitely. However, the State's own evidence offered at trial **conclusively** belies the State's theory. Specifically, the State's evidence showed that Defendant informed the Sheriff's Office that he no longer lived in any apartment unit by signing the homeless log, as follows:

¶ 25 A deputy testified that for periods when Defendant was *not* homeless, he must report his address to the Iredell County Sheriff's *within*

*three business day*s after he moves in. And for periods when he *is* homeless, he must sign the homeless log at the Sheriff's Office at least every other business day during these periods of homelessness.

¶ 26 The State produced the reporting logs from the Sheriff's Office that showed that Defendant signed the homeless log on Monday June 17 and again on Wednesday June 19, representing that he was homeless during this period. He would have been required to sign the homeless log again that Friday June 21 if he was, in fact, still homeless on that day. However, Defendant did not report in again until the following Tuesday June 25. (It was this period, between June 21-25 for which Defendant was convicted for misreporting his address.) On that day, Tuesday June 25, he reported *two* changes in his residential status. First, he reported that he *had been living* in Building *604*, Unit 6A since the previous Friday June 21, a report made within three business days. Second, he signed the homeless log, indicating to that, as of that day, Tuesday June 25, he was again currently homeless, no longer living in the apartment.

¶ 27 The apartment manager testified for the State that the complex was seeking the eviction of anyone living in Building *602*, Unit 6A; that on Tuesday June 25, she knocked on the door of that unit; that Defendant answered the door; that she told him that the occupants were being evicted; and that Defendant told her that he and his friend would comply, indicating that they would be moving "their" belongings out.

¶ 28 The State also called a deputy who testified that he went out to the complex on Wednesday June 26 to confirm that Defendant was living in Building 604, as he had reported the previous day. (The deputy was obviously unaware that Defendant had also reported the previous day that he was no longer lived at the apartment complex.) The deputy stated that Defendant was not found in Building 604; that he spoke to the manager, who told him of her encounter with Defendant the prior day in Building 602; and that there was no indication that Defendant was still living in Building 602.

¶ 29 I simply do not see how the State's evidence shows that his misreport was done for the purpose of avoiding supervision. He made his misreport timely (within three business days of moving in). He signed the homeless log timely (as soon as he was again homeless). Though he misreported the building number, this misreport could not have been made to avoid supervision, as he had already moved out and had already accurately reported that he was again homeless. The majority suggests that the two reports, being made on the same day, were inconsistent. However, the State's own evidence shows that Defendant was simply following the rules in making the two reports. It is true that the

Sheriff's Office did not know where he was living over that weekend. But the Office's reporting rules did not require Defendant to report that he had been living in the apartment until the day he was kicked out.

2. The State failed to produce any evidence creating a reasonable inference that Defendant was still homeless on Friday June 21.

¶ 30 Alternatively, the State could have presented evidence that Defendant intended to lie, not about the building number *per se*, but about the duration of his stay in the apartment. That is, one could *suspect* that Defendant moved into the apartment after Friday June 21, residing there for less than five days, but that he reported Friday as his move-in date to hide his failure to sign the homeless log that Friday, as he would have been required to do. Indeed, one may have a *suspicion* that Defendant lied for this very purpose. But the State did not meet its burden of presenting evidence from which the jury could *reasonably infer* that Defendant was, in fact, homeless on Friday June 21. Indeed, the only evidence offered by the State that was before the jury as to where Defendant was living between June 21 and June 25 showed that he was living in Building 602, at least during the latter part of that period. But any other belief as to Defendant's residency status during this period would be based on suspicion. And our law does not allow a defendant to be convicted on mere suspicion.

3. The State failed to present evidence that Defendant lied to hide the fact that he was living within 1000 feet of a school, which he was prohibited from doing.

¶ 31 Assuming Defendant intentionally lied, another possible motive may be that he misreported for the purpose of hiding the fact that he was living within 1000 feet of a school. That is, one might suspect that Building 604 (the address he reported) is just outside 1000 feet from a school, whereas Building 602 (where he was actually living) is not. Indeed, as noted by the majority, the State originally charged Defendant with residing within 1000 feet of a school. But the State abandoned this charge and, otherwise, did not put forth any evidence regarding the proximity of either Building 602 or Building 604 to a school.

¶ 32 I have carefully reviewed the evidence and tried to think of other motives which might support the jury's verdict. I do not believe the State or the majority have shown how it can be reasonably inferred from the evidence any particular illicit purpose on the part of Defendant or demonstrating exactly how the Sheriff's Office was deceived by his misreport.

STATE v. McCUTCHEON

[281 N.C. App. 149, 2021-NCCOA-699]

STATE OF NORTH CAROLINA
v.
BRENDA KAY McCUTCHEON

No. COA21-218

Filed 21 December 2021

Appeal and Error—preservation of issues—admissibility of testimony—no plain error

In a prosecution for first-degree murder which relied on circumstantial evidence that defendant shot her husband, defendant failed to preserve for appellate review any issue regarding the admissibility of testimony on direct examination from the victim's brother and sister-in-law regarding the effect that the murder had on the brother, and waived review by soliciting similar evidence on cross-examination of both witnesses. Even if the evidentiary issues had been preserved, the testimony was relevant to the brother's credibility and defendant failed to show she was prejudiced by its admission.

Judge ARROWOOD concurring in result only.

Appeal by defendant from judgment entered 14 February 2020 by Judge Peter Knight in Buncombe County Superior Court. Heard in the Court of Appeals 1 December 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.

TYSON, Judge.

¶ 1 Brenda Kay McCutcheon ("Defendant") appeals a jury's verdict finding her guilty of first-degree murder. Defendant was sentenced to life imprisonment without possibility of parole. We find no error.

I. Background

¶ 2 Defendant and Dr. Frank "Buddy" McCutcheon, Jr. ("Buddy"), a surgeon aged 64, had been married for 32 years in July 2016. On 15 July

2016, Buddy fell asleep on the living room sofa around 9:30 p.m. Defendant testified she fell asleep in the upstairs bedroom around 11:00 p.m. Around 3:30 a.m. on 16 July 2016, she purportedly heard a loud noise and went downstairs to investigate. She entered the living room, smelled gunpowder, and determined Buddy had been shot. Defendant testified she ran out the front door, ran through the ivy to the neighbors' house and banged on their door. When no one answered the door, Defendant stated she ran back to her house, grabbed the mobile phone, ran back outside, and called 911.

¶ 3 Emergency responders found Buddy had been shot one time in the back of his head as he slept. Officers found a silver gun in the shrubs beside the McCutcheons' home. The gun belonged to Buddy and had fired the bullet later recovered from Buddy's head.

¶ 4 Defendant's fingerprints were not found on the gun. A DNA mixture was found on the gun, but the major contributor was Buddy. No determination could be made about the two minor contributors. No blood was found on Defendant's clothing. No gunshot residue was found on Defendant's hands, pants, or underwear, but her shirt contained one small particle, characteristic of gunshot residue, but with the origin inconclusive.

¶ 5 Roxanne Whittington, a family friend, went to the McCutcheons' home to offer her condolences about a week later. Whittington was interviewed by police. Whittington testified Defendant's demeanor toward her was "very cold." On 11 August, Whittington reached out to police to provide additional information about Buddy's death and officers conducted a second interview. Whittington testified on direct examination that during the first interview, she was grieving, in shock, and it was a combination of "[Defendant's] actions or lack of remorse" and "getting [her] head a little clearer" that caused her to request a second law enforcement interview.

¶ 6 Sabrina Adams testified at trial she had worked with the McCutcheons at the medical practice for 11 years. During that time, she was engaged in a four-year sexual affair with Buddy, but she asserted Defendant did not know about it until after Buddy was killed. Adams suggested during her testimony that Defendant had killed Buddy because Defendant had mismanaged the practice's finances.

¶ 7 A North Carolina Department of Revenue ("DOR") investigation showed that from May 2012 to June 2016, the practice failed to pay withholding taxes from employee paychecks to the DOR. Defendant was Buddy's office manager, was responsible for submitting withholding

taxes to DOR, and had failed to do so. The State theorized Defendant had killed Buddy to keep him from learning about the withholding tax deficit.

¶ 8 Buddy's brother, Richard McCutcheon, testified at trial. Richard was asked questions regarding his relationship with his oldest brother, Buddy. Richard was then asked, "How has [Buddy's] death affected you and your family?" Richard testified it was a "dark place," it was "terrible" and "tragic." Richard's wife, Rebekah, also testified. The prosecutor asked her how Buddy's death had affected Richard. Rebekah recounted Richard had locked himself in his room for weeks after the murder.

¶ 9 The jury heard testimony from detectives, neighbors, family, friends, co-workers, and associates. The jury asked to review several exhibits and deliberated 6.5 hours over the course of two days to reach a verdict. On 14 February 2021, the jury found Defendant to be guilty of first-degree murder. Defendant was sentenced to life imprisonment without the possibility of parole and timely filed this appeal.

II. Jurisdiction

¶ 10 This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issue

¶ 11 Whether the trial court committed plain error by admitting testimony from Buddy's brother concerning how Buddy's death had affected him.

IV. Argument

A. Plain Error Review

¶ 12 To preserve an issue for review, a party must have presented a timely motion or objection below, stating the specific grounds for the ruling desired, and have obtained a ruling. N.C. R. App. P. 10(a)(1). "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). Where a defendant does not challenge the admission of evidence on appeal, this Court is "necessarily required to assume that [the evidence] w[as] properly admitted[.]" *State v. Mumma*, 372 N.C. 226, 234, 827 S.E.2d 288, 294 (2019).

¶ 13 An unpreserved issue may be presented on appeal "when the judicial action questioned is *specifically and distinctly* contended to amount to plain error." N.C. R. App. P. 10(a)(4) (emphasis supplied).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said "the . . . mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Cummings, 352 N.C. 600, 616, 536 S.E.2d 36, 49 (2000) (citations and internal quotation marks omitted).

¶ 14 An "empty assertion of plain error, without supporting argument or analysis of prejudicial impact," is insufficient to warrant a review of the merits. *Id.* at 637, 536 S.E.2d at 61.

¶ 15 Also, "a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Crane*, 269 N.C. App. 341, 343, 837 S.E.2d 607, 608 (2020) (citation omitted). Eliciting the same or similar contested evidence on cross-examination waives the right to challenge the admission of that evidence on appeal. *State v. Wingard*, 317 N.C. 590, 599, 346 S.E.2d 638, 644 (1986).

¶ 16 Here, Defendant failed to object when the challenged testimony was admitted during Richard and Rebekah's direct examinations. Defense counsel elicited evidence of a similar nature about the impact of Buddy's death and Richard's grief upon cross examination. Amplified evidence about Richard's grieving was also admitted without objection during his redirect, which has not been challenged on appeal.

¶ 17 Defendant waived review of Richard's testimony by later eliciting evidence similar in nature during cross. *See id.* Regarding Rebekah's testimony, virtually the same evidence had been admitted previously without objection on Richard's redirect, which Defendant has not challenged and has abandoned. N.C. R. App. P. 28(a). This evidence is now deemed properly admitted. *See Mumma*, 372 N.C. at 234, 827 S.E.2d at 294. Defendant failed to preserve any issue concerning the admission of the challenged statements. *See* N.C. R. App. P. 10(a).

¶ 18 Defendant has failed to show plain error review is warranted when the separate, unchallenged admissions are essentially the same as the challenged evidence derived from Richard's and Rebekah's direct examinations. Defendant instead treats all of the evidence cumulatively in arguing plain error. *See State v. Lane*, 271 N.C. App. 307, 316, 844 S.E.2d 32, 40 (2020) (recognizing plain error review requires prejudice to be shown). Defendant failed to show that hers is an "exceptional case" warranting review or to demonstrate any prejudice therefrom. *Cummings*, 352 N.C. at 616, 536 S.E.2d at 49. Defendant failed to show this Court should review the merits of her asserted arguments.

B. Admitting Evidence

¶ 19 Defendant asserts the trial court erred by admitting into evidence certain statements by Richard and Rebekah McCutcheon during their direct examinations. Defendant argues the statements were irrelevant under Rule 401 and are inadmissible under Rule 402.

¶ 20 "A trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal." *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (2011) (citations omitted). Relevant evidence includes all "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). Generally, "[a]ll relevant evidence is admissible" and "[e]vidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2019). "[E]vidence need not bear directly on the question in issue if it is helpful to understand the conduct of the parties, their motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *State v. Roper*, 328 N.C. 337, 356, 402 S.E.2d 600, 611 (1991) (citation omitted).

¶ 21 "The jury's role is to . . . assess witness credibility[.]" *State v. Moore*, 366 N.C. 100, 108, 726 S.E.2d 168, 174 (2012). Hence, evidence impacting the jury's assessment of witnesses' credibility generally is always relevant under Rule 401. *See State v. Triplett*, 368 N.C. 172, 175, 775 S.E.2d 805, 807 (2015). Evidence "offered to explain the conduct of a witness [is] relevant and admissible[.]" *Roper*, 328 N.C. at 356, 402 S.E.2d at 611. Evidence may be "relevant to explain or rebut the evidence elicited by defendant through cross-examination of the State's witnesses." *State v. Cagle*, 346 N.C. 497, 507, 488 S.E.2d 535, 542 (1997).

1. Richard's Testimony

¶ 22 Defendant challenges Richard's statements describing the impact of his brother's death during his direct examination, stating it was a "dark

place," "terrible," "tragic," and John, his younger brother "still cries to this day."

¶ 23 Prior to Richard's testimony, Defendant had attempted to impeach Roxanne Whittington's credibility by suggesting potential bias and coordination among several of the State's witnesses, including Richard. Defendant elicited evidence suggesting that Whittington had spoken with Richard and others shortly after Buddy's murder, that Whittington learned from them about the criminal investigation into the medical practice's tax embezzlement. Roxanne's conversation with Richard had allegedly caused her to reach out to police and to conduct a second interview in August 2016, wherein she stated that she believed Defendant had murdered Buddy.

¶ 24 Later, during Richard's direct examination, the prosecutor revisited the issue, eliciting testimony from Richard that "it was about six or seven months after [Buddy's] death that [he] had finally talked to [Whittington]."

¶ 25 The prosecutor then asked, "How has [Buddy's] death affected you and your family?" Richard replied:

> It's been terrible. I can't -- I lost my only son two years before Buddy. And I can tell you, if anybody has children, there is nothing worse, I don't think, in this life. But a year later I lose my 18 year old grandson at my daughter's birthday party as well. . . . Then a year later Buddy's gone. It's a dark place. It's tragic. And I don't think words can explain it, but my little brother still cries, still cries to this day.

Defendant did not object nor move to strike any of Richard's answers.

¶ 26 Defendant attempted to impeach Richard's credibility during cross examination by referencing prior inconsistent statements he made to police in July 2016.

> [Defense counsel]: Okay. And he is a no-nonsense police officer. You can tell that by looking at him, correct?
>
> [Richard]: Yes, sir.
>
> [Defense counsel]: All right. So he doesn't have any reason to write down what you are calling to tell him, to write it down wrong?

> [Richard]: Okay.
>
> [Defense counsel]: Is that right?
>
> [Richard]: Probably. [Indecipherable.] I am sure he did what he thoughts (sic) was right.
>
> . . . .
>
> [Richard]: That's what it says. Yes, sir.
>
> [Defense counsel]: Well is that what you told him?
>
> [Richard]: I believe it was. I was crying. I was grieving. I don't remember any of this.
>
> [Defense counsel]: Okay.
>
> [Richard]: I take your word that it's what I said, but I can tell you right now when you lose your brother like this –
>
> . . . .
>
> [Richard]: – you are crying. You are in such pain. I can not remember any of this.

¶ 27 Defendant elicited testimony from Richard: "when you lose your brother like this . . . you are in such pain" and he could "not remember any" of the police interview.

¶ 28 The extent of Richard's grief after Buddy's death was relevant to explain or rebut the evidence Defendant had elicited during Whittington's cross-examination. That evidence suggested Richard had spoken with Whittington shortly after Buddy's death, supplied her with incriminating information that she had told the police, and had influenced Whittington's decision to conduct the second police interview in August 2016 wherein she stated she believed Defendant had murdered Buddy. *See Cagle*, 346 N.C. at 507, 488 S.E.2d at 542. The evidence was also admissible to provide the context for Richard's answer and for the jury to understand why it was unlikely Richard had spoken with Whittington until months after her August 2016 interview with officers. *Roper*, 328 N.C. at 356, 402 S.E.2d at 611. The testimony was further relevant to the jury's assessment of Richard's credibility as a State witness by providing a better understanding of any possible motives or biases. In view of the "great deference" afforded a trial court, the challenged testimony satisfied the low bar of logical relevance to allow admission. *See Lane*, 365 N.C. at 27, 707 S.E.2d at 223.

¶ 29 Even if the challenged statements were admitted in error, Defendant waived review and invited error by eliciting evidence of a similar nature during Richard's cross-examination. *See Crane*, 269 N.C. App. at 343, 837 S.E.2d at 608.

2. Rebekah's Testimony

¶ 30 Defendant challenges Rebekah's testimony that "Richard locked himself in his room for six weeks" when Richard believed it was only two weeks.

¶ 31 "Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness." *State v. Garcell*, 363 N.C. 10, 39, 678 S.E.2d 618, 637 (2009) (citations and internal quotation marks omitted).

¶ 32 The prosecutor asked Richard about his behavior following his brother's death during his redirect examination. Richard explained he did not interact with family much, spending most of his time in his bedroom grieving. Defendant has not challenged the admission of this evidence.

¶ 33 Rebekah testified after her husband, Richard. During Rebekah's direct examination, the prosecutor revisited the issue and asked what Rebekah had observed about Richard's behavior following Buddy's death. Rebekah testified that Richard had locked himself in his room for weeks, he was "heart broken," she did not "think [Richard] knew how to deal with . . . the grief," and that it was "horrible."

¶ 34 It is relevant that Richard's grief from his brother's death rendered him unwilling to communicate even with his family for weeks. That evidence of Richard's grief is relevant to rebut the evidence Defendant elicited concerning the timeline of Richard's communication with Whittington, and whether Richard influenced her to conduct the August 2016 police interview.

¶ 35 Testimony of Richard's grief by Rebekah is also relevant as corroborative evidence admitted previously during Richard's redirect examination. Defendant attempted to impeach Richard's credibility further on cross-examination with prior inconsistent statements. Rebekah's testimony was more relevant for the jury's assessment of Richard's credibility. *See State v. Chapman*, 359 N.C. 328, 358, 611 S.E.2d 794, 818 (2005). Defendant's argument has no merit.

3. Victim-Impact Evidence

¶ 36 Victim-impact evidence includes the "nature and extent of any physical, psychological, or emotional injury suffered by the victim" or their

family "as a result of the offense committed by the defendant." N.C. Gen. Stat. § 15A-833(a)(1) (2019).

¶ 37 In *Graham*, the prosecutor asked a victim's mother—who was present when the defendant and an accomplice broke into her home at night and then witnessed the defendant stab her son multiple times—numerous questions during a lengthy colloquy during the guilt phase. *State v. Graham*, 186 N.C. App. 182, 187-89, 650 S.E.2d 639, 644-45 (2007).

¶ 38 This Court held the questions asked and the answers elicited, combined with the State's reference to the witness as a "second victim," constituted inadmissible victim-impact evidence irrelevant to the context or circumstances of the crime. *Id.* at 192, 650 S.E.2d at 646. In light of the entire record and evidence of the defendant's guilt, this Court applied the prejudicial standard under Section 15A-1443(a) and held there was no "reasonable possibility that the jury's verdict would have been different." *Id.* at 192, 650 S.E.2d at 647.

¶ 39 Here, Buddy's brothers were not present for his murder. The State did not ask the kinds of questions of them, similar to those asked in *Graham*. The challenged evidence was not only relevant for victim-impact purposes. Defense counsel elicited evidence that Buddy's brother, John, did not "want [Defendant] held responsible if she wasn't the one who did it." Defendant elicited testimony that John had tried to "keep some sort of contact with [Defendant] more than other people have" and "extended the benefit of the doubt to [Defendant] more than other people in the family[.]" Defendant failed to preserve these issues for appeal and they are dismissed.

C. Defendant's Burden to Show Prejudice

¶ 40 To establish prejudice, Defendant must show "after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 320–21 (2015) (citation omitted). "Defendant can show no prejudice where evidence of a similar import has also been admitted without objection and has not been . . . [challenged] on appeal." *State v. Trull*, 349 N.C. 428, 456, 509 S.E.2d 178, 197 (1998) (citation omitted).

¶ 41 Here, the uncontradicted evidence established each element of first-degree murder: Buddy was fatally shot in the back of his head with his gun by someone inside of his home while he was asleep. The critical issue before the jury was whether Defendant or someone else perpetrated the murder. Defendant acknowledged after the State rested "the elements of the crime are satisfied" and disputed only the fact of whether she was the perpetrator.

¶ 42 The jury heard testimony and evidence to support the facts that: (1) Defendant was in the home when Buddy was murdered; (2) Buddy had not been awoken by an intruder or their dog barking; (3) there were no signs of forcible entry and nothing appeared displaced; (4) the murder weapon was usually stored in the kitchen drawer among other miscellaneous items; and, (5) the weapon was later found discarded outside right next to the home.

¶ 43 Overwhelming circumstantial evidence links Defendant to Buddy's murder, that is wholly unrelated to evidence about Richard's or John's grief dealing with the unexpected death of their brother. No reasonable probability is shown, had the challenged statements been excluded, the jury would have acquitted Defendant of first-degree murder, had the challenged statements been excluded.

V. Conclusion

¶ 44 "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case." *Cummings*, 352 N.C. at 616, 536 S.E.2d at 49.

¶ 45 Defendant waived review by failing to object and by eliciting like testimony of which she complains. The testimony of Richard and Rebekah is relevant to support the witnesses' credibility. Defendant has failed to show prejudice. Defendant received a fair trial, free from prejudicial errors she preserved or argued. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judge GRIFFIN concurs.

Judge ARROWOOD concurs in result only.

STATE v. THOMAS

[281 N.C. App. 159, 2021-NCCOA-700]

STATE OF NORTH CAROLINA
v.
CHAN TAVARES THOMAS, DEFENDANT

No. COA20-402

Filed 21 December 2021

1. Evidence—hearsay—exception—past recollection recorded—interview with law enforcement—email to law enforcement

The trial court did not err in a murder trial by admitting an interview with a witness that had been recorded by law enforcement the night of the murder and a later email that the same witness dictated to a family member to send to law enforcement. Pursuant to Evidence Rule 803(5), there was sufficient evidence that the admissions accurately reflected the witness's knowledge at the time her thoughts were recorded, and she did not disavow the statements despite not recalling their contents when she testified.

2. Evidence—expert testimony—gunshot residue—reliability

The trial court did not abuse its discretion in a murder trial by admitting expert testimony regarding gunshot residue where the State sufficiently established the reliability of the expert's analysis pursuant to Evidence Rule 702(a). Despite defendant's argument that the expert failed to follow his own lab's protocols by testing the residue on defendant's hands outside the prescribed time period, the protocols contained an exception that permitted the delayed testing.

3. Appeal and Error—preservation of issues—reliability of evidence—issue not raised at hearing

In a murder trial, where defendant challenged the reliability of expert testimony on gunshot residue in his motion in limine, but failed to raise the specific ground before the trial court during voir dire of the expert and to obtain a ruling from the trial court, the issue was not preserved for appellate review.

4. Evidence—lay opinion—video footage—identification of defendant's car by officer

The trial court did not abuse its discretion in a murder trial by allowing a police officer to identify defendant's car from video surveillance footage based on the car's color and features, where the relevant guidelines regarding identification of events from video footage set forth in *State v. Belk*, 201 N.C. App. 412 (2009) and *State*

v. Buie, 194 N.C. App. 725 (2009), did not weigh in defendant's favor, particularly where the officer rested his opinion on firsthand knowledge of defendant's car from having seen it in person within only a few hours of the car having been recorded in the videos.

5. Evidence—prior consistent statements—testimony contradicted and did not corroborate another witness—plain error analysis

In a first-degree murder trial, there was no plain error in the admission of two statements by a witness (attributing statements to another witness about defendant's behavior and involvement in the crime) which were admitted as prior consistent statements where, although one of the statements contradicted the other witness's testimony and was therefore admitted in error as a prior consistent statement, and where the other statement may have also been admitted in error, defendant could not show prejudice because the same facts were presented to the jury from a different, admissible source.

6. Evidence—hearsay—then-existing state of mind—threat made by defendant against victim

There was no error in a first-degree murder trial by the admission of a statement, pursuant to Evidence Rule 803(3) (then-existing mental, emotional, or physical condition), that the deceased victim told a witness that defendant had threatened to kill him and his girlfriend, because the statement went beyond mere facts where the victim expressed being afraid of defendant due to the threat.

7. Evidence—relevance—murder trial—recovery of bullet from defendant's car—unconnected to the murder

In a first-degree murder trial, there was no plain error in the admission of testimony about a bullet recovered from defendant's car that was not connected to the murder for which defendant was being tried. Even though the testimony was irrelevant and was therefore admitted in error, defendant could not show prejudice where other evidence connected defendant with guns and the error had no probable impact on the guilty verdict.

Appeal by defendant from judgment entered on or about 6 March 2019 by Judge Michael J. O'Foghludha in Superior Court, Durham County. Heard in the Court of Appeals 13 April 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State.

Joseph P. Lattimore, for defendant.

STROUD, Chief Judge.

¶ 1 Defendant Chan Tavares Thomas appeals from a judgment entered following a jury trial finding him guilty of first degree murder, discharging a firearm into an occupied vehicle in operation inflicting serious bodily injury, and six counts of discharging a firearm into an occupied vehicle in operation. Defendant makes six arguments on appeal, of which three are plain error arguments, relating to hearsay exceptions, expert testimony, lay opinion testimony, and relevancy. Defendant also argues cumulative error. We find no error on four issues, no plain error on the remaining two issues because they did not prejudice Defendant, and no cumulative error.

I. Background

¶ 2 The State's evidence tended to show that on the evening of 2 December 2014, the victim, Kenneth Covington, and Demesha Warren, who had a long-term, on-again, off-again, non-exclusive sexual relationship with Defendant, were watching television together at Warren's apartment in Durham. Warren and Covington were friends from work, and while Warren denied they were in a romantic relationship, Warren's best friend from the time described Warren and Covington's relationship as romantic. Regardless of the true nature of the relationship, Defendant was jealous of Covington's relationship with Warren. For example, in August 2014, Defendant attacked Warren because of her relationship with Covington, and, upon seeing Covington and Warren driving around together one day, Defendant threatened to kill them if he ever saw them together again. As a result of those threats, Covington feared Defendant.

¶ 3 At one point during the night of 2 December, Covington took Warren's car to go to the store. Defendant somehow learned that someone else was driving Warren's car, and he came to her apartment to confront her about it. Warren refused to open her door for Defendant and told him from her patio to leave her alone. At that point, Defendant left Warren's apartment in his car, a gray or silver Acura. Warren tried to call Covington to tell him Defendant was in the neighborhood but could not reach him.

¶ 4 After Covington left the store and as he was driving back to Warren's apartment, a car later identified as Defendant's pulled alongside the car Covington was driving. Defendant then shot at Covington's car multiple times with a .40 caliber gun. Following the shooting, the car Covington

was in crashed about a block down the road, and a bystander found Covington unresponsive with bullet wounds. When EMS arrived at the scene, they pronounced Covington dead due to a gunshot wound in his left ribcage. At trial, the forensic pathologist who performed the autopsy confirmed that gunshot wound killed Covington.

¶ 5 The police, specifically Investigator James Barr, determined the car Covington was found in belonged to Warren and went to her apartment from the crime scene. Barr interviewed Warren and recorded that interview on a small digital recorder he carried. During the interview, Warren told Barr that Defendant had previously attacked her because of her relationship with Covington and Defendant had visited her apartment earlier that night. After the interview, Warren had her best friend at the time pick her up so that Warren could eventually go stay with her family in Fayetteville. When her friend picked her up, Warren told the friend, "that bastard killed him," which the friend took to mean that Defendant had killed Covington.

¶ 6 In addition to her interview with Barr the night of the murder, Warren provided a written statement to Barr a few days later at Barr's request. She spoke to a family member who transcribed her statement in an email. When Warren experienced technical problems sending the email, she eventually had a family member drive her to Durham where she handed the printed-out email to Barr in person and signed and dated it. The email statement recounted Warren's interactions with Defendant and Covington the day of the murder, including most pertinently that she watched television with Covington in the evening, Covington took her car to the store, and the interaction where Defendant asked Warren who was driving her car.

¶ 7 After concluding the interview with Warren the night of the shooting, Barr and other officers went to Defendant's residence. Upon arriving, Barr noticed Defendant's car, a gray or silver Acura with a sunroof, and based on his experience from past DWI cases, he felt under the hood and determined the car was still warm, indicating it had recently been driven. Barr then interviewed Defendant. Defendant told Barr he had been working that night and had gone to see a woman—other than Warren—but that he was home by 12:30am, before the shooting and car crash happened around 12:40am. Defendant did not initially mention he had gone to Warren's apartment, but when confronted by Barr with that information, Defendant admitted he had stopped by Warren's apartment, claiming the stop was related to concert tickets. Defendant also denied any involvement in Covington's murder and even denied knowing Covington. But Defendant admitted he knew what kind

of car Warren drove. Defendant also admitted that he was the only one who drove the Acura that was out front and that he was the only one using that car the night of the murder.

¶ 8 During and following the interview, Defendant allowed the police to collect forensic evidence. First, he volunteered the clothes he wore the night of the murder. Defendant also consented to a gunshot residue ("GSR") test on his hands and car. The GSR collection expert collected the GSR kits from Defendant's hands and car at about 6am in the morning. The collection expert also filled out a standard GSR analysis information form based on Defendant's answers; Defendant said he had not fired a gun recently or been in close proximity to a gun that was fired, had not washed his hands recently, and had been asleep for the past four to six hours before collection. The State's GSR expert testified at trial that the kit revealed characteristic GSR particles on Defendant's left hand and in his vehicle.

¶ 9 When Barr received the GSR results in early January 2015, he obtained an arrest warrant on the murder charge. Defendant refused to meet at the police headquarters, so Barr arranged to meet with Defendant at a gas station about an unrelated matter with the goal of arresting him for the murder without incident. Upon discovering Barr had a murder warrant, Defendant fled and evaded police in the ensuing pursuit. About a week later, officers in Burlington, North Carolina saw Defendant in their jurisdiction and arrested him without incident. When the police recovered Defendant's car, they searched it and found a .45 caliber bullet that did not match the weapon used in the murder of Covington. Defendant was charged with one count of first degree murder, one count of discharging a firearm into an occupied vehicle in operation inflicting serious bodily injury, and six counts of discharging a firearm into an occupied vehicle in operation.

¶ 10 At trial, the State presented this evidence along with additional evidence of Defendant's jail phone calls with Warren in which Defendant repeatedly blamed Warren for implicating him in the murder. Defendant and the State also clashed on a few issues at trial. First, because Warren testified that she could not remember in detail the events at issue due to trauma-induced memory loss from Covington's murder, the death of family members, losing her job, and being separated from her son, the State sought to introduce her prior statements to Barr, both the interview and the email statement, as well as her past statement to her friend implicating Defendant in Covington's murder. While Defendant did not object to the statement Warren made to her friend, Defendant objected to Warren's past statements to Barr on the grounds that Warren did not

remember making them. The State responded by asking the prior statements to Barr be read into evidence pursuant to Rule of Evidence 803(5) for past recorded recollection and Rule 804(b)(1) for former testimony because the statements were admitted at a prior trial.[1] The trial court ruled the past statements were admissible under Rule 803(5) because Warren had testified it was her statement, made while matters were fresh in her mind, that she could no longer remember because of the trauma and because she testified she told Barr everything that happened to her on that night.

¶ 11 Defendant also objected to the State presenting the GSR evidence, leading the trial court to hold a full GSR hearing. Defendant's motion, filed by former counsel, was based upon multiple grounds, including the State Crime Lab's failure to follow its own protocol in testing a GSR kit from Defendant as it was collected more than four hours after the shooting and the State Crime Lab's failure to establish the threshold levels of each GSR particle element. At the hearing, Defendant argued only the failure to follow protocol by collecting the GSR kit more than four hours after the shooting. After hearing from Barr, the GSR collection expert, the GSR expert, and an outside expert, the trial court ultimately ruled the GSR evidence was admissible. As relevant to the four-hour-protocol issue, the trial court found the State Crime Lab's protocol, as testified to by the GSR expert, requires evidence of incapacity on the GSR kit information form to test kits collected more than four hours after the shooting. The trial court found that evidence existed here because, as recorded on the form Defendant stated he had been sleeping at the relevant time. The trial court also found that the State Crime Lab's policy sought to avoid fruitless searches because more time between the shooting and collection makes it less likely GSR evidence will be found; as a result, finding GSR on Defendant's hands was more probative rather than less given the delay.

¶ 12 Finally, as relevant to the issues on appeal, Defendant objected to Barr's testimony about the color and features of the car in surveillance videos of the shooting and whether the car belonged to Defendant. Aside from sustaining the objection to a description of the car's color for one black-and-white video, the trial court overruled all Defendant's objections without additional explanation.

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1. Defendant was previously tried on these charges, and that case resulted in a hung jury. As we more fully address below, the trial court clarified it did not rely on the former testimony hearsay exception, so the prior trial has no impact on this appeal from the retrial.

¶ 13 Defendant did not offer any evidence at trial. The jury convicted Defendant of all eight counts. Defendant was sentenced to life imprisonment without parole for the first degree murder charge and to 83 to 112 months total on the seven discharging weapons counts. Pursuant to his notice of appeal in open court, Defendant appeals.

II. Witness Statements Admitted as Past Recorded Recollections

¶ 14 **[1]** Defendant first argues the trial court erred in admitting two of Warren's past statements—one recorded by Barr the night of Covington's murder and the other an email Warren later wrote to Barr—via North Carolina General Statute § 8C-1, Rule 803(5) because the State failed to meet the Rule's requirement that "the statements correctly reflected Warren's prior knowledge of the matters discussed." (Capitalization altered). Specifically, Defendant argues the State could not establish the accuracy of the statements "due to Ms. Warren's lack of memory about what she said." Defendant then argues he was prejudiced by the statements coming into evidence because without them, "there is a 'reasonable possibility' of a not guilty verdict." (Citing N.C. Gen. Stat. § 15A-1443(a) (2019).)

¶ 15 The State argues the statements were admitted not just under Rule 803(5), which concerns past recorded recollections, but also under Rule 804(b)(1), which covers prior testimony. N.C. Gen. Stat. § 8C-1, Rules 803(5) and 804(b)(1) (2019). The State's argument has two flaws. First, even assuming without deciding that Warren was unavailable as required by Rule 804(b), the statements would not be admissible under Rule 804(b)(1). N.C. Gen. Stat. § 8C-1, Rule 804(b). By its plain language, Rule 804(b)(1) only reaches "[t]estimony given as a witness at another hearing of the same or a different proceeding." *Id.* While the recording and email were apparently admitted at a prior trial, the State did not try to admit the past testimony from that prior trial. Rather the State sought to admit and later had read into the record the actual recording and email. Because the underlying statements, not the past testimony, were introduced and played for or read to the jury, Rule 804(b)(1) would not apply here.

¶ 16 Even if the Rule applied here, it is not clear we could even consider this alternative ground for admitting the past statements. The State argues the second potential grounds for admission is relevant because "[t]he burden is on the defendant to show that there was no proper purpose for which the evidence could be admitted." In making that argument, the State relies on *State v. Moseley*, 338 N.C. 1, 32, 449 S.E.2d 412,

431 (1994). However, the portion of *Moseley* the State cites is about Rule 404(b) specifically. *See id.* The burden is on the defendant to show no proper purpose only in the 404(b) context because "[t]he list of purposes in the second sentence of subsection (b) of Rule 404 is neither exclusive nor exhaustive." *Id.* Thus, we only analyze the basis of admission upon which the trial court relied. Here, while the trial court initially discussed Rule 804(b)(1)[2] as well, it clarified twice that the statements were admitted under Rule 803(5). Thus, we limit our analysis to Rule 803(5).

A. Standard of Review

¶ 17 "[A]dmission of evidence alleged to be hearsay is reviewed *de novo* when preserved by an objection." *State v. Harris*, 253 N.C. App. 322, 327, 800 S.E.2d 676, 680 (2017) (citing *State v. Wilson*, 197 N.C. App. 154, 159, 676 S.E.2d 512, 515 (2009)); *see also Wilson*, 197 N.C. App. at 159, 676 S.E.2d at 515 ("We review *de novo* the trial court's determination of whether an out-of-court statement is admissible pursuant to" Rule 803.). Defendant objected to the introduction of both the recording and the email on hearsay grounds. Thus, we review admission of both documents *de novo*, *i.e.*, "as if we were considering the issue for the first time." *State v. Brown*, 258 N.C. App. 58, 68, 811 S.E.2d 224, 231 (2018).

B. Analysis

¶ 18 Rule 803(5) provides that a type of out-of-court statement labeled "recorded recollection" is admissible as an exception to the general rule against hearsay. N.C. Gen. Stat. § 8C-1, Rule 803(5) (capitalization altered). While the Rule speaks of a "memorandum or record," the word record is broadly construed to include both audio and video recordings. *Wilson*, 197 N.C. App. at 160, 676 S.E.2d at 516 (holding "an audio recording can be admissible as a 'record' under Rule 803(5)"); *Harris*, 253 N.C. App. at 325–26, 800 S.E.2d at 679–80 (ruling a video interview of the State's witness by law enforcement "was properly introduced pursuant to Rule 803(5)"). "The rule applies in an instance where a witness is unable to remember the events which were recorded, but the witness recalls having made the entry at a time when the fact was fresh in her memory, and the witness knew she recorded it correctly." *Brown*, 258 N.C. App. at 68, 811 S.E.2d at 231 (quotations and citation omitted).

¶ 19 In prior cases, we have broken down Rule 803(5) into three foundational requirements. *Id.*, 258 N.C. App. at 68, 811 S.E.2d at 230–31 (citing

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2. The trial court says "803(1)" but this appears to have been a misstatement because the trial court discussed testimony at a prior trial, which is relevant to 804(b)(1). N.C. Gen. Stat. § 8C-1, Rule 804(b)(1).

N.C. Gen. Stat. § 8C-1, Rule 803(5)). Rule 803(5) permits a memorandum or record to be read into evidence where:

> (1) the witness once had knowledge about the matters he recorded, (2) the witness now has insufficient recollection to enable him to testify fully and accurately about those matters, and (3) the record was made or adopted by the witness at a time when the matters were fresh in his memory and reflected his knowledge correctly. N.C. Gen. Stat. § 8C-1, Rule 803(5).

Brown, 258 N.C. App. at 68, 811 S.E.2d at 230–31.

¶ 20 Here, the dispute centers on the third foundational requirement, specifically whether the records reflected Warren's knowledge correctly. Only that foundational requirement can be challenged based on the record before us. Warren once had knowledge about the matters recorded in both the video recording and the email statement because they involved events in her life concerning Defendant and the murder victim. Further, Warren did not at the time of trial have sufficient recollection that enabled her to testify fully and accurately about the matters in the statements. While Warren could remember speaking with Barr and giving him a statement at his urging, she could not remember the contents of either the conversation or the statement due to trauma-induced memory loss.

¶ 21 The caselaw on whether the record correctly reflected the witness's knowledge at the time involves the far sides of the spectrum. On the one end, this Court has ruled the record did not correctly reflect the witness's knowledge at the time where the witness disagreed with or disavowed their prior statements on the stand. *See Wilson*, 197 N.C. App. at 160–61, 676 S.E.2d at 516 (witness testified anything she said was "not going to be credible because really my mental state, I [was] liable to say anything") (emphasis removed); *State v. Spinks*, 136 N.C. App. 153, 159, 523 S.E.2d 129, 133 (1999) (witness "disagree[d] with some of the statements found" in the prior recorded statement); *State v. Hollingsworth*, 78 N.C. App. 578, 581, 337 S.E.2d 674, 676–77 (1985) (witness testified the whole past recorded statement was "a lie. I lied . . . ."). One of those cases even involved a tape-recorded statement, leading this Court to clarify that the mere fact a statement is recorded is not enough to meet the requirement the statements contained therein reflected the witness's knowledge accurately at the time. *Wilson*, 197 N.C. App. at 161, 676 S.E.2d at 516.

¶ 22 On the other end of the spectrum, this Court has ruled that the record accurately reflected the witness's knowledge at the time when the person testified they recorded all the information they had at the time. *Brown*, 258 N.C. App. at 69–70, 811 S.E.2d at 231–32; *see State v. Leggett*, 135 N.C. App. 168, 173, 519 S.E.2d 328, 332 (1999) (ruling the foundational requirement was met when witnesses testified their past statements were accurate). This Court has ruled similarly when the witness had the chance to review the statement at the time and edit it as necessary, "thereby adopting it." *State v. Love*, 156 N.C. App. 309, 315, 576 S.E.2d 709, 712–13 (2003) (footnote omitted);[3] *see also Leggett*, 135 N.C. App. at 173, 519 S.E.2d at 332 (ruling the requirements of Rule 803(5) were satisfied when the witness "did recall reviewing and correcting the statement that the detective took from him, thereby adopting it.").

¶ 23 Unlike prior cases, this case involves a set of facts in the middle of the spectrum. Warren did not testify the statements were correct at the time, but she likewise did not disavow the statements on the stand. As to the recording, Warren testified she knew it was her voice in the recording, even if she did not know at the time she was being recorded. Warren also testified initially that she "was pretty much just ranting" before then stating she was "more so talking to Investigator Barr like he was my best friend, like he just needed to know what I had been through or something, I don't know." While Defendant seizes on the "just ranting" testimony, the testimony is not a direct disavowal of Warren's previous statement as seen in the cases where we have held Rule 803(5)'s requirements were not met. Looking to the continuation of Warren's answer, the reference to "ranting" appears to refer to Warren's emotional state rather than the truthfulness of her statement. She affirmatively stated at the end of this question that she was telling Barr "what I had been through" and agreed that she was "just laying it all out." Absent any direct statements indicating she was lying, we conclude that in telling Barr what she had been through and in "laying it all out," Warren was relaying information that "reflected [her] knowledge correctly." *Brown*, 258 N.C. App. at 68, 811 S.E.2d at 231.

¶ 24 Turning to the email statement, we reach a similar conclusion. As with the recording, Warren did not disavow the statement, but she also did not testify it accurately reflected her knowledge at the time. Warren "was talking to a family member and telling them and because they knew

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3. This case found no abuse of discretion on those facts, rather than reviewing the issue *de novo*. *Love*, 156 N.C. App. at 315, 576 S.E.2d at 713. Our use of *de novo* review is based on more recent caselaw cited in the standard of review subsection above.

that Investigator Barr needed it, that's what happened." Based on that testimony, it appears Warren dictated the statement to a family member. In the past, this Court has allowed statements written by others to come in as a witness's statement when the witness had a chance to review the statement. *See Love*, 156 N.C. App. at 315, 576 S.E.2d at 713; *Leggett*, 135 N.C. App. at 173, 519 S.E.2d at 332. While Warren did not expressly testify she reviewed the statement, she signed and dated the statement when she handed it to Barr and confirmed it was her handwriting. This Court previously considered signing and dating a statement, albeit one written by the witness, to support a finding that the written statement correctly reflected the witness's prior knowledge. *See Brown*, 258 N.C. App. at 69–70, 811 S.E.2d at 231–32. While again this is a close call, we conclude that the State presented enough information about the email statement to show Warren was relaying information that correctly reflected her knowledge. *See id.*, 258 N.C. App. at 68, 811 S.E.2d at 231.

¶ 25 After *de novo* review, we find no error in admitting either of Warren's prior statements under Rule 803(5) because there is enough evidence for us to conclude Warren's past statements correctly reflected her knowledge at the time.

III. Gunshot Residue Expert Testimony

¶ 26 Defendant next argues the trial court erred in admitting evidence from the State's gunshot residue ("GSR") expert's analysis because "the State failed to meet its burden of establishing the reliability of the analysis." Defendant contends the GSR expert's analysis was not reliable in two different ways.

¶ 27 First, Defendant alleges the expert failed to follow his own laboratory's protocols "regarding the time between the alleged discharge of a firearm and the swabbing of persons/ objects for testing." In making that argument, Defendant relies heavily on *State v. Corbett*, 269 N.C. App. 509, 839 S.E.2d 361 (2020), *aff'd* 376 N.C. 799, 2021-NCSC-18[4], where this Court agreed with the defendant's argument that an expert was unreliable if he failed to follow his own admitted reliability standards. Defendant here cites to the expert's testimony that the lab's policy was not to analyze a kit if more than four hours had passed since a shooting, except in the case of incapacitation, including sleeping, or death. Defendant then states the GSR expert analyzed the swabs despite their

4. Because the dissent in this Court focused on whether the defendant had preserved the issue about the reliability of the expert's testimony, the Supreme Court addressed only that topic. *Corbett*, ¶¶ 52–53. Therefore, the substantive analysis of this Court still stands.

collection five hours and forty-one minutes after the shooting because Defendant was allegedly sleeping. Defendant argues the trial court erred because "there was other evidence indicating that [Defendant's] activities would not meet the definition of death or other incapacitation," but the expert failed to follow protocol and performed the GSR analysis anyways. Ultimately, according to Defendant, that failure to follow protocol means the expert's opinion, as in *Corbett*, "was 'based upon insufficient facts and data, and accordingly, could not have been the product of reliable principles and methods applied reliably to the facts of this case.' " (Citing *Corbett*, [269 N.C. App. at 558, 839 S.E.2d at 398].)

¶ 28 Defendant also argues the expert failed to follow his lab's protocols regarding "the threshold amount values of barium, antimony, and lead," *i.e.*, the GSR particles. Defendant indicates the State's expert and the trial judge did not address the topic, even though it was in Defendant's motion, and thus "the State failed to meet its burden of establishing the reliability of the analysis."

¶ 29 Defendant argues the alleged errors prejudiced him because "this error affected the live issue of whether [Defendant] was the person who gunned down Mr. Covington." Defendant further argues prejudicial error is more likely on an expert issue because "of the heightened credence juries tend to give scientific evidence." (Quoting *State v. Helms*, 348 N.C. 578, 582–83, 504 S.E.2d 293, 295–96 (1998).)

A. Standard of Review

¶ 30 "A trial court's ruling as to the admissibility of proffered expert testimony will not be reversed on appeal absent a showing of abuse of discretion." *Corbett*, ¶ 51 (citations and quotations omitted). "[A] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citing *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)).

B. Analysis

¶ 31 Under Rule 702(a), expert testimony must satisfy three tests to be admissible:

> First, the area of proposed testimony must be based on "scientific, technical or other specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue."

> . . . .
>
> Second, the witness must be "qualified as an expert by knowledge, skill, experience, training, or education."
>
> . . . .
>
> Third, the testimony must meet the three-pronged reliability test that is new to the amended rule: "(1) The testimony [must be] based upon sufficient facts or data. (2) The testimony [must be] the product of reliable principles and methods. (3) The witness [must have] applied the principles and methods reliably to the facts of the case."

McGrady, 368 N.C. at 889–90, 787 S.E.2d at 8–9 (quoting N.C. Gen. Stat. § 8C-1, Rule 702(a) (2019)) (brackets in original). "In other words, North Carolina's Rule 702(a) now incorporates the standard from the *Daubert* line of cases." *Id.*, 368 N.C. at 888, 787 S.E.2d at 8 (referencing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993)). Defendant's arguments here focus only on the third requirement, reliability.

¶ 32 While the reliability test has three specific components drawn from the text of Rule 702(a), N.C. Gen. Stat. § 8C-1, Rule 702(a)(1)–(3), "[t]he precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152–53, 119 S. Ct. 1167 (1999)).

> The primary focus of the inquiry is on the reliability of the witness's principles and methodology not on the conclusions that they generate. However, conclusions and methodology are not entirely distinct from one another, and when a trial court concludes that there is simply too great an analytical gap between the data and the opinion proffered, the court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.

Id. (quotations, citations, and alterations omitted).

¶ 33 Our Supreme Court has given guidance on how the trial court *may* test reliability:

> Many previous cases, both federal and state, articulate particular factors that may indicate whether or not expert testimony is reliable.
>
> . . . .
>
> In the context of scientific testimony, *Daubert* articulated five factors from a nonexhaustive list that can have a bearing on reliability: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) the theory or technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has achieved "general acceptance" in its field. *Daubert*, 509 U.S. at 593–94, 113 S.Ct. 2786.
>
> . . . .
>
> . . . . In some cases, one or more of the factors that we listed in *Howerton* may be useful as well. *See Howerton* [*v. Arai Helmet, Ltd.*], 358 N.C. [440,] 460, 597 S.E.2d [674,] 687 (listing four factors: use of established techniques, expert's professional background in the field, use of visual aids to help the jury evaluate the expert's opinions, and independent research conducted by the expert).

McGrady, 368 N.C. at 890–91, 787 S.E.2d at 9–10. Ultimately, the trial court has discretion "to consider any of the particular factors articulated in previous cases, or other factors it may identify, that are reasonable measures" to test the three reliability prongs in Rule 702(a)(1)–(3). *Id.*, 368 N.C. at 892, 787 S.E.2d at 10.

¶ 34 Applying those legal principles, we address each of Defendant's two allegations that the State's GSR expert failed to follow his lab's protocol in turn.

1. Four-Hour Protocol

¶ 35 **[2]** Defendant first argues the trial court erred in admitting the State GSR expert's testimony on reliability grounds because he failed to follow his lab's protocols regarding testing material collected more than four hours after a shooting. Defendant relies heavily on this Court's opinion in *Corbett* that held the trial court abused its discretion in admitting

expert testimony where the expert failed to follow the method he testified was appropriate when conducting blood pattern analysis. *See id.*, 269 N.C. App. at 554–55, 558, 839 S.E.2d at 396–98. This Court also explained, "noncompliance with the reliability standards and protocol prescribed in one's own treatise is inherently suspect . . . ." *Id.*, 269 N.C. App. at 555, 839 S.E.2d at 396. Defendant analogizes that case to the alleged failure of the State's expert to follow his lab's policies around not testing if there are delays in collecting GSR evidence after a shooting, except in certain circumstances, here.

¶ 36 Defendant reads *Corbett* correctly. A trial court abuses its discretion in finding an expert reliable when the expert fails to follow the protocols she testifies are appropriate. *Id.*, 269 N.C. App. at 554–55, 558, 839 S.E.2d at 396–98; *see also McGrady*, 368 N.C. at 898–99, 787 S.E.2d at 14–15 (finding no abuse of discretion when the trial court excluded an expert's proffered testimony because the expert acknowledged variables that could affect his opinions but then did not consider one of those factors in arriving at his conclusion in the case). However, Defendant's argument fails because that is not the situation the trial court faced here.

¶ 37 The State's GSR expert testified during voir dire that the State Crime Lab, his employer, has a technical procedure that if more than four hours elapsed between the time of the shooting and time of collection of the GSR kit, the Lab will not examine the kit. But there is an exception to that rule, which allows the kit to be examined if the person from whom the evidence was collected was incapacitated or deceased during the time between the shooting and the collection. The Lab defines incapacitation as "[a]nything that limits mobility," including sleep. Under questioning by the trial court, the expert clarified that the technical procedure directs GSR analysts to test the kit if information on the GSR analysis information form, which is collected by the person who administers the kit, indicates evidence of incapacitation:

> Q. Okay. Protocol of the lab is if more than four hours have elapsed from the time of shooting to the time of testing on a living active person, it will not be tested.
>
> A. Can I read it from the technical procedure?
>
> Q. Yeah.
>
> A. One moment, please. GSR collection kits –
>
> Q. Go slower.
>
> A. Gunshot residue collection kits that meet one or more of the following criteria shall not be examined and a report shall be generated. One of those

> reasons is the gunshot residue analysis information form revealed that a time greater than four hours had elapsed between discharge of firearm and collection of gunshot residue hand kit. And then underneath it says, this does not apply to gunshot residue hand kits collected from incapacitated or deceased subjects.
>
> Q. Okay. So if -- to put it in sort of plain English, *if on the form itself there is evidence of incapacitated, and it's more than four hours, you will test the kit?*
>
> A. *That's correct.*

(Emphasis added.) The GSR expert explained that as a result, he has to "go by the information that's given to me regarding how to proceed." In other words, the State Crime Lab's technical procedure allows an analyst to test a kit collected greater than four hours after a shooting if the analyst is given information that the person from whom the evidence was collected was incapacitated.

¶ 38 Turning to Defendant's GSR kit and the expert applying that procedure, the GSR information form indicated that five hours and forty-one minutes elapsed between the time of the shooting and the time the GSR kit was collected. Thus, under the State Crime Lab's procedures, the GSR kit should not have been analyzed absent a showing of, *inter alia*, incapacitation based on the information on the GSR information form. Defendant told the person collecting the GSR kit from him that he had been sleeping, and the person collecting the kit wrote that on the GSR information form, thereby providing such evidence of incapacitation. As a result, the State's GSR expert followed the policies of the State Crime Lab in analyzing the kit.

¶ 39 In making its ruling, the trial court relied on the same facts in finding that the GSR expert did not violate the State Crime Lab protocol. In particular, the trial court found:

> Now as to what the -- what the protocol of the State Crime Lab, the Court finds that the protocol of the State Crime Lab in 2014 was that gunshot residue testing should not be conducted after four hours of an alleged shooting unless there was evidence of incapacity or someone being deceased.
>
> The Court finds that -- that the protocol was that if there was evidence of incapacity, then the kit could be examined. And in this case, according to the form which was filled out, there was evidence of incapacity

> from [Defendant], namely that between the time that he had come home at 12:30 and the time that he'd been woken up that he'd been sleeping.

The trial court further explained that the purpose of the State Crime Lab's protocol is to avoid "fruitless searches" because the longer time between the shooting and collection, the less likely it becomes any analysis will find GSR due to dissipation. Thus, the trial court concluded finding GSR on Defendant's hands was more probative rather than less probative given the delay. The trial court's analysis aligns with our own review of the testimony, so its ruling was not manifestly unsupported by reason and therefore was not an abuse of discretion.

¶ 40 Defendant's argument to the contrary fails because it does not appreciate the nuance of the State Crime Lab's procedure. Defendant argues "there was other evidence indicating that [Defendant's] activities would not meet the definition of death or other incapacitation." The State Crime Lab's procedure does not consider other evidence; as the trial court explained, it only considers evidence on the GSR information form. By following the information from the form, the expert followed State Crime Lab policy as required for the evidence to be reliable and thereby admissible. *See McGrady*, 368 N.C. at 890, 787 S.E.2d at 9; *Corbett*, 269 N.C. App. at 554–55, 558, 839 S.E.2d at 396–98. If Defendant wanted to bring up the other evidence showing he was not sleeping as he told the GSR collection expert, he could have challenged the reliability of the test results by other means. *See State v. Griffin*, 268 N.C. App. 96, 108, 834 S.E.2d 435, 442 (2019) ("We note that 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking admissible evidence. [Citation] These conventional devices, rather than wholesale exclusion are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.' " (alterations from original excluded) (citing *Daubert*, 509 U.S. at 596, 113 S. Ct. 2786)).

¶ 41 We find the trial court did not abuse its discretion in admitting the testimony of the State's GSR expert because he followed the State Crime Lab's procedures as required to meet Rule 702(a)'s reliability requirement.

2. Threshold Amounts of GSR Elements

¶ 42 **[3]** Defendant also argues the trial court abused its discretion in admitting testimony from the State's GSR expert because the expert "never established that the data satisfied the additional protocol requirement of threshold levels of the elements" that make up GSR. Defendant included this ground for objecting to the State's GSR expert in his initial

motion in limine, but Defendant did not include it when summarizing the motion during voir dire of the expert. After the second time Defendant summarized the motion, the trial court asked if the basic grounds of the motion were, "essentially that as far as the hands go that was outside the protocol of the state crime lab, which is four hours[?]" Defendant's attorney responded, "Yes, sir, that's exactly right." Based on this sequence of events, while Defendant raised the threshold levels issue in his motion, he did not present this issue to the trial court at the hearing. As a result, it is unsurprising that the trial court never ruled on the threshold levels issue.

¶ 43 The Appellate Rules require a party to preserve issues for appeal by presenting a request, and "[i]t is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10(a)(1). Rule 10(a)(1)'s requirement to obtain a ruling extends to situations where the party had multiple grounds in its initial motion but only got a ruling on one. *See State v. Warren*, 244 N.C. App. 134, 148–49, 780 S.E.2d 835, 844–45 (2015) (holding defendant failed to preserve an argument for appeal as to two witnesses when his motion to continue was based on three witnesses but he only got a ruling as to one witness and failed to ask for a ruling on the other witnesses). Thus, because Defendant failed to obtain a ruling from the trial court on his threshold levels issue, the issue is not preserved for our review under Rule 10(a)(1).

IV. Lay Opinion Testimony about Car Color

¶ 44 **[4]** Defendant's third argument is that the trial court erred by allowing Investigator Barr "to give lay opinions about the color and other features [a sunroof] of one of the cars depicted in video footage" of the shooting at issue. (Capitalization altered.) In making this argument, Defendant relies heavily on *State v. Belk* and *State v. Buie*. *Belk*, 201 N.C. App. 412, 689 S.E.2d 439 (2009); *Buie*, 194 N.C. App. 725, 671 S.E.2d 351 (2009). Defendant relies on *Belk* to argue a lay witness can only give an opinion about the contents of a video when there is a rational basis for concluding the witness is more likely than the jury to correctly identify what was shown. Defendant then cites *Buie* as an example of a case where the trial court impermissibly allowed a lay witness to narrate a surveillance tape because the police officer did not have firsthand knowledge of what the video depicted. Defendant contends this case is just like *Buie* because Barr did not observe the events depicted in the video. Defendant argues it was therefore error to "permit Investigator Barr to give his opinions about what he was observing on the videos." Defendant finally

argues the error prejudiced him, especially because jurors give "significant weight" to opinion testimony from police officers. (Citing *Belk*, 201 N.C. App. at 418, 689 S.E.2d at 443.)

A. Standard of Review

¶ 45 We review the trial court's decision to admit lay opinion testimony for abuse of discretion. *See State v. Williams*, 363 N.C. 689, 701, 686 S.E.2d 493, 501 (2009) (applying the abuse of discretion standard when the defendant argued testimony was "inadmissible lay opinion testimony"); *see also Belk*, 201 N.C. App. at 417, 689 S.E.2d at 442 ("We review a trial court's ruling on the admissibility of lay opinion testimony for abuse of discretion.").

B. Analysis

¶ 46 "Ordinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury." *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980). That general rule exists because "the jury is charged with determining what inferences and conclusions are warranted by the evidence." *Buie*, 194 N.C. App. at 730, 671 S.E.2d at 354 (citing *State v. Peterson*, 225 N.C. 540, 543, 35 S.E.2d 645, 646 (1945), *overruled in part on other grounds by State v. Hill*, 236 N.C. 704, 73 S.E.2d 894 (1953)). North Carolina Rule of Evidence 701 carves out an exception for lay opinion testimony that "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2019). As Defendant correctly identifies, *Buie* and *Belk* are the leading cases on lay opinion testimony related to events depicted in a video.

¶ 47 In *Buie*, this Court reviewed a police officer's narration of surveillance tapes and opinion on what the tapes showed. 194 N.C. App. at 730, 671 S.E.2d at 354. This Court recognized:

> The current national trend is to allow lay opinion testimony identifying the person, usually a criminal defendant, in a photograph or videotape where such testimony is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury's fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony.

Id. (citation and quotations omitted). The *Buie* court then determined based on past case law that lay opinion testimony about what video depicts is only admissible "when their [the witnesses'] interpretations were based in part on firsthand observations." 194 N.C. App. at 732, 671 S.E.2d at 356.

¶ 48 To support that conclusion, the *Buie* court relied on two cases, *State v. Mewborn* and *State v. Thorne*. *Mewborn*, 131 N.C. App. 495, 507 S.E.2d 906 (1998); *Thorne*, 173 N.C. App. 393, 618 S.E.2d 790 (2005). As recounted by the *Buie* court, the lay opinion testimony in *Mewborn* was admissible because the officer testified markings on the perpetrator's shoes in the video were very similar to markings on the defendant's shoes the officer had seen when the defendant was questioned by police. *Buie*, 194 N.C. App. at 732, 671 S.E.2d at 356 (citing *Mewborn*, 131 N.C. App. at 499, 507 S.E.2d at 909). Similarly, in *Thorne*, this Court upheld the admission of a police officer's opinion that the perpetrator's "gait" in a "lost surveillance video" was similar to the defendant's gait based on the officer's past observation of the defendant's gait. *Id.*, 194 N.C. App. at 733, 671 S.E.2d at 356 (citing *Thorne*, 173 N.C. App. at 399, 618 S.E.2d at 795). Thus, *Buie*'s firsthand knowledge requirement allows a witness to have firsthand knowledge of the person being identified; it does not require the witness to have observed firsthand the events depicted in the video. *Id.*

¶ 49 Based on those legal rules, the *Buie* court concluded that the police officer's testimony had been admitted in error. *Id.* The police officer did not base his testimony "on any firsthand knowledge or perception" but instead testified based exclusively on his viewing of the video. *Id.* This Court emphasized that the officer "was not offering his interpretation of the similarities between evidence he had the opportunity to examine firsthand and a videotape" but instead opined that the actions in the video aligned with another witness's testified-to "recollection" of the crime. *Id.*

¶ 50 In *Belk*, this Court provided trial courts additional guidance on lay opinion testimony and videos by laying out several factors the courts can consider. 201 N.C. App. at 415–16, 689 S.E.2d at 441–42. Specifically, courts are to consider:

> (1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance photograph was taken or when the defendant was dressed in a manner similar to the individual

> depicted in the photograph; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant had altered his appearance prior to trial.
>
> . . . .
>
> . . . [as well as (5)] the clarity of the surveillance image and completeness with which the subject is depicted
>
> . . . .

Id. (quotations and citations omitted). Ultimately, a reviewing court must uphold the admission of "lay opinion testimony if there was a rational basis for concluding that [the witness] was more likely than the jury correctly to identify [the d]efendant as the individual in the" video. *Id.*, 201 N.C. App. at 417, 689 S.E.2d at 442.

¶ 51 The *Belk* court found the trial court erred in admitting the police officer's lay opinion testimony that the individual in the video was the defendant because there was no basis to say the officer was more likely to correctly identify the defendant than the jury. *Id.*, 201 N.C. App. at 418, 689 S.E.2d at 443. The court concluded most of the factors it listed weighed against admission because the defendant had not altered his appearance, the person in the footage was not in a disguise, and there was no issue with surveillance footage clarity. *Id.* Further, while the officer had seen the defendant before, she had only seen him briefly, at most when she passed the defendant in her patrol car. *Id.*

¶ 52 Here, Investigator Barr did not identify Defendant in the video footage but rather was describing a car in the videos. Still, the principles regarding identification from *Buie* and *Belk* apply. First, we have found no cases in which a defendant challenged lay opinion testimony identifying a car as the defendant's car in video footage, but the general identification principles translate. Second, Barr was identifying the car in the video as Defendant's car. Barr had earlier in his testimony described Defendant's car as "a 2002, silver or gray Acura" with a sunroof. Thus, when Barr described the car in the videos as "silver or gray" and as having a sunroof, he was identifying the car in the videos as Defendant's car.

¶ 53 Turning to the requirements of *Buie* and *Belk*, the trial court had a rational basis for concluding Barr was more likely than the jury to correctly identify the car in the videos as Defendant's car. *See Belk*, 201 N.C. App. at 417, 689 S.E.2d at 442. Focusing on *Belk*'s first factor and the key requirement of *Buie*, Barr had prior firsthand knowledge of Defendant's car that he subsequently identified in the videos. Barr viewed the car in the early morning hours after the shooting and, based on his experience

from DWI cases while a patrol officer, had felt under the hood of the car to determine how recently it was driven. Beyond that initial check of the vehicle, Barr also stood near the vehicle and watched as the person who collected the GSR samples from the vehicle did her work. This is similar to *Mewborn* because Barr saw Defendant's car around the time he questioned Defendant, and, as in *Mewborn*, that provided sufficient firsthand knowledge for Barr to subsequently identify Defendant's car in surveillance videos. *Buie*, 194 N.C. App. at 732, 671 S.E.2d at 356 (citing *Mewborn*, 131 N.C. App. at 499, 507 S.E.2d at 909).

¶ 54 Beyond the first factor weighing heavily against him, *Belk*'s remaining factors are neutral at best for Defendant. *Belk*'s second factor weighs in favor of permitting the testimony because Barr saw Defendant's car mere hours after the videos in which he identified the car as Defendant's car were taken. To the extent it applies to a car, *Belk*'s third factor, disguise, tilts towards Defendant because the car in the video does not appear to have been disguised. The fourth *Belk* factor, alteration of appearance, does not apply here because unlike a defendant who would be in the courtroom, Defendant's car was not observed contemporaneously by the jury at trial. Finally, as to *Belk*'s fifth factor, we have no evidence about the quality of the video. Thus, the other factors produce an even split for Defendant at best.

¶ 55 Based on this review of the factors relevant in *Buie* and *Belk*, the trial court did not abuse its discretion in allowing Barr to identify Defendant's car by color and by its sunroof in the relevant videos. Contrary to Defendant's contention, Barr had the required firsthand knowledge because he was familiar with Defendant's car from viewing it in person before his testimony. As the *Buie* court made clear, Barr did not need to have firsthand knowledge of the events depicted in the videos; he only needed to have firsthand knowledge of Defendant's car so that he could "offer[] his interpretation of the similarities between evidence he had the opportunity to examine firsthand" and the videos. *See Buie*, 194 N.C. App. at 733, 671 S.E.2d at 356 (finding error because the witness was not able to do that). Because the trial court did not abuse its discretion, we find no error as to the lay opinion testimony issue.

V. Plain Error Analysis

¶ 56 Defendant's three remaining arguments all contend the trial court committed plain error in making various evidentiary rulings. Because the plain error standard of review is the same for all three arguments, we first lay out that standard before analyzing each separate argument.

A. Standard of Review

¶ 57 The plain error standard of review applies to unpreserved evidentiary errors. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). 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. (quotations, citations, and alterations omitted). In other words, to prevail on plain error, a defendant must show not just that an error occurred but also that the error prejudiced him. *See id.* (describing how prejudice is necessary "[f]or error to constitute plain error"); *see also State v. Fisher*, 171 N.C. App. 201, 208, 614 S.E.2d 428, 433 (2005) ("A prerequisite to our engaging in a 'plain error' analysis is the determination that the [trial court's action] constitutes 'error' at all." (quoting *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468 (1986) (alterations in original))).

B. Prior Consistent Statements

¶ 58 **[5]** Defendant first argues the trial court plainly erred in admitting testimony by Tiffany Alston to corroborate testimony by Warren because "Warren's testimony directly conflicted with that of" Alston. Defendant contends that Warren's testimony contradicted two statements that Alston attributed to Warren while testifying. First, Alston testified Warren told her that Defendant confronted Warren over her relationship with the victim, but Defendant claims Warren never "state[d] that there was tension between" her and Defendant over her relationship with the victim and that Warren testified she could not recall a dispute over the subject. Second, Alston testified Warren told her the night of the shooting that "the bastard killed him"[5] with Alston believing Warren was referring to Defendant, but Defendant contends Warren testified that she

5. Defendant misquotes Alston's testimony. She testified Warren said, "*that* bastard killed him" not "the bastard killed him." (Emphasis added.)

never "pointed the finger at" Defendant, "including in her conversations with Ms. Alston." Defendant argues that because the statements Alston attributed to Warren did not add weight or credibility to Warren's testimony, and in fact "were contradictory" to such testimony, they "were improperly admitted under the guise of corroboration." (Quotations and citations omitted).

¶ 59 Defendant further asserts this error constituted plain error because it prejudiced him. Defendant first argues, relying on *State v. Coleman*, 227 N.C. App. 354, 742 S.E.2d 346 (2013), that "plain error is more likely to be found when the error impacts 'the only controverted issue' in the case," as he alleges it did here where "the live issue for the jury was the identity of the killer." Defendant further claims "the State's other evidence pointing to [Defendant's] guilt was not overwhelming" such that "the erroneously admitted evidence likely tipped the scales in favor of the State." (Quotations and citations omitted.)

¶ 60 While prior consistent statements are out-of-court statements, they are nonetheless admissible because they are "not offered for their substantive truth and consequently [are] not hearsay." *State v. Levan*, 326 N.C. 155, 167, 388 S.E.2d 429, 435 (1990). "To be admissible, the prior consistent statement must first, however, 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 (quotations and citation omitted); *see also Williams*, 363 N.C. at 703, 686 S.E.2d at 503 ("Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness.") (quotations and citations omitted). The prior statement can also contain new information that adds weight or credibility because the corroborative testimony must only be "generally consistent with the witness's testimony" such that "slight variations will not render it inadmissible." *Williams*, 363 N.C. at 704, 686 S.E.2d at 503. But a past statement is not admissible as a prior consistent statement if it "actually directly contradict[s] . . . sworn testimony." *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 212 (1991) (quotations and citation omitted) (ellipses in original); *see also State v. Stills*, 310 N.C. 410, 416, 312 S.E.2d 443, 447 (1984) (finding error when statements meant to be corroborative "in part . . . contradicted the substantive testimony").

¶ 61 Here, we address each of the two challenged instances in turn. Defendant first challenges Alston's testimony that Warren told her Defendant confronted Warren over her relationship with the victim. On this subject, Warren testified that she never talked with Defendant

about her relationship with the victim and that she could not recall a 2014 incident when there was a dispute over that relationship. Alston testified that Warren told her Defendant had argued with Warren, taken her phone, and hit Warren because of her relationship with the victim. Thus, Alston's testimony about Warren's past statements was not admissible as a prior consistent statement because it contradicted Warren's sworn testimony. *See McDowell*, 329 N.C. at 384, 407 S.E.2d at 212 (stating a past statement is not admissible as a prior consistent statement when it contradicts sworn testimony). As a result, the trial court erred in admitting Warren's prior statements to Alston on this subject as prior consistent statements.

¶ 62 The trial court did not, however, plainly err because Defendant cannot show the required prejudice. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (requiring a defendant to demonstrate prejudice "[f]or error to constitute plain error"). The facts in Warren's past statement to Alston came into evidence through other means, specifically Warren's recorded statement to Barr the night of the shooting that we already determined was properly admitted. Since the jury heard the same facts from a different, admissible source, Defendant cannot show the error in admitting Alston's testimony about Warren's past statements on the subject "had a probable impact" on the jury finding Defendant guilty. *Id.* Therefore, the trial court did not plainly err in admitting Alston's testimony about Warren's past statements that Defendant confronted Warren over her relationship with the victim.

¶ 63 Turning to the second challenged instance—Alston's testimony that Warren told Alston the night of the murder, "that bastard killed him"—we reach a similar conclusion. Alston testified Warren told her "that bastard killed him" and Alston believed Warren was talking about Defendant. When asked about her actions the night of the shooting, however, Warren testified she did not ever blame Defendant or intend to blame him for the shooting.

¶ 64 Assuming *arguendo* the trial court erred in finding Alston's testimony about Warren's past statement to be admissible as a prior consistent statement, the trial court did not plainly err. First, the most damaging part of Alston's testimony was not Warren's past statement but rather Alston's interpretation of the statement as referring to Defendant. Second, the jury heard other evidence indicating Warren was the source of the police's suspicions about Defendant because Investigator Barr testified that the night of the shooting Warren told him about her ex, *i.e.*, Defendant, and then the police decided to go to Defendant's residence. Third, the State presented other significant evidence identifying

Defendant as the perpetrator. Looking just at the evidence we have already reviewed, Warren's statements to Barr reveal Defendant was jealous of Warren's relationship with the victim to the point of violence, Defendant knew the victim was driving Warren's car around the time of the murder, the car Defendant admitted to driving was captured on surveillance footage of the shooting, and Defendant and his car tested positive for GSR particles mere hours after the shooting. Based on all this evidence, Defendant cannot show prejudice. *See id.*, 365 N.C. at 519, 723 S.E.2d at 334–35 (finding no prejudice when evidence against defendant was overwhelming). Therefore, we conclude the trial court did not plainly err on this second subject either.

C. Victim's Statement that Defendant had Threatened to Kill Him

¶ 65 **[6]** Defendant next argues the trial court plainly erred in permitting testimony about the victim telling a witness that Defendant had threatened to kill the victim and Warren. Defendant contends this testimony was hearsay that did not fit within the exception in North Carolina General Statute, § 8C-1, Rule of Evidence 803(3), which allows a statement of the declarant's then-existing state of mind. Defendant alleges Rule 803(3) does not apply here because it does not cover statements that merely recount factual events without emotion and the witness's testimony here showed the victim's statements "were devoid of the requisite emotion to be admitted . . . ." Defendant also argues this error prejudiced him by referring to his previous prejudice argument.

¶ 66 Rule 803(3) exempts from the bar against hearsay any of declarants' statements on then-existing mental, emotional or physical condition:

> The following are not excluded by the hearsay rule . . . :
>
> . . . .
>
> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

N.C. Gen. Stat. § 8C-1, Rule 803(3).

¶ 67 As the language of the Rule suggests, statements that purely express the declarant's state of mind, emotion, etc. are admissible. *See State*

v. Hardy, 339 N.C. 207, 229, 451 S.E.2d 600, 612 (1994) (listing examples of a declarant's state of mind including "I'm frightened" or "I'm angry"). "Statements that merely recount a factual event are not admissible under Rule 803(3) because such facts can be proven with better evidence, such as the in-court testimony of an eyewitness." *State v. Smith*, 357 N.C. 604, 609, 588 S.E.2d 453, 457 (2003) (citing *Hardy*, 339 N.C. at 229, 451 S.E.2d at 612). In the middle are statements of both facts and emotions. Such statements are still admissible when the "factual circumstances surrounding [the declarant's] statements of emotion serve only to demonstrate the basis for the emotions." *See State v. Gray*, 347 N.C. 143, 173, 491 S.E.2d 538, 550 (1997) (finding statements described in that way admissible under Rule 803(3)), *overruled in part on other grounds by State v. Long*, 354 N.C. 534, 557 S.E.2d 89 (2001). To summarize, statements that include only emotion or that include emotions and the facts underlying those emotions are admissible under Rule 803(3), but pure statements of fact are not. *See State v. Lesane*, 137 N.C. App. 234, 240, 528 S.E.2d 37, 42 (2000) ("Thus, to synthesize, our courts have created a sort of trichotomy in applying Rule 803(3). Statements that recite only emotions are admissible under the exception; statements that recite emotions and the facts underlying those emotions are likewise admissible; but statements that merely recite facts do not fall within the exception.").

¶ 68 Within this framework, our Supreme Court has "consistently held that a murder victim's statements that she fears the defendant and fears that the defendant might kill her are statements of the victim's then-existing state of mind." *State v. Hipps*, 348 N.C. 377, 392, 501 S.E.2d 625, 634–35 (1998) (collecting cases). For example, the Supreme Court said facts related to the defendant's prior assaults on the murder victim were admissible when they helped demonstrate why the murder victim was afraid she was going to be killed. *Id.*, 348 N.C. at 391–92, 501 S.E.2d at 634; *see also Gray*, 347 N.C. at 172–73, 491 S.E.2d at 550 (holding evidence of husband-defendant's assaults on wife-murder victim was admissible to explain the victim's statements that she feared her husband was going to kill her). By contrast, our courts excluded statements by murder victims that contained only facts and no statements by the declarant about their state of mind or emotions. *Hardy*, 339 N.C. at 228–30, 451 S.E.2d at 611–13; *Lesane*, 137 N.C. App. at 240–41, 528 S.E.2d at 42 (so holding despite witness ascribing emotions to declarant).

¶ 69 Here, Defendant claims the following testimony was not admissible under Rule 803(3): "And Kenneth [the victim] told me that when he [Defendant] seen them [the victim and Warren] together that he told

them if he see them again that he was going to kill them." While that statement does not convey any emotion itself, reading on in the transcript reveals that factual circumstance "serve[s] only to demonstrate the basis for the emotions." *Gray*, 347 N.C. at 173, 491 S.E.2d at 550. The subsequent testimony contains the following exchange:

> Q. Now, did Kenny [the victim] ever tell you whether or not he was afraid of [Defendant]?
>
> A. He told me that he was afraid of him *because the threats that was being made to him*.

(Emphasis added.) Thus, the fact of Defendant threatening the victim exists to explain why the victim was afraid of Defendant. That is precisely the type of statement by a murder victim expressing fear of the defendant that our Supreme Court has long held admissible under Rule 803(3). *Hipps*, 348 N.C. at 391–92, 501 S.E.2d at 634; *Gray*, 347 N.C. at 172–73, 491 S.E.2d at 550. Therefore, the trial court did not err in admitting the victim's statement that Defendant had threatened him.

D. Admission of Bullet

¶ 70 **[7]** In Defendant's final plain error argument, he contends the trial court erred by "admitting evidence that Investigator Barr recovered a .45 caliber bullet from [Defendant]'s car because the bullet had no connection to the murder." (Capitalization altered.) Defendant argues, relying on case law, that ammunition unconnected to the charged crime and that does not have any tendency to prove any fact in issue is irrelevant and therefore inadmissible. (Citing *State v. Bodden*, 190 N.C. App. 505, 509, 661 S.E.2d 23, 26 (2008).) Defendant then cites to Barr's own testimony that the .45 caliber bullet did not have the same caliber as the murder weapon and argues testimony about the .45 caliber bullet was irrelevant and thus inadmissible. Defendant further argues this prejudiced him as required to meet the plain error standard and that the alleged plain error "necessitates a new trial."

¶ 71 "The admissibility of evidence is governed by a threshold inquiry into its relevance." *State v. Royster*, 237 N.C. App. 64, 68, 763 S.E.2d 577, 580 (2014) (internal quotations and citation omitted). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2019). 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." N.C. Gen. Stat. § 8C-1, Rule 401 (2019).

¶ 72 In the pertinent context here, weapons and ammunition are relevant and therefore admissible "where there is evidence tending to show that they were used in the commission of a crime." *See State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994) (stating rule in the context of weapons and then applying it to ammunition on the facts of the case) (quotations and citation omitted). The reverse is also true; weapons and ammunition "that are not connected to the crime charged and which have no logical tendency to prove any fact in issue are irrelevant and inadmissible." *See Bodden*, 190 N.C. App. at 509–10, 661 S.E.2d at 26 (stating rule in terms of items in general and then applying it to ammunition on the facts of the case) (quotations and citation omitted). For example, in *Bodden*, this court excluded as irrelevant nine millimeter bullets when an agent from the State Bureau of Investigation testified either .38 or .357 caliber bullets were used in the shooting. *Id.*

¶ 73 Here, Defendant challenges the admission of testimony concerning a .45 caliber bullet. Barr testified that the .45 caliber bullet "did not match the crime scene" and that the murder weapon "was a .40 caliber" gun. Thus, as in *Bodden*, the testimony concerning the .45 caliber bullet was irrelevant and thus inadmissible because it was "not connected to the crime charged" and had "no logical tendency to prove any fact in issue." *Bodden*, 190 N.C. App. at 509, 661 S.E.2d at 26. Therefore, the trial court erred in admitting testimony about the .45 caliber bullet.

¶ 74 The trial court's error does not amount to plain error, however. To satisfy the plain error standard, Defendant would have to show prejudice, *i.e.*, 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. Removing the mention of the .45 caliber bullet would not have been likely to change the result of the trial. At worst, the .45 caliber bullet brought before the jury evidence which may tend to suggest Defendant had some association with a gun other than the one used in the murder. But the jury already heard evidence Defendant and his car both tested positive for gunshot residue based on swabs taken the night of the crime. Thus, the bullet did not draw any connection between Defendant and guns that had not already been drawn. Based on this evidence, as well as the prior prejudice analysis above, we find the error did not have a probable impact on the jury's finding that Defendant was guilty. *Id.* Therefore, the trial court did not plainly err when it admitted testimony about the .45 caliber bullet.

VI. Cumulative Error

¶ 75 Finally, Defendant argues "the cumulative effect of the errors requires a new trial" even if the errors individually do not warrant a new trial. "Cumulative errors lead to reversal when taken as a whole they deprived the defendant of his due process right to a fair trial free from prejudicial error." *State v. Wilkerson*, 363 N.C. 382, 426, 683 S.E.2d 174, 201 (2009) (citations, quotations, and alterations omitted). Here, the only errors we find do not amount to plain errors. The State argues, based on *State v. Holbrook*, 137 N.C. App. 766, 529 S.E.2d 510 (2000), that plain error doctrine cannot be applied cumulatively, *i.e.*, that plain errors taken together cannot amount to cumulative error. On the facts here, we do not need to reach that argument or make such a sweeping statement. As laid out above, the errors individually had, at most, a miniscule impact on the trial because the facts underlying the evidence admitted in error or the implications thereof came in through other means and the jury heard extensive other evidence implicating Defendant in the killing. Even combining the two errors would not lead to a situation that deprived Defendant of his right to a fair trial. *Wilkerson*, 363 N.C. at 426, 683 S.E.2d at 201. Therefore, we do not find any cumulative error.

VII. Conclusion

¶ 76 After reviewing each of Defendant's contentions, we find no prejudicial error in this case. After *de novo* review, the trial court did not err in admitting Warren's past statements under Rule 803(5). Further, the trial court did not abuse its discretion in admitting the testimony from the State's GSR expert or from Investigator Barr identifying Defendant's car in surveillance videos. Finally, the trial court did not plainly err in admitting testimony as a prior consistent statement, in admitting testimony pursuant to Rule 803(3), and in admitting testimony about a bullet found in Defendant's car. We also find no cumulative error.

NO PREJUDICIAL ERROR.

Judges ARROWOOD and JACKSON concur.

STATE v. THORPE

[281 N.C. App. 189, 2021-NCCOA-701]

STATE OF NORTH CAROLINA
v.
EDWARD THORPE

No. COA21-268

Filed 21 December 2021

Criminal Law—continued imprisonment during global pandemic—motion for appropriate relief—cruel and unusual punishment—habeas corpus

An order denying defendant's motion for appropriate relief (MAR) was affirmed where defendant's sentence was lawful when originally imposed, and therefore requiring him to continue serving his prison sentence during the global coronavirus pandemic—despite his pre-existing health conditions—did not constitute cruel and unusual punishment under the federal or state constitutions, and his sentence was not "invalid as a matter of law" under N.C.G.S. § 15A-1415(b)(8). Further, the trial court properly denied defendant's alternative request for habeas relief, which he made by reference in his MAR rather than by filing a formal petition for a writ of habeas corpus, as required by N.C.G.S. § 17-7.

Appeal by defendant from order entered 21 October 2020 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 16 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for defendant.

ARROWOOD, Judge.

¶ 1 Edward Thorpe ("defendant") appeals from order denying his motion for appropriate relief ("MAR") and habeas corpus claims therein. Defendant contends he is entitled to relief because his medical history poses a particular risk of serious illness or death from COVID-19 while incarcerated. For the following reasons, we affirm.

I. Background

¶ 2 Between 26 January 2015 and 29 September 2015, defendant was indicted on counts of breaking and entering, larceny after breaking and entering, possession of stolen goods, assault on a female, habitual misdemeanor assault, and establishing himself as a habitual felon. On 9 February 2016, defendant entered into a plea agreement in which he pled guilty to two counts of habitual misdemeanor assault and one count each of breaking and entering, larceny, and possession of stolen goods, and in which he also admitted his status as a habitual felon. In exchange, these charges were consolidated into a single judgment of 77 to 105 months imprisonment, and his remaining charges were dismissed. Defendant was so sentenced on 30 May 2017.

¶ 3 On 14 October 2020, defendant, acting *pro se*, filed a MAR in which he claimed his underlying health conditions,[1] coupled with his living arrangements while incarcerated, made him especially susceptible to severe illness or death from the COVID-19 pandemic (the "pandemic"). Thus, defendant argued his "continued confinement in prison violate[d] his right to be free from cruel punishment under Article I, § 27 of the North Carolina Constitution."

¶ 4 Defendant argued "the MAR statutes were enacted as mechanisms for amending sentences previously believed to be lawful." In the alternative, defendant sought relief under "North Carolina's habeas statutes[,]" arguing he was entitled to be discharged under N.C. Gen. Stat. § 17-33(2). In conclusion, defendant requested that his habitual felon status be vacated, his remaining convictions be consolidated, his judgment be amended "without habitual felon status" and with a "Class H, Level VI sentence of 25-34 months[,]" "or other appropriate relief[.]"

¶ 5 In an order issued on 21 October 2020, the trial court denied defendant's MAR as well as his request to " 'amend his conviction' by way of habeas corpus" for lack of any statutory or appellate authority to grant the relief sought. On 19 November 2020, defendant filed a Petition for *Writ of Certiorari* with this Court seeking review of the trial court's order. Defendant's petition was granted on 16 December 2020.

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1. Namely, diabetes and hypertension. Defendant presented minimal documentation of his own medical condition and failed to present any medical evidence regarding how his specific medical conditions place him at increased risk due to COVID-19. Instead, defendant's MAR cited to various websites purportedly supporting his arguments regarding the risks of COVID-19. However, we will assume *arguendo* that his allegations regarding his health conditions and increased risk are accurate.

¶ 6 Notably, on 3 February 2021, defendant was released from prison "as part of the Extended Limits of Confinement program." Defendant contends, however, that he could still be returned to prison at this time and thus his appeal is not moot.

II. Discussion

¶ 7 On appeal, defendant argues that: (A) the trial court erred in denying his MAR, claiming he "is entitled to MAR relief under N.C. [Gen. Stat.] § 15A-1415(b)(8) because the combination of his pre-existing health conditions and the risk of coronavirus exposure in prison constitute cruel and unusual punishment[,]" rendering his sentence invalid as a matter of law; and (B) the trial court erred by "misapprehend[ing] the law regarding the availability of alternate habeas relief[,]" warranting a remand.

¶ 8 Because defendant is serving his sentence outside of prison, he "has therefore received the relief requested . . . and this case is moot." *State v. Daw*, 2021-NCCOA-180, ¶ 12. However, because "the public interest exception applies" in this case, we "will proceed to address the merits . . . ." *Id.* ¶ 17.[2]

A. Motion for Appropriate Relief

¶ 9 "Our review of a trial court's ruling on a defendant's MAR is 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Peterson*, 228 N.C. App. 339, 343, 744 S.E.2d 153, 157 (2013) (citations omitted). " 'When a trial court's findings on a [MAR] are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal.' " *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)).

¶ 10 N.C. Gen. Stat. § 15A-1415(b)(8), upon which defendant asserts his MAR, provides, in pertinent part, that relief is warranted when:

> The sentence imposed was unauthorized at the time imposed, contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or

2. "Resolution of the questions presented by this appeal on the merits would therefore clearly affect 'members of the public beyond just the parties in the immediate case.' " *Daw*, ¶ 17 (quoting *Chavez v. Carmichael*, 262 N.C. App. 196, 203-204, 822 S.E.2d 131, 137 (2018)).

> conviction level was illegally imposed, *or is otherwise invalid as a matter of law*.

N.C. Gen. Stat. § 15A-1415(b)(8) (2019) (emphasis added).

¶ 11 Defendant argues that his sentence is invalid as a matter of law due to the ongoing pandemic. Specifically, defendant contends that, because of his health condition, his continued imprisonment constituted cruel and unusual punishment under the North Carolina and the United States Constitutions. He however cites no binding precedent stating that requiring one to serve a sentence, which was lawful when imposed, during pandemic times makes a sentence cruel and unusual.

¶ 12 The trial court's judgment, sentencing defendant to 77 to 105 months' imprisonment, was filed in 2017, years before the pandemic had even begun. Thus, the original judgment, which does not on its face present any other error of law unrelated to the pandemic, is lawful. While we do not dispute the gravity of defendant's predicament in the context of a global pandemic, and while the State may well have a duty to modify the conditions under which it holds individuals who are incarcerated, the mere fact that one is held in prison does not give rise to a claim of cruel and unusual punishment or make that imprisonment invalid as a matter of law. Therefore, defendant had no recourse under N.C. Gen. Stat. § 15A-1415(b)(8).

¶ 13 Accordingly, the trial court did not err when it found it had "no statutory authority" to vacate defendant's judgment and denied his MAR.

B. Availability of Relief Under Habeas Corpus

¶ 14 Defendant seeks, in the alternative, relief under "North Carolina's habeas statutes" merely by reference in his MAR. Specifically, defendant has not formally filed a Petition for Writ of Habeas Corpus, in violation of procedural formalities imposed by statute. In fact, N.C. Gen. Stat. § 17-7 provides:

> The application must state, in substance, as follows:
>
> (1) That the party, in whose behalf the writ is applied for, is imprisoned or restrained of his liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known.

(2) The cause or pretense of such imprisonment or restraint, according to the knowledge or belief of the applicant.

(3) If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made.

(4) If the imprisonment or restraint is alleged to be illegal, the application must state in what the alleged illegality consists; and that the legality of the imprisonment or restraint has not been already adjudged, upon a prior writ of habeas corpus, to the knowledge or belief of the applicant.

(5) The facts set forth in the application must be verified by the oath of the applicant, or by that of some other credible witness, which oath may be administered by any person authorized by law to take affidavits.

N.C. Gen. Stat. § 17-7 (2019).

¶ 15 As the trial court noted in its order, defendant's MAR lacks the procedural requirements set out by N.C. Gen. Stat. § 17-7, particularly subsections (1), (4), and (5). Given these deficiencies, the trial court did not err in denying the alternative relief under habeas corpus.[3] Our affirmation of this denial is without prejudice to defendant's right to seek habeas relief with a properly supported petition.

III. Conclusion

¶ 16 For the foregoing reasons, the trial court did not err in denying defendant's MAR and the habeas corpus claim therein.

AFFIRMED.

Chief Judge STROUD and Judge JACKSON concur.

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3. We thus deny, per our opinion, the State's motion to dismiss this appeal.

STATE OF NORTH CAROLINA
v.
BRYSON JOHNSON WHATLEY

No. COA20-831

Filed 21 December 2021

Probation and Parole—revocation of probation—basis unclear—discrepancies between record and judgments

The trial court's judgments revoking defendant's probation in two criminal cases were vacated and remanded where, given discrepancies between the record and both judgments, the bases for revocation were unclear. The court checked boxes on the judgments indicating defendant had waived his revocation hearing and admitted to all of the alleged violations, but the hearing transcript indicated otherwise; the court orally ruled that it would revoke defendant's probation in both cases based on his violation of a Security Risk Group agreement, but the agreement was a written (and therefore valid) condition of defendant's probation in only one case; and the court checked boxes on both judgments finding defendant committed a new crime and had previously served two Confinement in Response to Violation (CRV) periods, but the State neither alleged nor presented evidence of a new crime before the trial court, and defendant had served two CRV periods in only one case.

Appeal by Defendant from Judgments entered 21 November 2019 by Judge Steve R. Warren in Buncombe County Superior Court. Heard in the Court of Appeals 20 October 2021.

Attorney General Joshua H. Stein, by Senior Deputy Attorney General Amar Majmundar and Assistant Attorney General Grace R. Linthicum, for the State.

Sigler Law, PLLC, by Kerri L. Sigler, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Bryson Johnson Whatley (Defendant) appeals from Judgments and Commitments revoking his supervised probation and activating two suspended consecutive sentences. The Record before us tends to show the following:

¶ 2 On 7 May 2018, a Buncombe County Grand Jury indicted Defendant on one count of Assault with a Deadly Weapon with Intent to Kill (17 CRS 86913) and one count of Robbery with a Dangerous Weapon (18 CRS 338). On 5 September 2018, Defendant pled guilty to the charges in 17 CRS 86913 and 18 CRS 338. The trial court sentenced Defendant to a term of twenty to thirty-three months in 17 CRS 86913, and a consecutive term of ten to twenty-one months in 18 CRS 338. The trial court suspended both sentences and placed Defendant on 36-month terms of probation in each case.

¶ 3 Defendant's probation officers filed numerous violation reports, and the trial court modified Defendant's terms of probation on numerous occasions. Relevant to this appeal, the trial court modified Defendant's probation on 25 January 2019 and ordered Defendant serve 90-day Confinement in Response to Violation (CRV) periods in both cases. On 2 May 2019, the trial court modified Defendant's probation in 18 CRS 338 and added a condition Defendant comply with the Security Risk Group Agreement (SRG Agreement). The trial court did not modify Defendant's probation in 17 CRS 86913 based on the same violation report. On 3 July 2019, the trial court modified Defendant's probation in 18 CRS 338 and imposed a second 90-day CRV period. The trial court also modified Defendant's probation in 17 CRS 86913 by imposing electronic monitoring on Defendant after his release from the CRV period in 18 CRS 338. However, the trial court did not impose a CRV period in 17 CRS 86913, and the trial court continued the disposition in that matter until 19 December 2019.

¶ 4 Finally, on 4 October 2019, Defendant's probation officer filed a violation report alleging eight probation violations in both cases. The eighth listed violation alleged Defendant failed to comply with the SRG Agreement. Defendant's cases came on for a probation violation hearing on 21 November 2019 in Buncombe County Superior Court.

¶ 5 At the outset, Defendant did not waive a hearing and expressly denied all eight alleged violations. The State moved to dismiss the seventh alleged violation and proceeded to present the trial court with evidence of Defendant's other alleged violations. The first four allegations related

to Defendant not reporting for supervision within 72 hours of release from CRV and not setting up electronic monitoring within that 72-hour period.[1] The fifth and sixth violations alleged Defendant did not obtain a GED and was not gainfully employed as previously ordered as probation conditions. Regarding the eighth violation, the State presented evidence Defendant posted gang related content online, in violation of the SRG Agreement.

¶ 6 In arguing the trial court should not find Defendant willfully committed the alleged violations contained in the relevant reports, defense counsel stated: "He served two CRVs on the first case. On the second case he served one and Your Honor held that one in abeyance, so in any event, two CRVs technical violations, technically he can be revoked." The Record indicates the only probation proceeding the trial held in abeyance or continued was the July 2019 proceeding in 17 CRS 86913. The trial court was "not reasonably satisfied there was a willful violation" in the first four allegations. The trial court expressed no findings as to the fifth and sixth alleged violations. After the parties concluded their cases, the trial court allowed Defendant's probation officer to speak. The probation officer stated:

> [Defendant] continues to walk down the dangerous and deadly path, being, in the 17 case, being found in willful violation of committing a felony act by possessing a firearm and serving two, or two CRVs in 2018 case, we would respectfully request revocation because I don't . . . know what other option is left.

The trial court found Defendant willfully violated the eighth condition and revoked Defendant's probation. Defendant gave oral Notice of Appeal in open court.

¶ 7 On 21 November 2019, the trial court entered Judgments in each case revoking Defendant's probation and activating his suspended sentences. On both Judgments, the trial court checked boxes indicating Defendant waived his revocation hearing and admitted to all eight violations. The trial court did not check the box indicating that each violation was itself a sufficient basis to revoke Defendant's probation. The trial court also checked boxes on both Judgments making Findings Defendant committed a new crime or absconded, and that Defendant had previously served two CRV periods.

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1. The testimony indicates Defendant checked in with the Probation Office on the day his 72-hour window expired some hours after the window expired.

Issue

¶ 8 The dispositive issue on appeal is whether the trial court erred in revoking Defendant's probation in 17 CRS 86913 and 18 CRS 338 when the Record and errors in the Judgments in both cases leave the trial court's bases for revocation unclear.

Analysis

¶ 9 Defendant argues we should vacate the trial court's Judgments in this case because discrepancies between the Record and the Judgments leave the trial court's bases for revocation in both cases unclear. We have previously vacated judgments revoking probation when the trial court's written judgment does not reflect the trial court's findings and rulings in the revocation hearing. *State v. Sitosky*, 238 N.C. App. 558, 564-65, 767 S.E.2d 623, 627-28 (2014), *writ denied*, 368 N.C. 237, 768 S.E.2d 847 (2015). In *Sitosky*, the defendant admitted to three of the violations included in the violation report. *Id.* at 560, 767 S.E.2d at 624. However, the trial court's written judgment indicated the defendant admitted to all of the violations in the report. *Id.* at 564, 767 S.E.2d at 627. Moreover, the trial court did not mark the box indicating each of the violations would be sufficient alone to revoke the defendant's probation. *Id.* at 565, 767 S.E.2d at 627-28. We concluded:

> [T]he judgments in this case do not provide us with a basis to determine whether the trial court would have decided to revoke Defendant's probation on the basis of her admission to committing the new crime . . . in the absence of the other alleged violations that it mistakenly found that Defendant had admitted.

Id. at 565, 767 S.E.2d at 627.

¶ 10 Similarly, in this case, the trial court marked the boxes on the Judgments indicating Defendant waived his hearing and admitted to all eight of the violations in the violation report. The trial court did not mark the box indicating each of those violations alone would support revoking Defendant's probation. Moreover, the trial court marked the boxes making separate Findings revocation was appropriate because Defendant committed a new crime or absconded, and the box indicating Defendant had served two prior CRV terms.

¶ 11 As evidenced by the transcript itself, however, Defendant did not waive his revocation hearing. Defendant expressly denied all eight of the allegations, and the trial court stated it would only find Defendant violated the eighth violation—not complying with the SRG Agreement.

Nothing in the Record indicates the trial court ordered a second CRV term in 17 CRS 86913. Therefore, the Judgments do not provide this Court "a basis to determine whether the trial court would have decided to revoke Defendant's probation" on any appropriate grounds for revocation. *Id*. Therefore, we must vacate the Judgments and remand these matters to the trial court for further proceedings. *Id*., 767 S.E.2d at 627-28.

¶ 12 As further guidance on remand, it appears from the trial court's orally rendered ruling at the conclusion of the hearing that the trial court intended to revoke probation in both cases solely based on Defendant's purported violations related to the SRG program in combination with Defendant serving two prior CRVs. Defendant contends, however, it would be error to revoke Defendant's probation in 17 CRS 86913 on this basis. We agree. Our review of the Record reflects that while this may have been a proper basis—upon proper findings—to revoke Defendant's probation in 18 CRS 338, for the reasons that follow this could not serve as a basis to revoke Defendant's probation in 17 CRS 86913.

¶ 13 "A hearing to revoke a defendant's probationary sentence only requires that the evidence . . . reasonably satisfy the judge in the exercise of [the judge's] sound discretion that the defendant has willfully violated a valid condition of probation . . . ." *State v. Jones*, 225 N.C. App. 181, 183, 736 S.E.2d 634, 636 (2013) (citation omitted). "The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion." *Id*. However, "[t]he court may only revoke probation for a violation of a condition of probation under G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a), except as provided in G.S. 15A-1344(d2)." N.C. Gen. Stat. § 15A-1344(a) (2019). Thus, a trial court may only revoke probation when a defendant commits a new crime, § 15A-1343(b)(1), absconds, § 15A-1343(b)(3a), or has previously served two 90-day terms of confinement based on violations of conditions of probation, § 15A-1344(d2). Moreover: "A defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which the defendant is being released." N.C. Gen. Stat. § 15A-1343(c) (2019). Conditions not reduced to writing are not valid conditions of probation. *See State v. Crowder*, 208 N.C. App. 723, 728, 704 S.E.2d 13, 16 (2010) ("Oral notice to defendant of his conditions of probation is not a satisfactory substitute for the written statement required by statute." (citation and quotation marks omitted)).

¶ 14 Here, Defendant argues the trial court could not have properly found he violated the SRG Agreement because the trial court never included the SRG Agreement in its written Orders modifying his probation

in 17 CRS 86913; thus, the SRG Agreement was not a valid condition of his probation in that matter. The Record shows none of the trial court's Orders modifying Defendant's conditions of probation in 17 CRS 86913 expressly included the SRG Agreement as a condition. The SRG Agreement was an express condition of Defendant's probation only in 18 CRS 338 as evidenced by Defendant's 2 May 2019 Waiver of Hearing and the trial court's 2 May 2019 Order modifying Defendant's probation in 18 CRS 338. Even though, as the State argues, the SRG Agreement may have referenced both 17 CRS 86913 and 18 CRS 338, the trial court had to include the condition in a written order for the condition to be valid. N.C. Gen. Stat. § 15A-1343(c) (2019); *Crowder*, 208 N.C. App. at 728, 704 S.E.2d at 16. Thus, because the SRG Agreement was only a written condition of probation in 18 CRS 338, it was a valid condition only in that case. Therefore, the trial court erred by basing its Finding Defendant violated the conditions of his probation on Defendant violating the terms of the SRG Agreement.[2]

¶ 15 Moreover, even assuming the trial court did not err in finding Defendant violated a valid condition by not complying with the SRG Agreement, in order to revoke probation, the trial court would have also had to find Defendant committed a new crime, absconded, or served two prior terms of CRV in this matter. N.C. Gen. Stat. § 15A-1344(a) (2019). The 24 January 2019 Order on Violation of Probation is the only order in the Record requiring Defendant to serve a CRV period in connection with probation violations in 17 CRS 86913. Defendant was ordered to serve a CRV period in 18 CRS 338 based on the same set of violations on 24 January 2019. Defendant was ordered to serve another CRV period in 18 CRS 338 on 3 July 2019. Therefore, revocation in 18 CRS 338 may have

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2. The State argues in 18 CRS 338 Defendant signed the form Order on Violation of Probation or on Motion to Modify which includes the instruction "(**Note:** *Defendant signs the following statement in all cases of supervised probation unless probation is terminated or not modified. . . .*)." Thus, the State contends the Order modifying Defendant's probation to include the SRG Agreement in 18 CRS 338 should also apply to 17 CRS 86913. This contention is baseless. The State provides no authority for its contention. Indeed, the State fails to provide the full quote from the form, much less its context. It is plainly apparent from the face of the form that this "note" is not a certification by a defendant but rather an instructional note to the person completing the form that a defendant's signature is required on the form unless probation is terminated or not modified. The note goes on to provide that a witness should sign the form at the same time as the defendant and, that for in-chambers consent modifications, both defendant and the prosecutor must sign the form prior to its entry. Here, Defendant consistent with the instruction signed the Order certifying only that he had received a copy of the Order prior to its entry, agreed to the SRG Agreement it set out specifically in 18 CRS 338, waived liability for any loss or damage he incurred performing community service, and understood his probation could be extended pursuant to applicable statutes.

been proper. However, the 3 July 2019 Order in 17 CRS 86913, based on the same violations, did not require Defendant to serve a CRV period in that matter. In fact, that Order in the Record before us does not include a "page two" where the trial court would indicate the CRV terms, and the trial court continued disposition in the matter to 19 December 2019. The 3 July Order only references CRV in connection with 18 CRS 338. Prior periods of CRV were the only bases for revocation under N.C. Gen. Stat. § 15A-1344(a) discussed and argued at the hearing. Because the Record does not indicate Defendant served two prior CRV periods in 17 CRS 86913, this would not be a proper basis for revoking his probation in that case.

¶ 16 The State argues that because Defendant had previously possessed a firearm—thus, Defendant committed a new crime—his probation could have been revoked at any time. The only time Defendant's possessing a firearm came up at the hearing in question was after the close of the evidence when the trial court allowed the probation officer to speak. However, the State did not include this alleged violation in the report relevant to this hearing. The State also did not bring up this point during the hearing and did not argue it to the trial court. Again, in a prior proceeding, on 3 July 2019, the trial court had continued disposition on that particular violation for 19 December 2019. Therefore, there was no evidence Defendant committed a new crime, absconded, or previously served two periods of CRV in 17 CRS 86913 specifically. Thus, the trial court erred in revoking Defendant's probation in 17 CRS 86913 pursuant to N.C. Gen. Stat. § 15A-1344(a) on these bases. Consequently, we vacate the trial court's Judgments revoking probation in 17 CRS 86913 and 18 CRS 338 and remand to the trial court for a determination as to whether there were grounds to revoke Defendant's probation and to make proper findings of fact based on the Record and evidence before it to support its determinations.

Conclusion

¶ 17 Accordingly, for the foregoing reasons, we vacate the Judgments and remand these matters to the trial court for clarification of the bases upon which it revoked Defendant's probation should it determine revocation was, in fact, proper.

VACATED AND REMANDED.

Judges DILLON and DIETZ concur.

WADSWORTH v. WADSWORTH

[281 N.C. App. 201, 2021-NCCOA-703]

SALLYCETA WADSWORTH, PLAINTIFF
v.
KEITH WADSWORTH, DEFENDANT

No. COA21-68

Filed 21 December 2021

1. Child Custody and Support—child support—calculation—work-related childcare costs—extraordinary expenses—arrears

The trial court in a divorce case properly calculated defendant husband's child support obligation where competent evidence supported its finding that the parties' reasonable work-related childcare costs were $600 per month; where, when calculating the children's extraordinary expenses, the court did not abuse its discretion by including costs for certain extracurriculars because although there was no evidence that these costs would be recurring, there also was no evidence that they would not be; and where, when calculating defendant's arrears, the court was not required to give defendant a credit for any extraordinary expenses he had paid while the case was still pending.

2. Divorce—alimony and child support—security for payments—life insurance policy—improper

The trial court erred by ordering defendant husband to maintain a life insurance policy—naming plaintiff wife as beneficiary—to secure his past-due alimony and child support payments where the policy did not qualify as "security" within the meaning of N.C.G.S. § 50-16.7(b) (requiring a supporting spouse to secure alimony payments). Rather, because the death benefit on the policy exceeded the value of the overdue payments, the requirement that defendant maintain the policy was, in effect, not only a second award of alimony but also one that violated the rule that alimony must terminate upon the death of either spouse (N.C.G.S. § 50-16.9(b)).

3. Attorney Fees—divorce—fees relating to equitable distribution—not recoverable

In a combined action for equitable distribution, alimony, and child support, the trial court's award of attorney fees was vacated and remanded for entry of an award that did not include fees for the equitable distribution portion of the case, which are not recoverable under the divorce statute.

Appeal by Defendant from order entered on 6 July 2020 by Judge Jim Love, Jr., in Johnston County District Court. Heard in the Court of Appeals 5 October 2021.

Mary McCullers Reece for the Plaintiff-Appellee.

Tiffanie C. Meyers for the Defendant-Appellant.

JACKSON, Judge.

¶ 1 Keith Wadsworth ("Defendant") appeals from the trial court's order on equitable distribution, alimony, and child support. We affirm in part, vacate in part, and remand the case to the trial court for entry of an award of attorney's fees that does not include fees for equitable distribution.

I. Background

¶ 2 The parties met in Bridgeport, Connecticut, and were married on 28 July 2001. Defendant had one child from a prior relationship at the time. Sallyceta Wadsworth ("Plaintiff") was aware of Defendant's eldest child before the parties were married.

¶ 3 In 2004, after the birth of their first child, the parties moved to North Carolina. Defendant accepted a position as a contract negotiator at Aetna Healthcare and Plaintiff worked part-time as a self-employed hairstylist while raising their child. In 2009, a second child was born to the marriage.

¶ 4 Sometime in 2009, a deputy sheriff served Defendant at the marital home with a lawsuit for child support. Defendant told Plaintiff that the lawsuit was related to his oldest child, and she believed him.

¶ 5 In 2011, Plaintiff became pregnant again. Not long afterward, Plaintiff found a VHS tape in the marital home that contained a recording of Defendant engaging in sexual intercourse with another woman. The recording bore a date during the parties' marriage. Plaintiff confronted Defendant about the tape, and he did not deny he was in it.

¶ 6 Plaintiff then found the court papers Defendant had been served with in 2009 and learned that the lawsuit was *not* related to Defendant's eldest child, but instead was related to child support for two children Defendant had with another woman during the parties' marriage.

¶ 7 Plaintiff gave birth to the third child of the marriage in November 2011. At the time, Defendant was traveling frequently. He told Plaintiff that the trips were work-related, but bank and credit-card statements

showed that the trips included destinations such as Daytona Beach, San Juan, Myrtle Beach, and the Mohegan Sun, a casino in Connecticut.

¶ 8 Defendant moved out of the marital residence on 14 April 2013 but continued paying for the mortgage and utilities and contributed towards the cost of groceries, clothing, and shoes for some time. These contributions decreased over time.

¶ 9 Defendant had a third child with another woman while still married to Plaintiff in August 2017.

¶ 10 Plaintiff initiated this action on 13 December 2017 in Johnston County District Court. The matter came on for trial before the Honorable Jim Love, Jr., on 27 June 2019. Judge Love presided over a three-day bench trial. The court entered an order on 6 July 2020 ordering Defendant to pay Plaintiff past-due and prospective child support, alimony, and awarding Plaintiff attorney's fees. The court ordered Defendant to maintain life insurance to secure his alimony and child support obligations.

¶ 11 Defendant entered timely written notice of appeal from the trial court's order on 4 August 2020.

II. Analysis

¶ 12 Defendant makes essentially five arguments on appeal. We address each in turn.

A. Standard of Review

¶ 13 "It is well established that child support orders entered by a trial court are accorded substantial deference by appellate courts[.]" *Sergeef v. Sergeef*, 250 N.C. App. 404, 406, 792 S.E.2d 192, 193 (2016) (internal marks and citation omitted). This deference "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[.]" *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (internal marks and citation omitted). Our review is thus limited to "whether there is sufficient competent evidence to support the findings of fact, and whether, based on these findings, the Court properly computed the child support obligations." *Miller v. Miller*, 153 N.C. App. 40, 47, 568 S.E.2d 914, 918-19 (2002) (citation omitted). "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." *Shipman*, 357 N.C. at 475, 586 S.E.2d at 253-54 (internal marks and citation omitted).

B. Challenged Factual Findings

¶ 14 **[1]** Defendant's first three arguments on appeal challenge the trial court's findings of fact. Defendant argues that the trial court erred in calculating his child support obligation based on work-related childcare of $600 per month; that the trial court erred in calculating extraordinary expenses based on insufficient evidence; and that the trial court erred in calculating his child support arrears based on insufficient evidence. We disagree with all three contentions.

1. Finding of Fact 42

¶ 15 Defendant challenges the evidentiary support for the trial court's finding that the reasonable work-related childcare costs of the parties were $600 per month. We hold that this finding was supported by competent evidence.

¶ 16 The trial court found as follows in Finding of Fact 42:

> 42. That in order for Plaintiff to work, the minor children Maya and Mason needed work-related childcare on days they are not in school. During 2018, the Plaintiff had to make an election to either work and pay childcare or not work. That she could only afford childcare which cost $150.00 per week. That Plaintiff feels that in the future she would need to pay childcare for eighteen weeks. That the Plaintiff's cost of daycare would be $600.00 per month.

¶ 17 The finding above was based on Plaintiff's testimony and her financial affidavit, which included the following breakdown of her average work-related childcare expenses for her younger two children for an estimated ninety days per year:

90 days of childcare/five workdays per week=18 weeks,

18 weeks x two children x $200 per week=$7,200

$7,200/12 months=$600/month

¶ 18 Plaintiff testified as follows on direct examination:

> [PLAINTIFF'S COUNSEL]: So looking at [your financial affidavit], have you tried to estimate the number of days you would need each month to provide that daycare or work-related childcare so you could work those days?

> [PLAINTIFF]: Yes.
>
> [PLAINTIFF'S COUNSEL]: Have you used a school calendar to try to determine the number of days that they are out of school, if it's during the school year?
>
> [PLAINTIFF]: Yes. This is it. It includes teacher workday, holidays, summer breaks. Holidays . . . [,] [a] total of 90 days for the year for the school year, calendar year, that they are out of school.
>
> [PLAINTIFF'S COUNSEL]: And so, if we looked at that in terms of weeks, that would be about 18 weeks?
>
> [PLAINTIFF]: Correct.
>
> [PLAINTIFF'S COUNSEL]: And then did you multiply that times two children times $200 a week, and then prorate that per month to be about $600 per month?
>
> [PLAINTIFF]: Yes.
>
> [PLAINTIFF'S COUNSEL]: And is that the number that you used in your financial affidavit on page three, rather than the $200—or $150 that you state that you're currently able to afford.
>
> [PLAINTIFF]: Yes.

We hold that this testimony, along with Plaintiff's financial affidavit, was competent evidence to support the trial court's finding that the reasonable work-related childcare costs of the parties were $600 per month.

¶ 19 Defendant asserts that the finding of $600 per month is erroneous because it is based on a $200 per week rate Plaintiff paid for childcare during the summer when the children were not in school and not on daily rates for childcare during the school year, and that determining prospective childcare costs based on a weekly rate rather than a daily rate will result in overpayment for childcare. Defendant points to testimony by Plaintiff that she paid for childcare by the day some of the time when she could not afford to pay for an entire week to support the idea that basing prospective childcare costs on a daily rather than weekly rate would result in lower costs overall. Plaintiff's testimony does not support this idea, however. Plaintiff testified that she paid for childcare at a daily rate when she did not have the funds to pay for a weekly rate; her testimony does not suggest that the daily price she paid was less expensive on a weekly basis than paying for a full week: instead, she

testified that she paid by the day when she could not afford to pay by the week. Accordingly, we reject the argument that determining the child-care costs based on a weekly rate rather than a daily rate was erroneous.

2. Findings of Fact 39, 40, and 41

¶ 20 Defendant also challenges the trial court's finding that the children's extraordinary expenses were $953.41 per month. Rather than challenge the sufficiency of the evidence to support the costs included in the monthly average of these expenses, Defendant contends that some of the costs used to calculate the average should not have been included because they were for activities that had taken place in the past and there was no evidence that these activities were ongoing. We hold that the trial court's findings related to the children's extraordinary expenses were supported by competent evidence and that the court did not abuse its discretion by calculating an average that included costs that there was no evidence would be recurring.

¶ 21 North Carolina General Statute § 50-13.4(c) provides that child support

> shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2019). "The calculation of child support is governed by North Carolina Child Support Guidelines established by the Conference of Chief District Court Judges." *Craven Cnty. ex rel. Wooten v. Hageb*, 2021-NCCOA-231 ¶ 12 (2021) (citation omitted). "Child support set in accordance with the Guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support." *Beamer v. Beamer*, 169 N.C. App. 594, 596, 610 S.E.2d 220, 223-24 (2005) (internal marks and citation omitted).

¶ 22 Regarding "extraordinary expenses," the Child Support Guidelines provide that

> [o]ther extraordinary child-related expenses (including (1) expenses related to special or private elementary or secondary schools to meet a child's particular education needs, and (2) expenses for transporting the child between the parent's homes) may be added

> to the basic child support obligation and ordered paid by the parents in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest.

N.C. Child Support Guidelines (2019). "Determination of what constitutes an extraordinary expense is within the discretion of the trial court[.]" *Biggs v. Greer*, 136 N.C. App. 294, 298, 524 S.E.2d 577, 581 (2000) (internal marks and citation omitted). A court may adjust the basic child support obligation for extraordinary expenses, but such an adjustment is discretionary and does not qualify as a deviation from the Guidelines. *Id.*, 524 S.E.2d at 581-82. Thus, "[e]ven though the guidelines note two specific extraordinary expenses, school and travel, . . . [this] list . . . is not exhaustive[.]" *Balawejder v. Balawejder*, 216 N.C. App. 301, 317, 721 S.E.2d 679, 688 (2011) (internal marks and citation omitted).

¶ 23 The trial court found in relevant part as follows:

> 39. That the Plaintiff's and Defendant's three minor children are involved in numerous extracurricular activities which require expenses. Kailey is involved in travel soccer, piano, and pageants. Maya is involved in gymnastics, school clubs, and theater camp. Mason is involved in basketball and theater camp.
>
> 40. That the minor child Maya is struggling in school, and the Plaintiff hired a tutor to help Maya with her studies.
>
> 41. That the approximate average of costs for the minor children's extracurricular activities and Maya's tutoring is $953.41 per month.

¶ 24 Defendant specifically objects to inclusion of costs for driving school, theater camp, and pageants to calculate the average costs of the children's extraordinary expenses. The trial court credited in full Plaintiff's financial affidavit in arriving at the $953.41 per month figure, which included a $65 cost for driving school, a $704 cost for pageants, and a $152.50 per-child cost for theater camp for two of the three children. While there was no evidence that the cost of the objected-to expenses would be recurring, neither was there evidence that these costs would *not* be recurring, setting aside the attorney argument in Defendant's appellate brief. We therefore hold that including these costs was well within the trial court's discretion in determining the children's average extraordinary expenses going forward.

3. Findings of Fact 51, 52, 53, 54, and 55

¶ 25 Defendant also challenges the trial court's findings related to his child support arrears for the 2018-2020 timeframe—the period when this action was pending. Specifically, Defendant argues that the court neglected to account for evidence that some of the children's extraordinary expenses had been paid by him directly during this two-year period and that some of the expenses did not exist during the entire period. We hold that the trial court was not required to give Defendant a credit for his children's expenses he paid after Plaintiff commenced this action but before the court entered the order on appeal, and that the court calculated his arrears correctly.

¶ 26 As noted previously, "[t]he North Carolina Child Support Guidelines allow the court to add to the parties' basic child support obligation based on certain extraordinary expenses[.]" *Balawejder*, 216 N.C. App. at 316, 721 S.E.2d at 688. "[A]bsent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the noncustodial parent's ability to pay extraordinary expenses." *Biggs*, 136 N.C. App. at 298, 524 S.E.2d at 582. "Thus, the trial court has the discretion to determine what expenses constitute extraordinary expenses, the amount of these expenses, and . . . how the expenses are to be apportioned between the parties." *Mackins v. Mackins*, 114 N.C. App. 538, 549, 442 S.E.2d 352, 359 (1994).

¶ 27 The trial court was not required to make findings of fact regarding Defendant's contribution to the children's extraordinary expenses during the time the case was pending or provide Defendant with any credit or offset for these contributions in calculating his child support arrears. Instead, the court needed only to determine the parties' adjusted gross incomes, and the cost of current work-related childcare, health insurance premiums, and extraordinary expenses. The trial court made these findings and used the results in the appropriate worksheet.

C. Securing Child Support and Alimony Obligations with Life Insurance

¶ 28 **[2]** The trial court found in relevant part as follows in support of its order that Defendant maintain a life insurance policy to secure his child support arrears and alimony obligation:

> 44. That the Plaintiff is a dependent spouse who is actually substantially dependent upon the Defendant for her maintenance and support.

> 45. That the Defendant is a supporting spouse upon whom the Plaintiff is actually substantially dependent for maintenance and support.
>
> . . .
>
> 54. That the Defendant's total child support arrears as of June 30, 2020 is . . . $114,730.22.
>
> . . .
>
> 56. The Defendant shall pay all amounts owed for July 1, 2020 ($4,105.35 in child support) on or before July 5, 2020. Defendant's child support arrearage for February 1, 2020 through June 30, 2020 is being repaid from Defendant's 401(k). Defendant's alimony arrears for February 1, 2020 through July 31, 2020 shall be repaid on or before July 5, 2020 . . . . Effective August 1, 2020, the Defendant shall pay Plaintiff child support of $4,105.35 and alimony of $1,900.00 each month on or by the first day of each month.
>
> 57. That Defendant shall secure his child support arrears and alimony by maintaining life insurance on his life with a death benefit of $550,000.00, naming Plaintiff as beneficiary.

¶ 29 Defendant argues that no North Carolina statute authorizes a trial court to order a supporting spouse to maintain a life insurance policy to secure a child support or alimony obligation. Plaintiff argues that N.C. Gen. Stat. § 50-16.7(b) authorizes such an order. Section 50-16.7(b) provides in relevant part that a court ordering the payment of alimony may "require the supporting spouse to secure the payment of alimony . . . by means of a bond, mortgage, or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property[.]" N.C. Gen. Stat. § 50-16.7(b) (2019). We hold that the life insurance the trial court ordered Defendant to maintain did not qualify as "security" within the meaning of § 50-16.7(b), and therefore do not reach the issue of whether life insurance can qualify as a "means ordinarily used to secure an obligation to pay money" under § 50-16.7(b).

¶ 30 An award of alimony is only authorized "upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors[.]" N.C. Gen. Stat. § 50-16.3A(a) (2019). N.C. Gen. Stat.

§ 50-16.1A(2) defines a "dependent spouse" as "a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." *Id.* § 50-16.1A(2). Subsection (5) of § 50-16.1A goes on to define "supporting spouse" as "a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent for maintenance and support or from whom such spouse is substantially in need of maintenance and support." *Id.* § 50-16.1A(5).

¶ 31 However, "[i]f a dependent spouse who is receiving postseparation support or alimony from a supporting spouse under a judgment or order of a court of this State remarries or engages in cohabitation, the postseparation support or alimony shall terminate." *Id.* § 50-16.9(b). Likewise, "[p]ostseparation support or alimony shall terminate upon the death of either the supporting or the dependent spouse." *Id.* The reason is that "[t]he purpose of alimony is to provide support and maintenance for the dependent spouse." *Potts v. Tutterow*, 114 N.C. App. 360, 363, 442 S.E.2d 90, 92 (1994) (citation omitted). Accordingly, alimony has been described as the proportion of the supporting spouse's estate "which is judicially allowed and allotted to a [dependent spouse] for [his or] her subsistence and livelihood during the period of (their) separation." *Rogers v. Vines*, 6 Ired. 293, 297 (1846). Just as alimony terminates on the death of either party, so too do other legal obligations to make support payments to a dependent spouse, *Bland v. Bland*, 21 N.C. App. 192, 196, 203 S.E.2d 639, 642 (1974), unless they are part of "a complete settlement of all property and marital rights between the parties" for which there is reciprocal consideration, such that "the entire agreement would be destroyed by a modification of the support provision[,]" *Walters v. Walters*, 54 N.C. App. 545, 548, 284 S.E.2d 151, 153 (1981) (internal marks and citation omitted), *rev'd on other grounds*, 307 N.C. 381, 298 S.E.2d 338 (1983).

¶ 32 The requirement in the trial court's order that Defendant "secure his child support arrears and alimony by maintaining life insurance on his life with a death benefit of $550,000.00," was, in effect, a second award of alimony rather than security for his alimony obligation of $1,900 per month and unsatisfied child support arrears. "Security" has been defined as "[c]ollateral given or pledged to guarantee the fulfillment of an obligation; esp., the assurance that a creditor will be repaid (usu. with interest) any money or credit extended to a debtor." *Security*, Black's Law Dictionary (11th ed. 2019). The obligations purportedly secured by the requirement in the trial court's order that Defendant maintain life insurance with a death benefit of $550,000 were the net,

unsatisfied child support arrears that accrued between 1 February 2020 and 30 June 2020 of $18,026.75 and a total potential alimony obligation of $456,000 in nominal terms (i.e., without any adjustment for inflation or other discounts), assuming (1) Defendant survived the entire twenty years he was ordered to pay $1,900 per month in alimony; (2) the parties never reconciled; and (3) Plaintiff never remarried. That is, setting aside the validity of this purported security, if the requirement that Defendant maintain life insurance with a death benefit of $550,000 was, in fact, security for his unsatisfied, net child support arrears and his total potential alimony exposure, the life insurance overcollateralized the obligations secured, which equaled at most $474,026.75. The obligations purportedly secured equaled $75,973.25 less than the $550,000 of "security."

¶ 33 More fundamentally though, the requirement in the trial court's order that Defendant maintain life insurance with a death benefit of $550,000 was, in effect, a second award of alimony, which the overcollateralization of the purported security underscores. The death benefit of $550,000 did *not* guarantee the fulfillment of the obligations to pay $18,026.75 in net, unsatisfied child support arrears and the obligation to pay as much as $456,000 in alimony. Were Defendant to pay his net, unsatisfied child support arrears on or before 5 July 2020 and the $1,900 per month, as ordered, but pass away on 31 July 2040, the day before his final $1,900 monthly alimony payment was due, assuming the parties never reconciled and Plaintiff never remarried, Plaintiff would receive a windfall: $18,026.75 in child support arrears; $454,100 in monthly alimony payments; and $550,000 of "security" in the form of a death benefit from the life insurance policy—representing more than a double recovery of the amounts purportedly "secured" by the life insurance. Accordingly, we hold that the life insurance the trial court ordered Defendant to maintain did not qualify as "security" within the meaning of § 50-16.7(b).

¶ 34 Finally, as we reasoned in *Squires v. Squires*, 178 N.C. App. 251, 264, 631 S.E.2d 156, 164 (2006), the requirement in the trial court's order that Defendant maintain life insurance with a death benefit of $550,000 is "without effect as such a term is barred by statute." To reiterate, "alimony shall terminate upon the death of either the supporting or the dependent spouse." N.C. Gen. Stat. § 50-16.9(b) (2019). The death benefit of the life insurance Defendant was ordered to maintain would constitute alimony Plaintiff received after Defendant's death—upon the occurrence of which any obligation of Defendant to pay Plaintiff alimony would have been extinguished. *See id.* Section 50-16.7(b) does not create an exception from the rule that an alimony obligation terminates upon the death of either the supporting or dependent spouse. We therefore

vacate the portion of the trial court's order requiring Defendant to maintain life insurance with a death benefit of $550,000 naming Plaintiff as beneficiary.

D. Attorney's Fees

¶ 35 **[3]** Defendant challenges the trial court's award of attorney's fees on the basis that the award includes fees incurred during the equitable distribution portion of the case, which are not recoverable. Plaintiff suggests that this is a clerical error in the order, but we disagree. We hold that (1) competent evidence in the record supported the trial court's findings that Plaintiff was a dependent spouse; (2) Defendant was a supporting spouse; and (3) Plaintiff had insufficient means to subsist during the prosecution of the case and defray necessary expenses. However, the attorney's fee award included fees incurred during the equitable distribution portion of the case, which was improper. We vacate the portion of the order awarding Plaintiff attorney's fees and remand the case for entry of an award of attorney's fees that does not include fees for equitable distribution.

¶ 36 "A party can recover attorney's fees only if such a recovery is expressly authorized by statute." *Robinson v. Robinson*, 210 N.C. App. 319, 336, 707 S.E.2d 785, 797 (2011) (internal marks and citation omitted). N.C. Gen. Stat. § 50-13.6 authorizes attorney's fee awards in actions for child custody, while N.C. Gen. Stat. § 50-16.4 authorizes them in actions for alimony. *See* N.C. Gen. Stat. § 50-13.6 (2019) ("[T]he 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."); *id.* § 50-16.4 ("[T]he court may . . . enter an order for reasonable counsel fees, to be paid and secured by the supporting spouse in the same manner as alimony."). In actions for equitable distribution, however, attorney's fees are not recoverable. *Robinson*, 210 N.C. App. at 337, 707 S.E.2d at 797 (citations omitted). In a combined action for equitable distribution, alimony, and child support, a trial court may award attorney's fees for the alimony and child support portions of the case, but not for the equitable distribution portion. *Id.*

¶ 37 Plaintiff's counsel averred in a 14 January 2020 affidavit prepared in support of the award of attorney's fees that total fees and costs for Plaintiff's claims for alimony, child custody, and child support were $11,321.86. A 14 January 2020 billing statement attached to the affidavit reflects a balance of $11,489.11, however, and the trial court awarded attorney's fees to Plaintiff in the amount reflected in the billing statement rather than the affidavit. A review of the billing statement reveals that

the billing statement includes fees for the equitable distribution portion of the case. There is a handwritten notation on the billing statement that states that "since 6/26/2019 (date of prior affidavit), an additional $6,515.61 has been incurred[.]" The affidavit likewise references a prior affidavit submitted by Plaintiff's counsel in support of the award, stating that through 26 June 2019, the recoverable fees were $4,806.25. However, this prior affidavit is not in the record on appeal. The exhibits/evidence log prepared by the clerk references a Plaintiff's Exhibit 27 described as "expenses for atty's fees" admitted by the court on 28 June 2019, suggesting that the prior affidavit not in the record may be Plaintiff's Exhibit 27.

¶ 38 Under Rule 9 of the North Carolina Rules of Appellate Procedure, our review "is solely upon the record on appeal," N.C. R. App. P. 9(a), and we cannot consider trial exhibits not included in the record on appeal, *Ronald G. Hinson Elec., Inc. v. Union Cnty. Bd. of Educ.*, 125 N.C. App. 373, 375, 481 S.E.2d 326, 328 (1997). We hold that the trial court erroneously relied only on the 14 January 2020 billing statement—which, as both the handwritten notation on the billing statement and affidavit indicate, included recoverable fees of only $6,515.61, not the total recoverable fees of $11,321.86. Accordingly, we vacate the attorney's fee award and remand the case for entry of an attorney's fees award that does not include fees for equitable distribution.

III. Conclusion

¶ 39 We affirm the order of the trial court in part but vacate the portions of the order requiring Defendant to maintain life insurance and awarding Plaintiff attorney's fees. We remand the case to the trial court for entry of an award of attorney's fees that does not include fees for equitable distribution. Because N.C. Gen. Stat. §§ 50-13.6 and 50-16.4 only authorize awards of reasonable fees, the award entered by the trial court on remand must be supported by factual findings demonstrating that the fees are reasonable. *See, e.g.*, *Falls v. Falls*, 52 N.C. App. 203, 221, 278 S.E.2d 546, 558 (1981) ("To support an award of attorney's fees, the trial court should make findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent.").

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges DILLON and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 DECEMBER 2021)

AM. SW. MORTG. CORP. v. ARNOLD 2021-NCCOA-704 No. 21-315	Mecklenburg (19CVS13210)	Affirmed
AM. SW. MORTG. CORP. v. O'MEARA 2021-NCCOA-705 No. 21-311	Brunswick (19CVS1338)	Affirmed
CRAM v. RALEIGH RADIOLOGY, LLC 2021-NCCOA-706 No. 21-116	Wake (19CVS17467)	Affirmed
GRANITE CONTRACTING, LLC v. CARLTON GRP., INC. 2021-NCCOA-707 No. 21-243	Mecklenburg (19CVS6471)	Affirmed
HAUSER v. IDILBI 2021-NCCOA-708 No. 21-302	Mecklenburg (20CVS5091)	Affirmed
HENDERSON v. TARGET 2021-NCCOA-709 No. 21-259	Cumberland (20CVS5892)	Affirmed
IN RE B.H. 2021-NCCOA-710 No. 21-295	Guilford (20JA94)	Affirmed in Part; Dismissed in Part
IN RE C.D.B. 2021-NCCOA-711 No. 21-397	Cabarrus (21JA2)	Affirmed
JONES v. TRINITY HIGHWAY PRODS., LLC 2021-NCCOA-712 No. 20-672	Edgecombe (20CVS53)	Affirmed
MILLER v. GRAHAM CNTY. 2021-NCCOA-713 No. 21-81	Graham (17CVS153)	Affirmed in part; Reversed and Remanded in part.
RICE v. RUTLEDGE RD. ASSOCS., LLC 2021-NCCOA-714 No. 21-74	Buncombe (18CVS4674)	Affirmed.

SAMUEL v. RC CREATIONS, LLC 2021-NCCOA-715 No. 21-123	N.C. Industrial Commission (17-805002)	Affirmed
SNIDER v. ELITE MOUNTAIN BUS., LLC 2021-NCCOA-716 No. 21-193	Macon (19CVM219)	Dismissed
STATE v. BASNIGHT 2021-NCCOA-717 No. 20-892	Washington (18CRS50008-09)	No Error
STATE v. CABALLERO 2021-NCCOA-718 No. 21-82	Durham (16CRS51355-56) (16CRS536)	No Error
STATE v. FIABEMA 2021-NCCOA-719 No. 20-765	Person (18CRS51332)	No Error
STATE v. HILGERT 2021-NCCOA-720 No. 21-233	New Hanover (17CRS52786)	REMAND TO THE TRIAL COURT TO VACATE JUDGMENT SUSPENDING SENTENCE AND ORDER REVOKING PROBATION, AND ENTER AN ORDER DISCHARGING AND DISMISSING THE CHARGE AGAINST DEFENDANT.
STATE v. HODGE 2021-NCCOA-721 No. 19-443-2	Wake (17CRS1541) (17CRS208127)	No Error
STATE v. JONES 2021-NCCOA-722 No. 21-130	Wake (18CRS220046)	Affirmed
STATE v. NEWTON 2021-NCCOA-723 No. 20-852	Mecklenburg (17CRS203146)	No Error
STATE v. PAKTIAWAL 2021-NCCOA-724 No. 20-925	Wake (16CRS223679)	PETITION DENIED & APPEAL DISMISSED.

STATE v. PARKS 2021-NCCOA-725 No. 20-832	Cumberland (18CRS62629) (18CRS63173) (18CRS63174)	NO PREJUDICIAL ERROR
STATE v. RAMIREZ 2021-NCCOA-726 No. 21-40	Guilford (06CRS102498) (08CRS24333)	Affirmed
STATE v. RUSS 2021-NCCOA-727 No. 20-742	Randolph (17CRS56248) (17CRS716225) (18CRS54142)	No Error
STATE v. SAWYER 2021-NCCOA-728 No. 20-776	Craven (18CRS53396) (19CRS53231) (20CRS46)	Vacated and remanded in part, affirmed in part.
STATE v. WARREN 2021-NCCOA-729 No. 21-276	Haywood (19CRS230)	No Error
STATE v. WASHINGTON 2021-NCCOA-730 No. 20-448	Wake (18CRS221292-94)	No Error
STATE v. WHITTED 2021-NCCOA-731 No. 20-683	Durham (18CRS55903) (19CRS1071)	No Error
STATE v. WROTEN 2021-NCCOA-732 No. 20-739	Buncombe (18CRS638) (18CRS88244)	Affirm

ASARE v. ASARE

[281 N.C. App. 217, 2022-NCCOA-1]

ERNESTINA ASARE, PLAINTIFF
v.
DENIS ASARE, DEFENDANT

No. COA20-708

Filed 4 January 2022

1. Divorce—alimony—equitable distribution—findings of fact—evidentiary support

In an alimony and equitable distribution order, the findings of fact concerning the status of certain real property and the husband's age, employment status, separate assets, and acts to preserve the marital assets were supported by competent evidence and by the trial court's determination that the husband's testimony was not credible. One incorrect finding—that the husband was sixty-six years old, when he was in fact sixty-seven years old—was not essential to support any of the conclusions of law.

2. Divorce—equitable distribution—classification—retirement account

In an alimony and equitable distribution order, where the evidence established that a portion of a retirement account was marital property and the other portion was the husband's separate property, the trial court abused its discretion by determining that the entire post-separation passive appreciation of the retirement account (from both the marital portion and the husband's separate portion) was marital property. Other than this error, which was ordered to be corrected on remand, the trial court did not abuse its discretion in determining the net valuation of the marital and divisible property, and it properly considered the relevant statutory factors in ordering an unequal division of the marital property.

3. Divorce—alimony—income and needs—lump sum and monthly payments

In an order awarding alimony to a wife, the trial court did not abuse its discretion in determining that the husband's current income was sufficient to pay alimony, in determining the husband's reasonable monthly needs, or in requiring the husband to pay both a lump sum and periodic monthly payments to the wife. The award was supported by competent evidence and by the trial court's determination that the husband's testimony and evidence were not credible.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from order entered 25 March 2020 by Judge J. Brian Ratledge and from order entered 26 January 2017 by Judge Debra Sasser in District Court, Wake County. Heard in the Court of Appeals 27 April 2021.

No brief filed for plaintiff-appellee.

Marshall & Taylor, PLLC, by Travis Taylor, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Denis Asare ("Husband") appeals from the trial court's order for alimony, attorney's fees, and equitable distribution. Husband asserts the trial court abused its discretion in several respects, including arguments related to the trial court's findings of fact, classification of property, and equitable distribution. Because one of the trial court's findings of fact regarding classification of divisible property was not supported by the evidence, we remand for entry of a new order with new findings as to the classification and valuation of the post-separation appreciation of the Vanguard account and for the trial court to make an equitable distribution based upon the new findings. The trial court's other findings of fact are supported by the evidence, and we find no abuse of discretion and therefore affirm the trial court's order as to alimony.

I. Background

¶ 2 Husband and Ernestina Asare ("Wife") were married on 25 March 1995. The parties had four children. Wife filed a complaint for equitable distribution, postseparation support, alimony, and attorney's fees on 24 May 2016. In the complaint, Wife asserted that the date of separation was 18 August 2015 when Husband "willfully abandoned" Wife. Wife alleged that Husband "had been commuting for work to Virginia during the week, returning to the former marital residence on weekends and holidays." Husband filed an answer on 8 July 2016, asserting that the date of separation was 1 April 2012. In the answer, Husband admitted that the parties' two children "resided with the parties at [the marital home] in Morrisville, North Carolina 27560 from 2006 until August 2015, when each of the younger children enrolled in college."

¶ 3 On 26 January 2017, the trial court conducted a hearing regarding postseparation support, attorney's fees, and the parties' date of

separation. On 26 January 2017, the trial court entered an order concluding the date of separation was 18 August 2015.

¶ 4 On 6 February 2017, Husband filed motions for relief from judgment, new trial and amendment of findings pursuant to Civil Procedure Rules 52, 59, and 60 from the trial court's order establishing the date of separation. Husband contended that the evidence presented did not support several findings of fact and one conclusion of law. The trial court denied Husband's motions on 30 May 2017.

¶ 5 On 14 February 2017, the trial court entered an order for postseparation support and attorney's fees in favor of Wife. The trial court ordered Husband to pay monthly postseparation support to Wife in the amount of $3,400.00 effective 1 September 2015, with the obligation remaining until the first of the following occurred: 1 August 2018, the entry of an order allowing or denying alimony to Wife, dismissal of Wife's alimony claim, or as provided in North Carolina General Statute § 50-16.9(b). The trial court also ordered Husband to pay a minimum of $50.00 per month to be applied to satisfy postseparation support arrears in the amount of $19,131.00 and $4,000.00 in Wife's attorney's fees.

¶ 6 On 23 February 2017, Husband filed motions for relief from judgment, amendment of findings, and for a new trial on the postseparation support order based upon Civil Procedure Rules 52, 59, and 60. Husband challenged several findings of fact and conclusions of law. He also argued that he had not received a fair trial for several reasons, including "time constraints imposed by the Court" that prevented Husband from submitting "much of the evidence he wanted to present to refute [Wife]'s testimony[,]" that Husband was "not afforded the opportunity to consult with his attorney to cross-examine an important witness[,]" and that the trial court had "interrupted [Husband]'s attorney and prevented him from completing questions."

¶ 7 On 26 June 2017, the trial court entered an order denying Husband's motions for relief from judgment and for a new trial and granting in part Husband's motion to amend the findings of fact. In addressing Husband's motion, the trial court found that "[i]n reviewing the totality of the evidence, the Court finds that there was sufficient credible evidence to support these findings of fact about which [Husband] complains except as specifically noted herein."

¶ 8 On 21 October 2019, the trial court heard the claims of equitable distribution and alimony. As relevant to the issues on appeal, the evidence showed that at the time of the trial, Wife was sixty years of age and residing at the former marital home in Morrisville, North Carolina

("marital home"), and Husband was sixty-seven years of age and residing with his nephew in West Legon, Ghana. The parties moved to North Carolina in 2006 after Husband became employed by Blue Cross Blue Shield of North Carolina. In October 2011, Husband started employment with Corvesta/Delta Dental ("Corvesta") in Roanoke, Virginia. In 2007, the parties purchased the marital home, which the parties agreed was originally held by the parties as tenants by the entirety.

¶ 9 During Wife's presentation of evidence, the trial court heard testimony from real estate appraisal expert Michael Ogburn ("Mr. Ogburn"). Mr. Ogburn, who was appointed by the trial court to appraise the marital home, testified that the fair market value of the home on 18 August 2015—the date of separation—was $455,000.00. Mr. Ogburn based his testimony on his appraisal report, which was admitted into evidence. Mr. Ogburn conducted another appraisal on 15 August 2018 and valued the marital home at $496,500.00. Mr. Ogburn testified that the valuation was based on a "direct sales comparison approach using properties within that immediate market[.]" Mr. Ogburn noted there was "a strong market with demand exceeding supply" which contributed to the increase in property value, while also noting the marital home was "over built" for the neighborhood, meaning the marital home was more valuable than neighboring properties.

¶ 10 The trial court next heard testimony from Bonnie Bowen ("Ms. Bowen"), called by Husband and stipulated by the parties as an expert witness in valuation of retirement benefits. Ms. Bowen was retained by Husband to determine the marital and separate components of Husband's retirement accounts. Ms. Bowen testified that the retirement accounts had a total value of $726,032.00 at the date of separation, $413,897.00 of which was marital and $312,135.00 of which was separate. By the date of distribution on 31 March 2019, the retirement accounts grew to a total of $1,041,991.00, with $523,763.00 marital and $518,228.00 separate. Ms. Bowen gave extensive testimony regarding her methods in tracking Husband's assets and in determining which portions were marital and separate.

¶ 11 Husband testified that he was sixty-seven years old at the time of the hearing, and he resided in West Legon, Accra, Ghana. Husband stated that he had moved to Ghana in October 2018 after selling a condominium in Roanoke, Virginia ("Roanoke condominium") because he "had nowhere to stay." When asked to clarify if Ghana was his permanent residence, Husband responded that he had moved to Ghana because he lost his job and had not "found anything," making it "futile . . . to stay in Roanoke, because there were very limited job opportunities."

¶ 12 Regarding his employment and qualifications, Husband testified that he had two MBA degrees and was last employed with Corvesta Delta Dental in February 2018. Husband stated that he received severance pay for six months, received "around $6,000" in unemployment benefits in 2018, and was currently receiving income from Social Security. Husband estimated that he was receiving approximately $2,500.00 per month with deductions for Medicare coverage but noted that he did not "remember the exact amount" because he did not have access to the accounts while staying in Ghana. Husband stated that he was not receiving any income from any other sources at the time of the hearing. Husband stated that he had withdrawn $40,000.00 from his Vanguard retirement account a few months earlier "as a result of a freeze that was put in [his] account and then that money escrow being given to [Wife]." Husband also stated that he sold the Roanoke condominium the year prior and received "[a]bout $80,000" in proceeds.

¶ 13 Husband testified that he owned a house in Acworth, Georgia ("Georgia home") on the date of separation and that the Georgia home was purchased during the marriage. Husband testified the Georgia home was sold on 9 July 2017 for $223,000.00, netting $92,122.91 in proceeds. The proceeds were awarded to Wife as an interim distribution on 17 July 2018. Husband also stated that a total of "about $60,000" was incurred to sell the Georgia home and that he paid $21,262.00 for repairs and maintenance of the Georgia home prior to its sale. When asked about a payment of $1,837.81 listed on an account balance from 31 January 2011, Husband stated that "it looks like it's the tax that I was paying on the Acworth home[,]" and that "I wouldn't say it is, but it could be. It looks like." Husband testified that an "account payoff" of $13,225.14 from 4 November 2013 was connected to a refinancing of the Georgia home.

¶ 14 The trial court admitted evidence of relevant bank account statements. When Wife's trial counsel asked if a 23 October 2015 withdrawal of $29,000.00 from his US Alliance account was to purchase the Roanoke condominium, Husband stated that it was not, but did not provide any other explanation for the withdrawal. Husband also confirmed that a Union Bank account statement from 11 November 2015 listed a $19,000.00 withdrawal.

¶ 15 On cross examination, Husband answered additional questions regarding various items included in his EDIA, including his income, tax deductions, and expenses at the date of separation. Husband testified that he listed $2,500.00 in current income from Social Security and estimated $3,000.00 in mandatory monthly deductions, based on a tax burden of

$36,000.00 for the year after selling the Georgia home. Husband additionally listed deductions of $150.00 per month for Medicare, $400.00 per month for a "dental insurance estimate" and $100.00 for "vision insurance[.]" Husband confirmed that he listed monthly expenses totaling $7,110.00 at the date of separation.

¶ 16 Wife's trial counsel then questioned Husband regarding his expenses. When Wife's trial counsel asked Husband to clarify "which of the expenses [he was] actually paying as of [that day,]" Husband responded that he "made a statement that [he] had to go to Ghana because [he had] no place to stay," so he was "currently not paying anything[.]" However, Husband then stated that "that's short lived[,]" and that he would begin to resettle his expenses as soon as the case was settled. When asked if the grand total for Part 1 expenses was zero, Husband replied: "Not really. For example, I have Internet service, I have a cell phone, I have auto insurance; I buy gas, I have my auto repairs; I eat, so food and household supplies would be part of it[.]" When asked if these expenses totaled $335.00, Husband stated that he "wouldn't say correct or wrong, but I'm saying that I'm in transit right now, so I don't have any expenses that – but it's going to change after today . . . and I'm estimating that this will be the expenses based on the past pattern of life that I live; these would be my expenses."

¶ 17 Wife's trial counsel continued questioning Husband on specific portions of his EDIA, particularly expenses listed under the "current" column. Husband stated that it was "more or less an income statement, it's a flow, so we just can't look at one particular date to make an assessment." Husband also asked why Wife's trial counsel was "using six months" to measure his spending on medical insurance. The trial court paused to address Husband:

> THE COURT: Sir, if you need clarification, this is not a -- this is not a chess match, sir.
>
> [HUSBAND]: No. Okay.
>
> THE COURT: And let me pause it right here. Sir, you've done this repeatedly throughout this hearing and, believe me, the Court's taken notice.
>
> [HUSBAND]: Okay.
>
> THE COURT: Answer the question that you're asked, not the question that you wish you were asked.

> [HUSBAND]: Okay.
>
> THE COURT: Okay?
>
> [HUSBAND]: I just want to understand the basis so I can correct --
>
> THE COURT: I know. Well --
>
> [HUSBAND]: -- the answers.
>
> THE COURT: Well, I think you understand the basis on a number of these. Go ahead.

Husband testified regarding the remainder of other items listed in his EDIA, indicating whether the expenses were ongoing or estimated future expenses.

¶ 18 Wife testified that at the time of the hearing she was sixty years old and worked forty hours per week as a surgical sterile processor for Duke University Health System. Wife stated that she was being paid $15.36 per hour at the time but anticipated an increase in pay rate pending a certification she was working towards. Wife stated that she previously worked at Home Depot in 2018 and Bed Bath & Beyond in 2018 and 2019. Wife testified that when the family lived in Georgia, all of her income "was given to [Husband]" and when the family lived in North Carolina, Wife used her income for food, children's expenses, and personal spending. Wife also testified that she received about $10,000.00 from her daughter in 2019.

¶ 19 Wife testified that she relocated to Georgia in 2000 and to North Carolina in 2006 due to Husband's employment in those states. Wife also stated that Husband sought to relocate the family to Ghana in 2002 and to Georgia in 2013, but Wife refused to relocate on both occasions. Wife also testified that due to Husband's frequent travel, she "was a stay-at-home mom" and "in charge of the children[,]" with respect to their hygiene, education, and overall needs.

¶ 20 Regarding her expenses, Wife testified that the mortgage payment on the marital home was $1,832.59 as of November 2018 and that the payment had increased to $2,047.60 by the date of the hearing.

The Equitable Distribution and Alimony Order

¶ 21 On 25 March 2020, the trial court entered an order for alimony, attorney's fees, and equitable distribution. Finding of Fact 17 included ten separate sections detailing the parties' property interests.

Finding of Fact 17(I): Real Property

¶ 22 Subsection A concerns the parties' marital home. The trial court found the marital home was marital property, Mr. Ogburn's testimony was credible as to the fair market value of the home on the date of separation, the mortgage was classified as marital debt, and accordingly that the net marital property value of the marital home at the date of separation was $85,582.55. Based on Mr. Ogburn's testimony regarding two appraisals on the marital home, the trial court found that the $41,500 increase in fair market value from the date of separation until 15 August 2018 was classified as divisible property.

¶ 23 In subsection B, the trial court made further findings with respect to the Georgia home. The sale proceeds were classified as 100 percent marital property and Wife was credited for receiving $92,211.91 as an interim distribution following the sale of the Georgia home.

¶ 24 In subsection C, the trial court addressed the Roanoke condominium, purchased by Husband shortly after separation. The trial court found that Husband made a down payment of $39,631.25 in cash on 29 October 2015 after withdrawing $29,000 from a US Alliance Bank account on 23 October 2015 and $19,000 from a Union Bank account on 26 October 2015. Although the trial court noted that on direct examination Husband denied using the money to purchase the Roanoke condominium, the trial court found Husband's testimony "untenable, particularly given Husband's education and sophisticated employment history reflecting six-figure annual earnings. This Court is not persuaded by Husband's inability to recall or remember the purpose or use of these large cash withdrawals one week before the Roanoke condo was purchased." Because the money in Husband's bank account had been identified and classified at trial as marital, the trial court determined that the Roanoke condominium was "classified as 100% marital property." Husband sold the Roanoke condominium in October 2018 and received $80,000 in net proceeds, which the trial court classified as part marital and part divisible property, with $39,631.25 (the down payment) classified as marital property and $40,368.75 (the increase in value) as divisible property.

¶ 25 Subsection D addressed Husband's property interests in Ghana. Although the trial court noted that Husband provided conflicting evidence and testimony regarding how much real property he owned in Ghana, it concluded that the only real property in Ghana known to the court belonging to either party was Husband's separate property not subject to equitable distribution.

¶ 26 The remainder of Finding of Fact 17 addressed the distribution of other property assets between the two parties. The trial court found that bank accounts in Husband's name had a total net value of $27,961.83 and distributed the accounts to Husband, along with a joint Bank of America account with a total value of $5,902.49. The trial court found that bank accounts in Wife's name had a total value of $414.79 and distributed the funds to Wife. The trial court noted a Roth IRA investment account with a balance of $30,070.31 at the date of separation, classified the account as marital property, and distributed it to Husband.

¶ 27 Regarding retirement benefits, the trial court found that during the marriage, Husband "was employed at IBM, Jefferson Wells, BCBSNC and Corvesta." The trial court found that Husband's IBM employment had both pre-marital and marital components, his Jefferson Wells and BCBSNC employments had entirely marital components, and his Corvesta employment had both marital and post-separation components. The trial court determined that Husband's Vanguard account, which was opened in 2010 to rollover his IBM retirement benefits, was a mixed asset. The trial court noted that during his IBM employment, Husband acquired a defined contribution plan and a defined benefit plan, both of which "had been commingled and were held in the Vanguard account[.]" The defined benefit plan was cashed out in a lump sum and paid to Husband in 2002.

¶ 28 The trial court summarized Ms. Bowen's qualifications and testimony, finding the testimony "credible regarding the tracing-out of the Vanguard Account." The trial court found that Ms. Bowen's "calculations related to the separate component of the Lump Sum part of the Vanguard Account are based on reliable and credible data." The trial court made a similar finding with respect to the 401K portion of the Vanguard account. The trial court found that on the date of separation, the Vanguard account had a total value of $412,160.00, of which $100,025.00 was classified as marital and $312,135.00 was classified as Husband's separate property. The trial court found that there was a net gain from all Vanguard funds totaling $84,609.00 and that Husband had failed to establish that the increase was separate property, accordingly finding that the $84,609.00 was marital property for the purposes of equitable distribution.

Finding of Fact 19: Unequal Distribution

¶ 29 The trial court began by finding that the total net value of the marital and divisible estate was $1,033,525.53, and that an equal distribution would result in an award of $516,762.76 to each party. Based on the facts

of the case, the trial court determined that an equal distribution would not be equitable and awarded 57 percent of the net marital and divisible estate to Wife, and 43 percent to Husband. The trial court made further specific findings after "considering all of the distributional factors enumerated in N.C.G.S. § 50-20(c)," beginning with the income, property, and liabilities of each party at the time the division of property was to become effective.

¶ 30 The trial court found that Wife was sixty years old and was employed with Duke University Health System, where she earned $15.36 per hour with the expectation that her hourly rate would increase once she completed her certification courses. Her pay stub showed gross earnings of $1,084.43 for 70.6 hours and net earnings of $935.27. The trial court noted that Wife's separate property included a portion of her 401K account which was earned after the date of separation, and that her liabilities included the Roundpoint mortgage she was ordered to pay on the marital home, which was $2,047.60 per month at the time, as well as real property taxes, utilities, and other living expenses.

¶ 31 With respect to Husband, the trial court found that he was sixty-six years old, was last employed by Corvesta before being laid off in February 2018 and was currently receiving approximately $2,500.00 per month in Social Security income, which began in December 2018 or January 2019. The trial court found that it was unclear "whether [Husband] will seek, or begin, some type of gainful employment in the future[,]" and that when the issue of employment was addressed at the hearing, Husband "provided differing answers regarding employment status, and the Court noted his various discrepancies and inconsistencies." Based on the evidence and testimony presented at the hearing, the trial court was "not persuaded [Husband] is 'retired', unemployable or that he is unable to find suitable work given his employment history and educational background."

¶ 32 Subsection B addressed the duration of the marriage and the age and physical and mental health of both parties, finding that the parties were married for over twenty years, both parties were in their sixties, and "by all accounts, present well and appear to be in good physical and mental health."

¶ 33 Subsection C addressed the expectation of pension, retirement, and other deferred compensation rights that were not marital property. The trial court found that Husband had separate retirement assets in excess of $450,000.00, while Wife's separate portion of her 401K had a total value of $10,006.91 as of 12 November 2018. The trial court further found that although Husband claimed that Wife "caused him to lose significant

pension benefits with IBM, [Husband] testified he voluntarily stopped working at IBM by his own choice. After IBM, he accumulated significant retirement benefits from Jefferson Wells, BCBSNC, and Corvesta, as detailed in earlier portions of this Order."

¶ 34 Subsection D addressed any equitable claim to, interest in, or direct or indirect contribution to the acquisition of marital property by a party not having title, finding that Husband traveled extensively while working with IBM and Jefferson Wells and was based in Roanoke, Virginia while working with Corvesta, and that Wife "primarily reared the parties' children during the times [Husband] was away from the home."

¶ 35 Subsection E addressed any direct or indirect contributions made by one spouse to help educate or develop the career of the other spouse. The trial court found that Wife had relocated on two occasions during the marriage due to Husband's changes in employment, first from Connecticut to Georgia, and second from Georgia to North Carolina. The trial court also noted that Wife refused to relocate on two occasions, specifically refusing to move to Ghana when Husband wanted to take a position overseas and refusing to move with Husband and their children to Georgia in 2013. The trial court found that Wife had deferred to Husband in furtherance of his career for "the vast majority of the marriage[.]" With respect to Husband's contributions, the trial court found that Husband had encouraged Wife to apply for certain jobs and drove her to a job interview, noting that although Husband's efforts were "admirable," they were "relatively minimal given the totality of Wife's job skills, the various demands of raising minor children, and the fact [Husband] usually made the decisions on when and where the parties would move since [Husband] was the primary wage-earner during the marriage."

¶ 36 Subsection F addressed the parties' actions with respect to marital or divisible property after the date of separation. The trial court found that Wife had maintained the equity in the marital home by making timely mortgage and property tax payments, and that the marital home had appreciated in value by $41,500 since the date of separation. The trial court found the following with respect to Husband's maintenance of the Georgia home:

> [Husband] took affirmative steps to maintain, preserve and prepare the Georgia home for sale after the date of separation. To this end, however, the actual expenses incurred by [Husband] is unclear since [Husband]'s own expense summary is, in some instances, either greatly inflated, duplicative or projected. Most of the supporting documentation [Husband] offered are

> emails, estimates, or proposals for work to be done, instead of actual expenses incurred.
>
> Since the Court cannot find [Husband]'s testimony about his actual out-of-pocket costs and expenses to be clear and credible, the Court cannot ascertain the true amount [Husband] paid after the date of separation to maintain and prepare the Georgia home for sale. Furthermore, [H]usband admitted he leased the Georgia home and received rental income from the tenants. A review of his income tax returns reflected he was able to write-off losses on the Georgia home in every year he filed a separate tax return, to wit: 2015 ($11,846 loss); 2016 ($13,090 loss); and 2017 ($52,567 loss).
>
> [Husband] has already received substantial equity out of the Georgia home, as he eventually acknowledged that in 2013 he refinanced the mortgage secured by the Georgia home and received $124,875.68 in equity as a result of the refinance. The November 30, 2013 USAlliance bank statement identified this mortgage's existence and balance payoff. After the Georgia home refinance, [Husband] deposited the proceeds of $124,875.68 into his Union Bank account.
>
> Based on the considerations above, the Court does not find [Husband]'s testimony on these issues to be credible or the evidence to be sufficient to support a finding in his favor on this distributional factor.
>
> Finally, [Husband] withdrew $134,000 from the Vanguard account in 2018 and also took $100,000 from Vanguard to set-up the TRP account. Both of these actions occurred after the date of separation and prior to distribution. The Court considers [Husband]'s actions as a distributional a [sic] factor, particularly since there was a net gain from all Vanguard and TRP funds of approximately $84,609 ($496,769 DOD *minus* $412,160 DOS per Page 1, [Husband]'s Exhibit #B3).

(Emphasis in original.)

¶ 37 In Findings of Fact 20 and 21, the trial court found that "[b]ased on the distributional factors in N.C.G.S[.] § 50-20(c) and more specifically discussed above," the parties were entitled to the property and accompanying values set out in Exhibit A, which was attached and incorporated by reference. The trial court determined that the unequal distribution favoring Wife and against Husband was "equitable under the facts of this case."

Alimony

¶ 38 Following the portion of the findings addressing equitable distribution, the trial court turned to the parties' finances. Findings 23 and 24 summarized the parties' Social Security earnings between 1995 and 2015. Husband's Social Security statements showed earnings of $54,423.00 in 1995 compared to $142,267.00 in 2015, while Wife's statements showed earnings of $713.00 in 1995 compared to $28,451.00 in 2015.

¶ 39 The trial court made findings regarding additional details about the parties' married life, including their children, their move from Connecticut to Georgia, Husband's employment, Wife's educational pursuits, and Wife's employment history. The trial court noted that a job log history provided by Wife only covered 2008 through 2013, and that while Wife maintained she had continued to look for work since 2013, "the Court saw little satisfactory evidence to support her asserted claim. [Wife]'s job log presented at [the] hearing only goes up to 2013 and is not wholly sufficient to the Court." Additionally, the trial court found that while Wife was employed in a promising career at the time, "no satisfactory evidence emerged showing she has reasonably and consistently sought employment which correlates with her educational skills after going back to school in 2005. [Wife]'s past lack of efforts on this point has likely affected her present income-earning ability." The trial court also found that Wife gave conflicting testimony on the frequency and amount of money received from her sister and daughter, and that Wife's claim that she had no other income other than from Duke was not credible.

¶ 40 The next several findings addressed the parties' standard of living during the marriage. The trial court found the parties "enjoyed a good, respectable standard of living during the marriage as evidenced by their 4216 square-foot Marital home and also the Georgia home." The trial court also noted that Husband regularly traveled to Ghana during the marriage, gifted money to various family members, friends, and other entities, and had substantial funds in his bank and investment accounts when the parties separated.

¶ 41 The following findings concern Husband's expenses and liabilities, as well as Husband's financial affidavit:

> 44. [Husband] lists his current regular recurring monthly expenses as $3,145 which includes, among other things, estimated anticipated costs such as rent at $1,200 per month and a car payment at $650 per month. He also included $50 per month for a pet despite acknowledging at [the] hearing he does not have a pet. His affidavit also includes various monthly payments for utilities even though he admitted he was not incurring those expenses at this time because he was residing with his nephew in Ghana.
>
> 45. [Husband] also listed certain expenses on his Affidavit which he expects to pay in the future, including $225 per month toward his nephew's education and living expenses. He further testified he is currently paying his mother $500 per month, which is also reflected on his Affidavit.
>
> 46. [Husband] claims several large debts to James Kumi and Solomon Owusu-Ansah on his Financial Affidavit, yet he did not produce any documentary evidence to support such debts or their present loan balances despite having ample time and ability to do so.
>
> 47. Stated simply, the Court affords little-to-no weight to [Husband]'s current Financial Affidavit from October 2019 since it fails to reflect, in totality, his actual current monthly expenses. [Husband] is only actually currently incurring $300-$500 of actual ongoing living expenses on a monthly basis.

¶ 42 With respect to Wife, the trial court found that Wife's pay stub from September 2019 reflected earnings of $15.36 per hour, with the expectation that her hourly rate would increase after obtaining re-certification. Regarding Wife's expenses, the trial court found that her financial affidavit detailed regular recurring monthly expenses totaling $3,812.75 and that the mortgage payment on the marital home increased from $1,832.59 to $2,047.60 after the affidavit was completed. The trial court found that Wife's total monthly living expenses of $4,624.75 were reasonable, and that compared to a gross monthly income of $3,120 per month (assuming a new hourly rate of $18 per hour) she would have a monthly deficit of $1,504.75, without factoring in any taxes or deductions. The trial court also noted that while Wife was a dependent spouse during the

marriage, her "initial lack of candor on the issue of income from family, along with her past failure to seek applicable employment contemporaneous with her job skills, are key factors noted and considered by this Court in considering Alimony."

¶ 43 The following findings of fact addressed Husband's employment status:

> 53. [Husband] claims he is at retirement age and is unable to pay alimony to [Wife]. [Husband]'s assertions are unconvincing to this Court given the variety of his answers regarding employment status.
>
> 54. At [the] hearing, when asked if he was currently unemployed, [Husband] stated, "I am retired". After referencing his termination from Corvesta in February 2018, he was then asked if he had sought employment since then, to which he responded, "Yes". He further stated he had "made a lot of contacts", such as applying for jobs, making phone calls and utilizing the LinkedIn resume, for example.
>
> 55. A review of [Husband]'s job application log provided at [the] hearing, however, shows he last applied for a job in September 2018, nearly 11 months before [the] hearing. At no point during the hearing did [Husband] imply, or even mention, he was simply unable to work or actually prohibited from obtaining employment.
>
> 56. A deeper review of this same job application log reveals he applied for jobs such as a Financial Crimes Analyst and also a Benefit Specialist, but there is no indication [Husband] even possesses the requisite expertise in these fields. [Husband]'s job skills were in audit and risk management, and he served as a Director in this capacity while working at Corvesta. [Husband] acknowledged he gained these particular job skills due to his previous experience at IBM. In all, it appears that nearly half of [Husband]'s applications were in line with his job skills and experience while the other half was not.
>
> 57. When asked by his counsel as to how this litigation has affected him, [Husband] testified that these pending matters have put him "in limbo" as to when

he will retire. [Husband] testified the previous day, though, that he was already retired.

58. The Court is not persuaded [Husband] is truly retired or that he has neither ability, nor intention, to be gainfully employed in the very near future. The Court also finds [Husband]'s job log to be inadequate and, given his background, also contains shortfalls in applying for jobs reasonably within his skillset.

59. [Husband] is in good health and demonstrates a rather keen mind, both of which bode well for him having continued future employment opportunities. [Husband]'s testimony as to his actual work status and being unable to find employment is neither credible nor substantiated by the evidence.

¶ 44 The following findings addressed Husband's ability to pay alimony:

60. As to his ability to pay Alimony, [Husband] clearly plans to continue gifting money to third parties, including his mother, along with paying $225 per month combined for his nephew's education and living expenses while he is in school. These expenses are voluntary.

61. By Order of this Court dated June 25, 2017, [Husband] was ordered to pay [post-separation support] to [Wife] at rate of $3,003, which included $50/month towards arrears.

62. [Husband] testified he made his last PSS payment of $3,003 on or about September 1, 2018.

63. Although [Husband] lost his job in February 2018, he continued to receive severance pay through the end of August 2018. He also received net bonus income in March 2018 totaling $19,176.14. [Husband] also received unemployment benefits in 2018 totaling approximately $6,000.

64. In December 2018/January 2019, [Husband] started receiving Social Security benefits in the amount of ~$2,500 monthly income.

65. [Husband] withdrew $134,000 from Vanguard in 2018.

> 66. In October 2018, [Husband] sold the Roanoke condo and netted $80,000 in October 2018. Thereafter, he moved to Ghana where he presently resides and also owns real property, perhaps even more property than this Court is aware.
>
> 67. [Husband]'s testimony about his lack of funds and inability to pay Alimony are simply not credible. [Husband] has ample means and ability to pay Alimony, and to pay such Alimony as ordered herein.
>
> 68. [Husband]'s lack of employment, coupled with his lack of candor as to the extent of any real property he owns in Ghana, appears little more than strategy he has designed to minimize potential ramifications or obligations pertaining to Alimony and Equitable Distribution, among others.

¶ 45 The trial court found that during the marriage, "[Wife] was the dependent spouse within the meaning of N.C.G.S. § 50-16.1A (2) and is substantially in need of support from [Husband] to maintain the standard of living to which she became accustomed during the marriage. During the marriage [Husband] was the supporting spouse within the meaning of N.C.G.S. § 50-16.1A (5)." Accordingly, in considering the factors set forth in North Carolina General Statute § 50-16.3A(b), the trial court determined that Husband was obligated to pay alimony to Wife.

¶ 46 The trial court ordered the following alimony term and form of payment:

> 75. [Wife] prefers a lump sum alimony payment in light of prior difficulties with [Husband] and, more pointedly, the fact [Husband] currently resides in Ghana.
>
> 76. Considering the likely obstacles which could foreseeably arise in the event of an alimony order all paid in only monthly installments, a portion of Alimony to be paid from [Husband] to [Wife] in lump-sum and also in monthly installments is appropriate, reasonable, equitable, and more efficient for both parties.
>
> 77. Therefore, the Court finds under these facts it is fair and equitable to order [Husband] to pay [Wife] alimony as follows:

a. A Seventy-Two Thousand Dollar ($72,000.00) lump sum cash payment directly to [Wife] as more fully set forth in the decretal portion of this Order.

b. In addition to the lump-sum ordered in sub-paragraph (a) immediately above, beginning October 1, 2020, and every month thereafter, [Husband] shall make monthly alimony payments of $1,200 directly to [Wife] as more fully set forth in the decretal portion of this Order.

78. The Court determined this lump-sum amount by considering an award of Alimony paid by [Husband] to [Wife] in the amount of $1,200 per month in alimony for a period of five (5) years. The monthly alimony ordered to begin in October 1, 2020 shall be for $1,200 monthly from [Husband] to [Wife] for a period of five (5) years.

Conclusions of Law

¶ 47 Based on the findings of fact, the trial court made conclusions of law restating several findings of fact, including: an equitable distribution of marital and divisible property and marital debt was not equitable; it was equitable for Wife to be awarded an unequal division in her favor of the net marital and divisible estate including retirement benefits; Wife was a dependent spouse and substantially in need of support from Husband to maintain her standard of living; the amount and method of payment of alimony was equitable and fair to all parties; Husband had the ability to pay the amount and form ordered; and neither party was entitled to an award of attorney's fees or sanctions.

Order and Decree

¶ 48 Following the findings of fact and conclusions of law, the trial court ordered the marital home and all equity be distributed to Wife, with additional direction for Husband to transfer his interest and control of the mortgage to Wife and for Wife to either refinance all encumbrances on the marital home into her sole name or facilitate a sale within six months of the order. The trial court further ordered that Wife receive an equitable distribution credit of $92,211.91 accounting for an interim distribution received by court order on 17 July 2018.

¶ 49 The order next detailed the distribution of assets between each party. In addition to the marital home, Wife was awarded the Honda

Pilot, the contents of two Wells Fargo accounts, the full contents of Husband's Fidelity Rollover Account on the date of separation (totaling $193,630.00), the divisible growth from the date of separation to 31 March 2019 ($38,332.00), seventy percent of the portion of Husband's Corvesta 401K account subject to equitable distribution ($120,242.00), all marital property in the Home Depot 401K account on the date of separation ($11,328.95), $1,537.16 in 2015 federal tax refunds, and $165.69 in 2015 state tax refunds. Husband was awarded all proceeds from the sale of the Roanoke condo (approximately $80,000.00), the Lexus and Toyota Corolla, the contents of two other Wells Fargo accounts, the contents of the USAlliance Federal Credit Union account, the contents of the Union Bank account, the contents of the joint Bank of America account, the contents of the Scottrade account, all marital property contents of the Vanguard account on the date of separation and any passive gains or losses from the date of separation ($100,025.00), the divisible property growth from funds originally in the Vanguard account on the date of separation ($84,609.00), thirty percent of the portion of Husband's Corvesta 401K account subject to equitable distribution ($51,000.00), $2,132.55 in 2015 federal tax refunds, $1,208.97 in 2015 state tax refunds, proceeds from Husband's 2015 Corvesta bonus paid in March 2016 ($9,929.33), and all debts from the Marriott Rewards credit card, UNC Health Care, and Tasha Timberland Hinton DDS.

¶ 50 The order required Husband to pay Wife a lump sum of $72,000.00 alimony within sixty days of the order's entry. Additionally, beginning 1 October 2020 and each month thereafter on or before the first day of the month until up through and including 30 September 2025, Husband was ordered to pay Wife an additional monthly sum of $1,200.00. Husband's obligation to pay alimony was set to terminate upon the first occurrence of any event provided in North Carolina General Statute § 50-16.9(b), including Wife's remarriage, death of either the Wife or Husband, cohabitation by Wife, or until 30 September 2025.

¶ 51 Husband filed notice of appeal from the equitable distribution and alimony order on 17 April 2020.

II. Discussion

¶ 52 Husband contends many findings of fact are not supported by the evidence; the trial court abused its discretion by awarding alimony; and the trial court erred in its classification, valuation, and distribution of property in equitable distribution. Although Husband begins his brief by addressing alimony, we will first discuss Husband's challenges to the trial court's findings of fact and equitable distribution.

A. Findings of Fact

¶ 53 **[1]** The standard of review from judgment entered after a non-jury trial is "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Dechkovskaia v. Dechkovskaia*, 232 N.C. App. 350, 352, 754 S.E.2d 831, 834 (2014) (citation omitted). These findings "are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Id.* Substantial evidence is defined "as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

¶ 54 Husband presents arguments challenging several of the trial court's findings of fact, in addition to arguing that the trial court should have made additional findings of fact based on the evidence presented at the hearing. Husband specifically challenges Finding of Fact 17(I)C, several portions of Finding of Fact 19, Findings of Fact 53-59, 67, 68, and 71. We address each in turn.

1. Finding of Fact 17(I)C

¶ 55 Husband argues the evidence did not support the trial court's finding that the Roanoke condominium was marital property, pointing to his testimony regarding withdrawals from his bank accounts and the source of the $39,631.25 down payment used for the condominium's purchase. Husband also emphasizes that there "is no dispute" that the condominium was purchased after the date of separation and was not owned at the time of the equitable distribution hearing.

¶ 56 The evidence presented at trial showed Husband withdrew $29,000.00 from his USAlliance Bank account on 23 October 2015, and $19,000.00 from his Union Bank account on 26 October 2015, for a total of $48,000.00. Husband then made a down payment of $39,631.25 in cash on 29 October 2015. Additionally, the evidence presented at trial established that although the bank accounts listed Husband as the title owner, both parties had an interest in the accounts, and accordingly all bank account assets were classified as marital property. In evaluating the evidence and testimony, the trial court determined that Husband's testimony regarding the withdrawals was "untenable" and that the evidence "sufficiently demonstrated the entire down payment of $39,631.25 came from [Husband]'s USAlliance and Union Bank accounts—all marital monies[.]" Despite Husband's assertions on appeal with respect to his testimony, the trial court specifically noted his testimony was not credible. We hold there was competent evidence to support the trial court's

finding that the purchase of the Roanoke condominium was funded by marital assets.

2. Finding of Fact 19

¶ 57 Husband next contends the trial court erred in several respects in Finding of Fact 19, particularly regarding Husband's age, employment status, separate assets, and acts to preserve marital assets.

¶ 58 Husband identifies several findings, including 19B, 53, and 71b, in which the trial court found that Husband was sixty-six years old, despite Husband's testimony that he was sixty-seven years old on the date of the hearing. Although it appears from the record that Husband was in fact sixty-seven years old at the date of the hearing, the trial court's findings that Husband was sixty-six are not essential to support any of the trial court's conclusions of law. Husband has not demonstrated that there is any material difference, for purposes of the trial court's consideration of the issues presented in this case, between age sixty-six and age sixty-seven. *See, e.g.*, *Black Horse Run Prop. Owners Ass'n-Raleigh, Inc. v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987) ("Where there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions.").

¶ 59 Husband argues the trial court erred in finding that he was not retired at the date of hearing, citing his testimony that he was involuntarily terminated and the trial court's statement that it did not "think it is a dispute that he was involuntarily terminated." Although Husband argues that he "clearly and unambiguously testified that he was retired[,]" the transcript reflects that Husband answered questions regarding his employment status with varying degrees of clarity. The trial court considered Husband's testimony that he was retired while also noting Husband's testimony regarding contacts and job search efforts made in 2018. The trial court's finding acknowledged Husband's "differing answers" and in light of the "various discrepancies and inconsistencies[,]" the trial court was "not persuaded [Husband] is 'retired', unemployable or that he is unable to find suitable work given his employment history and education." Based on competent evidence including Husband's testimony, the trial court evaluated Husband's credibility, and based on that evaluation, it was reasonable for the trial court to find that Husband was not retired or unemployable at the date of the hearing.

¶ 60 Husband argues the evidence did not support findings that Husband "has separate assets in excess of $450,000[.]" The trial court found

Husband had the following separate assets: real property in Ghana valued at $40,000.00; the separate portion of Husband's Vanguard account valued at $312,135.00; the separate portion of Husband's Corvesta account valued at $142,018.00; and a portion of Husband's 2015 bonus valued at $4,964.67, resulting in a total sum of $499,117.67. These findings were supported by Husband's testimony, Ms. Bowen's testimony, and other documentary evidence. The trial court did not err in finding that Husband had separate assets in excess of $450,000.[1]

¶ 61 Husband contends the trial court erred in Findings 19B and 59 that both parties "by all accounts, present well and appear to be in good physical and mental health," and that "[Husband] is in good health[,]" on the grounds that no evidence or testimony was offered as to the physical or mental health of either party.

¶ 62 "[I]n an equitable distribution proceeding, the parties' health is relevant to the extent it affects the equitable distribution of assets[,]" meaning that "if a party's health affects his or her ability to earn a living or increases his or her living expenses, that may be a factor that supports an unequal division of assets in his or her favor." *Denny v. Denny*, No. COA14-771, 242 N.C. App. 383, *6 (2015) (Unpublished). "Where evidence of a distributional factor such as a party's health is introduced, it is error for the trial court to fail to make findings of fact with respect to that factor." *Wall v. Wall*, 140 N.C. App. 303, 311, 536 S.E.2d 647, 652 (2000) (citation omitted).

¶ 63 In this case, the trial court had the benefit of observing the parties and hearing their testimony throughout the trial, and Husband has not pointed to any evidence in the record that either he or Wife are in poor health. *Cf. id*. Accordingly, the trial court did not err in finding that both parties "present well" and appeared to be in good health.

¶ 64 Husband contends there was insufficient evidence to support the trial court's finding that Husband "voluntarily stopped working at IBM by his own choice[,]" which the trial court considered as a distributional factor in Finding of Fact 19C. Husband notes Finding of Fact 19E that Wife refused to relocate to Ghana, which Husband contends was the direct cause of his termination from IBM. Although Husband implicates Wife in his termination from IBM, the evidence presented at the hearing

1. As discussed below, the trial court classified a portion of the post-separation appreciation on the Vanguard account as divisible property, but the evidence supports a classification of separate property as to the passive appreciation on the separate portion of the Vanguard account. Thus, the total value of Husband's separate assets will be different on remand, but it would still be "in excess of $450,000."

revealed that Husband had relocated away from his family for employment purposes on multiple occasions. The trial court did not err in finding that Husband's employment at IBM ended by his own choice.

B. Equitable Distribution

¶ 65 **[2]** Husband contends the trial court abused its discretion by incorrectly classifying, valuing, and distributing property pursuant to an equitable distribution and by awarding Wife an unequal distribution of marital and divisible property.

¶ 66 "Our review of an equitable distribution order is limited to determining whether the trial court abused its discretion in distributing the parties' marital property." *Robinson v. Robinson*, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011) (citations omitted). Findings of fact "are conclusive if they are supported by any competent evidence from the record." *Beightol v. Beightol*, 90 N.C. App. 58, 60, 367 S.E.2d 347, 348 (1988) (citation omitted).

¶ 67 Under North Carolina General Statute § 50-20(c), equitable distribution is a three-step process: the trial court must (1) classify property as being marital, divisible, or separate property; (2) calculate the net value of the marital and divisible property; and (3) distribute equitably the marital and divisible property. *Cunningham v. Cunningham*, 171 N.C. App. 550, 555, 615 S.E.2d 675, 680 (2005). The trial court "must classify the parties' property into one of three categories—marital, divisible, or separate—and then distribute the parties' marital and divisible property." *Berens v. Berens*, 260 N.C. App. 467, 469, 818 S.E.2d 155, 157 (2018) (citation omitted).

¶ 68 In order "to enter a proper equitable distribution judgment, the trial court must specifically and particularly *classify and value all assets and debts maintained by the parties at the date of separation*." *Robinson*, 210 N.C. App. at 323, 707 S.E.2d at 789 (emphasis in original) (citation and quotations omitted). The trial court's order "must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness." *Id.* (citation and quotations omitted).

1. Classification

¶ 69 Husband first addresses his Vanguard retirement account, arguing the trial court abused its discretion by determining that all postseparation appreciation of a mixed asset was entirely marital divisible property and did not contain a separate divisible property component. Husband specifically argues the trial court erred in finding that the increase of $84,609.00 in Husband's Vanguard account was marital property.

¶ 70 North Carolina General Statute § 50-20(b)(4) defines divisible property to include:

> All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

N.C. Gen. Stat. § 50-20(b)(4)(a) (2019). "Under the plain language of the statute, all appreciation and diminution in value of marital and divisible property is presumed to be divisible property *unless* the trial court finds that the change in value is attributable to the postseparation actions of one spouse." *Wirth v. Wirth*, 193 N.C. App. 657, 661, 668 S.E.2d 603, 607 (2008) (emphasis in original). "Where the trial court is unable to determine whether the change in value of marital property is attributable to the actions of one spouse, this presumption has not been rebutted and must control." *Id.* (citation omitted).

¶ 71 Ms. Bowen's account summary provided that the Vanguard account totaled $100,025.00 in marital property and $312,135.00 in Husband's separate property at the date of separation and appreciated to $120,559.00 in marital property and $376,211.00 in Husband's separate property as of 31 March 2019. Although the trial court accepted Ms. Bowen's testimony and calculations, it determined that Husband "failed to establish that this divisible income was separate property, therefore the presumption that this increase is marital remains and the Court treats this $84,609 as marital property for the purposes of equitable distribution." The evidence presented and accepted by the trial court does not support the trial court's finding that the entire increase of $84,609.00 was marital property because the evidence shows passive appreciation of $20,534.00 on the marital portion of the Vanguard account; this appreciation would be divisible property. Although the passive appreciation of the marital portion was divisible property, the passive appreciation on Husband's separate portion of the Vanguard account should have been classified as his separate property. The trial court abused its discretion in finding that the entire increase of $84,609.00 was marital property, as the evidence supported a finding that only the $20,534.00 increase in the marital portion of the Vanguard account was divisible property. As a result, we vacate this portion of the order and remand to the trial court for entry of an order correcting this valuation and classification.

¶ 72 Husband next contends the trial court abused its discretion by determining the Roanoke condominium and the proceeds from its sale were marital property. Husband's argument centers on his assertion at the hearing that he borrowed from third parties to pay the down payment for the Roanoke condominium. As previously discussed, the trial court's findings regarding the Roanoke condominium and Husband's account withdrawals were supported by evidence presented at the hearing. The trial court did not abuse its discretion in classifying the Roanoke condominium and the proceeds as marital property.

¶ 73 Husband argues the trial court abused its discretion by failing to award Husband credit for repairs of a marital asset from his separate estate. Husband cites his testimony that he paid $21,262.00 for repairs and maintenance to the Georgia home, as well as "an expense summary/invoices" provided to the trial court. Contrary to Husband's assertions, the trial court found that Husband's "expense summary is, in some instances, either greatly inflated, duplicative or projected[,]" and that "[m]ost of the supporting documentation [Husband] offered are emails, estimates, or proposals for work to be done, instead of actual expenses incurred." The trial court also noted equity Husband received from refinancing in 2013 as well as Husband's testimony that he received rental income from leasing the Georgia home. The trial court did not abuse its discretion in finding that Husband's testimony was not credible and the evidence was sufficient to support a finding in Husband's favor.

2. Net Value

¶ 74 Husband has not presented a specific argument with respect to the trial court's net valuation of the marital and divisible property. Accordingly, we address this step to note that the trial court was presented with voluminous detailed documentary evidence and expert testimony regarding the parties' assets. But as noted above, the trial court erred by classifying all the passive appreciation in the Vanguard account as divisible, as a portion of that appreciation was Husband's separate property. But except for this error to be corrected on remand, we hold that the trial court did not abuse its discretion in determining the net valuation of the marital and divisible property.

3. Unequal Division

¶ 75 The equitable distribution statute permits trial courts to order an unequal division of the parties' marital property, provided that the court considers the relevant statutory factors as set out in North Carolina General Statute § 50-20(c). *Peltzer v. Peltzer*, 222 N.C. App. 784, 788, 732 S.E.2d 357, 360 (2012). When evidence tending to show that an equal

division of marital property would not be equitable is admitted, the trial court "must exercise its discretion in assigning the weight each factor should receive in any given case." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). "It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion[,]" which requires a showing that the trial court's "actions are manifestly unsupported by reason." *Id.* (citations omitted). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

¶ 76 The trial court specifically addressed factors set out in North Carolina General Statute § 50-20(c) (1), (3), (5), (6), (7), (11a), and (12) in the subsections of Finding of Fact 19. Based on the evidence as discussed above, the trial court made lengthy, detailed findings addressing the relative values of Husband's and Wife's separate assets; Wife's deference to Husband in furtherance of his career for the "vast majority of the marriage"; and Wife's actions to maintain and preserve the equity in the marital home. The trial court properly considered the factors enumerated in North Carolina General Statute § 50-20(c) and did not abuse its discretion in ordering an unequal division of property.

C. Alimony

¶ 77 **[3]** Husband presents several arguments regarding the trial court's award of alimony. First, Husband contends the trial court abused its discretion by holding that his current income was sufficient to pay alimony to Wife. Husband specifically argues that the parties' incomes changed substantially between the date of separation in August 2015 and the date of the hearing in October 2019. Second, Husband argues the trial court abused its discretion in determining Husband's reasonable monthly needs by failing to consider his standard of living and expenses and by making findings regarding his current expenses that were not supported by the evidence. And third, Husband argues the trial court abused its discretion by failing to make findings of fact regarding the amount and duration of the alimony award and by ordering both a lump sum payment and periodic monthly payments. We address each in turn.

1. Standard of Review

¶ 78 In an action brought pursuant to Chapter 50 of the General Statutes, either party may move for alimony, and "[t]he court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an

award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section." N.C. Gen. Stat. § 50-16.3A(a) (2019). The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. N.C. Gen. Stat. § 50-16.3A(b).

2. Earnings and Earning Capacities of the Parties

¶ 79 "Alimony is ordinarily determined by a party's *actual* income, from all sources, at the time of the order." *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (emphasis in original) (citation omitted). "To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed [their] income in bad faith." *Id.*

¶ 80 As to Husband's income, the trial court found he began receiving Social Security benefits of approximately $2,500.00 per month in January 2019. The trial court also found "[Husband]'s testimony about his lack of funds and inability to pay Alimony are simply not credible. [Husband] has ample means and ability to pay Alimony, and to pay such Alimony as ordered herein." Significantly, the trial court found that "[Husband]'s lack of employment, coupled with his lack of candor as to the extent of any real property he owns in Ghana, appears little more than strategy he has designed to minimize potential ramifications or obligations pertaining to Alimony and Equitable Distribution, among others." This finding, coupled with the trial court's finding that it considered the "earnings and earning capacities of the parties[,]" reflects that the trial court determined that Husband had depressed his income and assets in bad faith and accordingly considered his earning capacity as well as his current income. The trial court did not abuse its discretion in considering Husband's earning capacity in setting alimony.

¶ 81 Husband also argues the parties' incomes substantially changed between the date of separation and the date of the hearing and contends the trial court abused its discretion via the alimony award "to a spouse who, as in this case, is earning at least $620 more a month in income than the supporting spouse at the time of trial[.]" Although Husband is correct that Wife's income had substantially changed since the date of separation, Husband has failed to show that the trial court abused its discretion in its findings regarding the parties' earnings and earning capabilities. As noted above, the trial court specifically found Husband's evidence regarding his current income and assets not to be credible. The trial court is the sole judge of the credibility and weight of the evidence. *See Matter of D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167–68 (2016) ("[T]he trial judge had the responsibility to 'pass[] upon the credibility of

the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom.' " (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968))).

3. Standard of Living and Reasonable Needs

¶ 82 Husband next contends the trial court failed to consider his standard of living and expenses and by making findings regarding his current expenses that were not supported by the evidence.

¶ 83 Regarding the reasonable needs of the parties, the trial court must consider the parties' accustomed standard of living established during the marriage in addition to the parties' actual expenses at the time of trial. *Myers v. Myers*, 269 N.C. App. 237, 261, 837 S.E.2d 443, 460 (2020). "This Court has long recognized that '[t]he determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves.' " *Nicks v. Nicks*, 241 N.C. App. 487, 501, 774 S.E.2d 365, 376 (2015) (citation omitted) (alteration in original). Our Supreme Court has established that the accustomed standard of living is based upon the parties' lifestyle during the marriage and not just economic survival:

> We think usage of the term accustomed standard of living of the parties completes the contemplated legislative meaning of maintenance and support. The latter phrase clearly means more than a level of mere economic survival. Plainly, in our view, it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed. For us to hold otherwise would be to completely ignore the plain language of G.S. 50-16.5 and the need to construe our alimony statutes in pari materia. This we are unwilling to do.

Williams v. Williams, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980).

¶ 84 Husband cites his testimony at trial and his EDIA in support of his argument that the trial court abused its discretion by ignoring the statutory factors in North Carolina General Statute § 50-16.3A(b). As previously discussed, the trial court determined that Husband's testimony

and EDIA were not credible and based its findings on the competent evidence presented at trial. The trial court also made findings with respect to Wife's monthly expenses and reasonable needs, which were based on Wife's testimony and EDIA. There was sufficient evidence to support the trial court's findings with respect to the standard of living and reasonable needs of the parties, and the trial court did not abuse its discretion.

4. Amount and Duration, Lump Sum, and Periodic Payments

¶ 85 Husband argues the trial court abused its discretion in requiring Husband to pay alimony by both lump sum payment and periodic payments.

¶ 86 The duration of an alimony award may be for a specified or for an indefinite term. N.C. Gen. Stat. § 50-16.3A(b). In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant statutory factors as identified in North Carolina General Statute § 50-16.3A. Also, "[t]he court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment." N.C. Gen. Stat. § 50-16.3A(c).

¶ 87 The trial court's findings address in detail many of the factors set forth in North Carolina General Statute § 50-16.3A(b), including the relative earnings and earning capacities of the parties; the ages and physical, mental, and emotional conditions of the spouses; the earnings and earning capacities of the parties; contributions of the parties to the education, training, or earning power of the other; the relative needs of the parties; the standard of living during the marriage; and other considerations relating to the economic circumstances of the parties. The order provided sufficient reasoning for the award, amount, and duration of alimony.

¶ 88 Regarding the form of payment, "[a]limony or postseparation support shall be paid by lump sum payment, periodic payments, income withholding, or by transfer of title or possession of personal property or any interest therein, or a security interest in or possession of real property, as the court may order." N.C. Gen. Stat. § 50-16.7(a) (2019). The trial court must make findings of fact supporting its determination of the "manner of payment" of the alimony, as well as the amount and duration. *See* N.C. Gen. Stat. § 50-16.3A(c) ("Findings of Fact. – The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment.").

¶ 89 This Court has held that trial courts have the authority to order both lump sum and periodic payments. *See Stickel v. Stickel*, 58 N.C. App. 645, 647, 294 S.E.2d 321, 323 (1982) (upholding trial court's award of periodic

payments of alimony together with lump sum payment of $30,000.00); *Guy v. Guy*, 27 N.C. App. 343, 346, 219 S.E.2d 291, 293 (1975) ("The trial judge, reacting to each case flexibly and fairly, may award the financially strained spouse assistance through a lump sum payment, a monthly stipend, or some unique combination thereof, in his discretion." (citation omitted)).

¶ 90 Although Husband asserts that North Carolina General Statute § 50-16.7(a) required the trial court to order only one form of alimony payment instead of two, Husband has not presented any authority supporting this argument. In fact, prior cases have approved a combination of a lump sum and periodic payments. *See Stickel*, 58 N.C. App. at 647, 294 S.E.2d at 323. As directed by North Carolina General Statute § 50-16.3A(c), the trial court made specific findings supporting its rationale for awarding a lump sum along with the periodic payments. The trial court considered the potential difficulty of enforcing the periodic payments of alimony, as Husband was residing in Ghana, as well as Husband's lack of credibility as to his financial circumstances and assets. The trial court had the discretion to award "some unique combination" of assistance and made the findings of fact needed to support this award. *Guy*, 27 N.C. App. at 346, 219 S.E.2d at 293. The trial court's award of both lump sum and periodic monthly payments was not an abuse of discretion. *See id.*

III. Conclusion

¶ 91 We hold that Findings of Fact 17(I)C, 19A-E, 53-59, 67, 68, and 71 were supported by competent evidence. We hold that the trial court did not abuse its discretion in its equitable distribution determination, except for Finding of Fact 19F that the entire passive appreciation in the Vanguard account of $84,609.00 was marital property, as the evidence supported a finding that only the $20,534.00 passive appreciation attributed to the marital portion of the Vanguard account was divisible property. As a result, we vacate and remand that portion of the order for correction of this valuation and classification. On remand, the trial court shall enter an amended order correcting the valuation and classification of the post-separation appreciation in the Vanguard account and, in its discretion, making any revisions to the distribution of the marital and divisible property as needed based upon that correction. The order on remand shall be based upon the existing record. If the trial court determines, in its discretion, that the modification to the findings as to the classification and valuation of the passive appreciation on Husband's separate portion of the Vanguard account would affect the alimony award in any way, either in the amount of alimony awarded

or the manner of payment, the trial court may, but is not required, to modify the alimony award only as necessary to address that change in the findings as to Husband's assets and ability to pay. Otherwise, we affirm the trial court's order regarding alimony.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judge ZACHARY concurs.

Judge TYSON concurs in part and dissents in part.

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

¶ 92 I concur with the majority's opinion holding that Finding of Fact 19F that the entire passive appreciation in the Vanguard account of $84,609.00 was marital property is unsupported. The evidence admitted supports a finding that only $20,534.00 in passive appreciation is to be attributed to the marital portion of the Vanguard account as divisible property.

¶ 93 This erroneous $84,609.00 valuation was also used to support the trial court's award of alimony and award for the unequal equitable distribution. The trial court's award of alimony and equitable distribution is also properly reversed and remanded. I respectfully dissent.

I. Standard of Review

¶ 94 Whether a spouse is entitled to an award of alimony is a question of law. *Rickert v. Rickert*, 282 N.C. 373, 379, 193 S.E.2d 79, 82 (1972). 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).

¶ 95 Generally, the trial court's decision regarding the amount of alimony and equitable distribution is:

> left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.

¶ 96 *Williamson v. Williamson*, 217 N.C. App. 388, 390, 719 S.E.2d 625, 626 (2011) (citations and quotation marks omitted). "When a trial judge

acts under a misapprehension of the law, this constitutes an abuse of discretion." *State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010) (citing *Hines v. Wal-Mart Stores E., L.P.*, 191 N.C. App. 390, 393, 663 S.E.2d 337, 339 (2008)).

II. Alimony

¶ 97 N.C. Gen. Stat. § 50-16.3A governs the award of alimony, and provides: "The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable *after considering all relevant factors*[.]" N.C. Gen. Stat. § 50-16.3A(a) (2019) (emphasis supplied).

¶ 98 "Alimony is ordinarily determined by a party's *actual* income, from all sources, *at the time of the order*." *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (citation omitted) (emphasis original and supplied). This Court reaffirmed this requirement and later held: "A supporting spouse's ability to pay an alimony award is generally determined by the supporting spouse's income *at the time of the award*." *Rhew v. Felton*, 178 N.C. App. 475, 484-85, 631 S.E.2d 859, 866 (2006) (emphasis supplied) (citation omitted). The party seeking alimony carries the burden to show the "accustomed standard of living" and their lack of the means to maintain that standard. *Williams v. Williams*, 299 N.C. 174, 181-82, 261 S.E.2d 849, 855 (1980).

¶ 99 Undisputed facts show at the time of the hearing Defendant had been terminated from his last employment, was sixty-seven years old, and had retired. He had begun to draw payments from Social Security. Defendant also can take distributions and withdrawals from his retirement accounts and pension plan. The trial court's improper attribution of the Vanguard account's appreciation as marital property affects Defendant's income as a retiree "*at the time of the award*." *Rhew*, 178 N.C. App. at 485, 631 S.E.2d at 866 (emphasis supplied). Plaintiff has failed to carry her burden. The error we all agree occured renders the trial court's alimony award to be wholly speculative. The award of alimony is properly reversed and remanded to the trial court for further evidence and correction.

III. Equitable Distribution

¶ 100 The equitable distribution statute requires the trial court to conduct a three-step analysis when making an equitable distribution of the marital assets: (1) classify the property; (2) calculate the net value of the property; and, (3) distribute the property in an equitable manner. N.C. Gen. Stat. § 50-20 (2019).

¶ 101 An equal distribution of the marital property is statutorily presumed to be equitable unless "the court determines that an equal division is not equitable." N.C. Gen. Stat. § 50-20(c) (2019). "The burden is on the party seeking an unequal division of marital assets to prove by a preponderance of the evidence that an equal division is not equitable." *Hall v. Hall*, 88 N.C. App. 297, 309, 363 S.E.2d 189, 197 (1987) (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

¶ 102 Plaintiff failed to meet her burden to overcome the statutory presumption of equal distribution presumption to be entitled to an unequal division. Defendant has shown the trial court erred by misclassifying and calculating the entire passive appreciation in the Vanguard account of $84,609.00 as marital property, as the evidence supported a finding that only the $20,534.00 passive appreciation should be attributed to the marital portion of the Vanguard account as divisible property. On remand the trial court should award an equal distribution, unless Plaintiff carries her burden to overcome the statutory presumption by showing entitlement to greater than an equal amount. N.C. Gen. Stat. § 50-20(c).

IV. Conclusion

¶ 103 I concur with the majority opinion's holding Finding of Fact 19F that the entire passive appreciation in the Vanguard account of $84,609.00 was marital property is erroneous. This error, coupled with a Defendant, who was discharged from his last employment without fault, is retired, draws Social Security, and who draws income from this account, requires the alimony as well as unequal equitable distribution order to be also reversed and remanded. I respectfully dissent.

BARUS v. COFFEY

[281 N.C. App. 250, 2022-NCCOA-2]

TIMOTHY BRYAN BARUS, PLAINTIFF
v.
LESLIE KILLIAN COFFEY, DEFENDANT
v.
RAMONA BARUS, INTERVENOR

No. COA20-823

Filed 4 January 2022

Child Custody and Support—motion to modify support—sufficiency of allegations—detailed financials not required

The trial court erred by denying a father's motion to modify child support for failure to state a claim upon which relief can be granted. The motion contained allegations in sufficient detail under N.C.G.S. §§ 50-13.7 and -13.10 and the Child Support Guidelines to provide notice to the mother that the basis on which the father sought child support was that three years had elapsed since entry of the last order and that there was a difference of 15% or more from the previously-ordered support (in this case, zero) to support calculated under current circumstances. The father made his motion using the AOC form designated for that purpose, and he was not required to allege the parties' actual incomes or any other detailed financial information.

Appeal by plaintiff from order entered 29 May 2020 by Judge Robert A. Mullinax, Jr. in District Court, Burke County. Heard in the Court of Appeals 8 June 2021.

Law Office of Jared T. Amos, PLLC, by Jared T. Amos, for plaintiff-appellant.

J. Steven Brackett Law Office, by J. Steven Brackett, for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Plaintiff appeals an order dismissing his motion for modification of child support based upon North Carolina General Statute § 1A-1, Rule 12(b)(6). Taking the allegations of the motion as true, as required upon review of a motion to dismiss, Father's motion for modification states a claim upon which relief can be granted, so we reverse and remand.

I. Background

¶ 2 Plaintiff-father and defendant-mother were married in 1998, had two children, and divorced in 2011-2012.[1] In 2014, a permanent custody order was entered with the parties sharing "joint care, custody, and control[,]" awarding "primary placement" to Father during the school year and joint placement during summer months ("2014 Permanent Order").[2] Under the 2014 Permanent Order, neither party paid child support.

¶ 3 On 4 April 2017, Father filed a verified motion requesting a modification of custody, medical coverage, and child support ("2017 Motion"). On 5 July 2017, Mother responded to Father's 2017 Motion and requested a change to the "exchange schedule." Other orders and documents were filed regarding issues beyond the scope of this appeal, but a hearing was set for the 2017 Motion. The 2017 Motion hearing was continued many times and was ultimately held on 25 July 2018, 10 September 2018, 12 September 2018, 11 October 2018, and 29 October 2018. Based on these hearing dates the trial court entered an order on 7 May 2019 entitled, "ORDER FOR MODIFICATION OF CUSTODY, CONTEMPT, and ATTORNEY FEES" ("May 2019 Order"). While the title of the order does not mention medical coverage or support, the first paragraph of the order notes it is addressing Father's "request to establish child support and modify the Order as it relates to health insurance."

¶ 4 In the May 2019 Order, the trial court denied both parties' motions to modify the 2014 Permanent Order in any way and left it in "full force and effect." The May 2019 Order does not include any findings or conclusions of law regarding the motion for medical coverage or child support, nor are these issues mentioned in the decree beyond noting the 2014 Permanent Order would "remain in full force and effect."

¶ 5 Thereafter, the trial court entered another order on 11 October 2019 on Father's 2017 Motion; the order is entitled "ORDER ON MODIFICATION OF CHILD SUPPORT AND MEDICAL COVERAGE" ("October 2019 Order"). The trial court notes the hearing date for the modification of child support and medical coverage was 7 May 2019, the same date as entry of the May 2019 Order leaving the 2014 Permanent Order in effect.[3] The trial court denied Father's motion to modify medical

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1. Father's complaint alleges a divorce date in 2011; Mother's answer alleges 2012. The exact date of divorce is not relevant to this appeal.

2. The order also addresses the intervenor who is not relevant to this appeal.

3. The 11 October 2019 "ORDER ON MODIFICATION OF CHILD SUPPORT AND MEDICAL COVERAGE" notes specifically that it is regarding "[t]he Plaintiff's April 4, 2017

insurance coverage and child support in the October 2019 Order. The October 2019 Order was not appealed. Because we do not have a transcript from the 2018 hearings or the court date in May 2019 when the order was entered, we cannot determine if the parties knew the trial court planned to issue another order based upon the 2018 hearings after entry of the May 2019 Order. The May 2019 Order makes no mention of a further determination or order and explicitly notes it is considering child support and medical coverage, yet the May 2019 Order ultimately made no findings or conclusions of law addressing the 2017 Motion as to child support or medical coverage.

¶ 6 Almost four months after the trial court entered the May 2019 Order, and a bit more than one month *before* the October 2019 Order was entered, Father filed another motion to modify child support on 30 August 2019 ("2019 Motion"). The 2019 Motion is the subject of this appeal. On 23 January 2020, the trial court held a hearing on Father's 2019 Motion; at that hearing Mother's counsel made an oral "motion to dismiss [Father's] Motion to Modify upon its failure to state a claim upon which relief could be granted."

¶ 7 By order entered 29 May 2020, the trial court found the 2019 Motion "vaguely references 'the parents' current incomes and circumstances[,]' " and thus "the [Father's] minimal allegations set forth in his [2019] Motion fail to provide [Mother] sufficient notice to allow [Mother] to prepare an appropriate defense to [Father's] [2019 M]otion" ("2020 Order"). The trial court concluded, "[t]he [Father's] Motion fails to state a claim upon which relief can be granted." The trial court entered an order granting Mother's "Motion to Dismiss pursuant to Rule 12b(6)" and dismissing Father's 2019 Motion. Father appeals only the 2020 Order.

II. Motion to Dismiss

¶ 8 Father contends the trial court erred in granting Mother's motion to dismiss his motion to modify child support under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

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motion for modification of medical coverage and motion for modification of support" and "was heard" "on May 7, 2019." But our record on appeal and the transcripts filed do not show any evidentiary hearing held on 7 May 2019. 7 May 2019 was the date of entry of the "ORDER FOR MODIFICATION OF CUSTODY, CONTEMPT and ATTORNEY FEES" which was based upon the hearing held on multiple dates through 2018. Considering the transcripts and both orders, it appears that both orders were based upon the evidence presented at the series of hearing dates in 2018. The trial court entered two separate orders based upon the 2018 hearing dates, the May 2019 Order and the October 2019 Order.

A. Standard of Review

¶ 9 We addressed a similar issue in *Stern v. Stern*, where the father filed a motion for modification of custody, and the mother moved to dismiss his motion. *Stern v. Stern*, 264 N.C. App. 585, 586–87, 826 S.E.2d 490, 492 (2019). The trial court did not state specific grounds for dismissal in *Stern*, but this Court ultimately addressed the issue as a motion to dismiss under North Carolina Rule of Civil Procedure 12(b)(6), the same basis as was used in this case:

> This Court has stated that dismissal of a motion to modify child support when only the allegations in the motion and the court file are considered by the trial court is a summary procedure similar to judgment on the pleadings. A trial court's ruling on a motion for judgment on the pleadings is subject to *de novo* review on appeal.
>
> > The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.
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> > . . . .
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> . . . But whether considered as a motion for judgment on the pleadings or as a motion to dismiss under Rule 12(b)(6), our standard of review is the same: we review the ruling *de novo* and we consider Father's allegations in the motion to modify as true and determine whether the allegations are sufficient to state a claim upon which relief may be granted under some legal theory.

Id. at 588–89, 826 S.E.2d at 493–94 (citations, quotation marks, and brackets omitted).

B. Substantial Change in Circumstances

¶ 10 Under North Carolina's Child Support Guidelines, a child support order is subject to modification based on a substantial change of circumstances if a motion to modify is filed at least three years after entry of the prior order and there is a difference of 15% or more in the amount of child support currently payable based upon application of the Guidelines:

> N.C. Gen. Stat. § 50–13.7(a)(2007) authorizes a North Carolina court to modify or vacate an order of a North Carolina court providing for the support of a minor child at any time upon motion in the cause by an interested party and showing of changed circumstances. Modification of an order requires a two-step process. First, a court must determine whether there has been a substantial change in circumstances since the date the existing child support order was entered. The 2006 Guidelines provide:
>
> > In a proceeding to modify the amount of child support payable under a child support order that was entered at least three years before the pending motion to modify was filed, a difference of 15% or more between the amount of child support payable under the existing order and the amount of child support resulting from application of the guidelines based on the parents' current incomes and circumstances shall be presumed to constitute substantial change of circumstances warranting modification of the existing child support order.
>
> When the moving party has presented evidence that satisfies the requirements of the fifteen percent presumption, they do not need to show a change of circumstances by other means. The Court's determination of whether changed circumstances exist is a conclusion of law.
>
> Upon finding a substantial change in circumstances, the second step is for the court to enter a new child support order that modifies and supersedes the existing child support order. Once a substantial change in circumstances has been shown by the party

> seeking modification, the trial court then proceeds to follow the Guidelines and to compute the appropriate amount of child support.

Head v. Mosier, 197 N.C. App. 328, 333–34, 677 S.E.2d 191, 195–96 (2009) (citations, quotation marks, and brackets omitted).[4]

¶ 11 North Carolina's 2020 Child Support Guidelines ("Guidelines") provide that a substantial change in circumstances is presumed where a child support order "was entered at least three years before the pending motion to modify was filed" and there is "a difference of 15% or more between the amount of child support payable under the existing order and the amount of child support resulting from application of the guidelines based on the parents' current incomes":

> In a proceeding to modify the amount of child support payable under a child support order that was entered at least three years before the pending motion to modify was filed, a difference of 15% or more between the amount of child support payable under the existing order and the amount of child support resulting from application of the guidelines based on the parents' current incomes and circumstances shall be presumed to constitute a substantial change of circumstances warranting modification of the existing child support order.

C. Father's Motion to Modify Child Support

¶ 12 Here, the specific basis for granting Mother's 12(b)(6) motion to dismiss was Father's 2019 "Motion fails to state a claim upon which relief can be granted" specifically because the "minimal allegations set forth in his Motion fail to provide [Mother] sufficient notice[.]" But Father filed his motion for modification on an AOC form and made factual allegations to support his motion.

¶ 13 Father used AOC-CV-600, Rev. 3/03 entitled "MOTION AND NOTICE OF HEARING FOR MODIFICATION OF CHILD SUPPORT ORDER" as based upon North Carolina General Statutes §§ 50-13.7 and -13.10. The entirety of the form is filled out including the appropriate county, court file number, and Father's and Mother's full names and addresses. The form

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4. While North Carolina General Statute §§ 50-13.4, -13.7 and the Child Support Guidelines have since been amended, the amendments do not change our analysis on appeal. *See generally* N.C. Gen. Stat. §§ 50-13.4, -13.7; 2020 Child Support Guidelines.

provides that Father "moves the Court modify the Order for Child Support now in effect in this action[.]" The form then notes specifically that Father wants to modify the 25 August 2014 order in effect. The form then states, "Since the current Order for Child Support was entered, circumstances have changed as follows" and Father added the following allegations:

> More than three years have elapsed since the entry of the prior order and there is a difference of 15% or more between the amount of child support payable under the existing order and the amount of child support resulting from application of the guidelines based on the parents' current incomes and circumstances.

¶ 14 Father then requested that the Order for Child Support be modified by increasing child support and added that he was requesting "Increased/establish support from the Defendant to the Plaintiff based upon N.C. Support guidelines." The form is signed by Father's attorney and dated. The notice of hearing portion is also filled out to give Mother notice of a hearing on 3 October 2019 at 9:00am.

¶ 15 Father's motion plainly contains the allegations required to state a claim for modification of child support based upon the presumption of substantial change of circumstances according to the Child Support Guidelines. *See generally Head*, 197 N.C. App. at 333–34, 677 S.E.2d at 195–96. Father alleged the order he is attempting to modify was entered in 2014 and there has been a change since that time of 15% or more in the amount of child support payable based upon application of the Guidelines. Father's allegations need not be any more specific under the Guidelines or the statutes upon which the AOC form he used was based. *See generally* N.C. Gen. Stat. §§ 50-13.7, -13.10; 2020 North Carolina Child Support Guidelines.

¶ 16 Because this issue comes on appeal from dismissal based on Rule 12(b)(6), we cannot address the issue of whether there has actually been a substantial change of circumstances justifying modification of child support; the only question is whether Father *stated a claim upon which relief may be granted*. "The function of a motion to dismiss is to test the law of a claim, not the facts which support it." *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979) (citation and quotation marks omitted). We must take all Father's allegations as true, *Stern*, 264 N.C. App. at 588, 826 S.E.2d at 493, and the motion makes all the allegations required to state a claim for a modification of child support under North Carolina General Statutes §§ 50-13.7 and -13.10 and the Child Support Guidelines. *See generally* N.C. Gen. Stat. §§ 50-13.7, -13.10; 2020 Guidelines.

¶ 17 The motion's reference to "the parties' current incomes and circumstances" is not "vague" in the context of the AOC form for a motion to modify child support, the cited statutes on the form, and the Guidelines. It is perfectly clear that Father is requesting an increase of child support, to be paid to him by Mother, calculated based upon the Guidelines and the current incomes and other relevant financial circumstances of the parties. There is no requirement for Father's motion to allege the actual incomes of the parties or any other detailed financial information. It is also clear that Father claims he is entitled to a modification of child support based upon the presumption created by the Guidelines because it had been three years since entry of the last order and the alleged 15% difference between child support under the 2014 Permanent Order -- which was zero -- and a calculation of child support based upon the parties' current incomes and circumstances. Although we recognize the mathematical fact that 15% of zero is still zero, the Child Support Guidelines do not contemplate foreclosing a parent in this situation from ever seeking a modification of child support based upon changes in the parties' incomes and changes in the other financial factors addressed by the Guidelines. Even where neither parent pays child support to the other because of the custodial schedule and the numbers used in the original calculation of child support, as was apparently the situation for these parties in 2014, it is still possible to do a Guideline calculation of each parent's child support obligations based upon current circumstances to determine if Mother would now owe child support to Father. Father contends that calculation would result in a change in the child support obligations of each party and that Mother would owe child support to him.

¶ 18 Considering the confusion regarding which issues were addressed by the May 2019 and October 2019 orders, we also note that as part of the rationale for granting Mother's motion to dismiss, the trial court did *not* find or conclude that the court had already addressed the issue of child support in the May 2019 Order. If the most recent child support order was the May 2019 Order instead of the 2014 Order, three years would not have passed since entry of the prior child support order when Father filed his motion to modify child support on 30 August 2019, and the time period for a presumption under the Guidelines would not apply. *See generally Head*, 197 N.C. App. at 333–34, 677 S.E.2d at 195–96. And the October 2019 Order was entered *after* Father filed the motion to modify child support, but it did not address the August 2019 motion to modify. As noted above, we cannot determine if Father had reason to know in August 2019 that the trial court intended to enter another order based upon the 2018 hearings, in addition to the May 2019 Order. The May 2019 Order purports to address all the issues presented and does not give any

indication that a further order would be entered. We recognize, given the convoluted procedural history of this case and the many hearings on different motions, it is possible the trial court had considered the issue of child support again since 2014, but the later orders in our record do not specifically address the issue of child support, and we must base our ruling on those orders.

¶ 19 Again, we express no opinion on whether Father will be entitled to a modification of child support on remand, as that will depend upon the parties' actual incomes and relevant expenses under the Child Support Guidelines. We simply hold that Father's motion for a modification of child support was set out in adequate detail to give Mother notice of his claim as he made all the factual allegations required by the AOC form under North Carolina General Statutes §§ 50-13.7 and -13.10 and the Child Support Guidelines. Father's motion was on the AOC form specifically intended for motions to modify child support. Since Father's motion stated a claim for modification of child support, the trial court erred by dismissing the motion for failure to state a claim under Rule 12(b)(6).

III. Conclusion

¶ 20 We reverse the order dismissing Father's motion to modify child support based upon Rule 12(b)(6) and remand for further proceedings.

REVERSED AND REMANDED.

Judges COLLINS and WOOD concur.

IN RE K.H.

[281 N.C. App. 259, 2022-NCCOA-3]

IN THE MATTER OF K.H.

No. COA21-379

Filed 4 January 2022

1. Child Abuse, Dependency, and Neglect—neglect—injurious environment—hearsay—business records exception—drug test results

An order adjudicating respondents' child as neglected was affirmed where the trial court properly admitted reports showing positive test results for respondents and their child (which the drug test collection agency's president, as custodian of the agency's records and as someone familiar with its drug testing procedures, was qualified to authenticate) under the business records exception to the hearsay rule, and therefore the court's findings based on this evidence supported its conclusion that respondents' home was an injurious environment for the child. Even disregarding this evidence, the court's unchallenged findings describing respondents' prolonged substance abuse and keeping of paraphernalia in the home supported an adjudication of neglect.

2. Child Abuse, Dependency, and Neglect—neglect—disposition—continued DSS custody

After adjudicating respondent-mother's child as neglected, the trial court did not abuse its discretion in continuing custody of the child with the department of social services (DSS), maintaining the child's placement with a relative, and maintaining reunification as the permanent plan. The court's unchallenged findings of fact showed that the child was thriving in his relative placement and that respondent-mother—despite missing drug screens, testing positive on two drug screens, and visiting her child infrequently—had made some progress on her case plan with DSS.

Appeal by Respondents from orders entered 26 and 29 April 2021 by Judge Spencer G. Key, Jr., in Surry County District Court. Heard in the Court of Appeals 1 December 2021.

Susan Curtis Campbell for Petitioner-Appellee Surry County Department of Social Services.

James N. Freeman, Jr., for Appellee Guardian ad Litem.

IN RE K.H.

[281 N.C. App. 259, 2022-NCCOA-3]

Stam Law Firm, PLLC, by R. Daniel Gibson, for Respondent-Appellant Mother.

Anné C. Wright for Respondent-Appellant Father.

COLLINS, Judge.

¶ 1 Respondent-Father and Respondent-Mother appeal from orders adjudicating their son, Ken, a neglected juvenile and maintaining his custody with the department of social services.[1] Because the trial court's findings of fact support its conclusion that Ken was a neglected juvenile and the trial court did not abuse its discretion with respect to disposition, we affirm.

I. Background

¶ 2 On 15 September 2020, Petitioner Surry County Department of Social Services ("SCDSS") received a report "alleging substance use by the Respondents which was impacting their care of" Ken, as well as "an injurious environment impacting [Ken's] safety." On 24 September 2020, SCDSS filed a juvenile petition alleging that Ken was neglected. The trial court held adjudication and disposition hearings on 25 and 26 March 2021.

¶ 3 At the adjudication hearing, Petitioner presented testimony from Audrey Huston, a SCDSS social worker; Jonathan Young, a paramedic with Surry County Emergency Services; officer Jody Beketov of the Mount Airy Police Department; and Michael Barnes, president and owner of Unique Background Solutions ("UBS"). Beketov testified that when she first came to Respondents' residence on 26 February 2020 to investigate possible stolen property, she observed Mother taking Ken to a neighbor's house. Beketov searched the Respondents' residence with Mother's consent and found "a burnt spoon and a used syringe" in the bathroom trash can and "a clear plastic baggy that had a crystal-like substance inside" under the toilet seat. Over objection, Beketov testified that she identified pills in the plastic bag as alprazolam based on visual inspection and identified other substances in the bag as methamphetamine and fentanyl based on field tests. Beketov also found "several paraphernalia items located throughout the residence," but could not

1. Various imperfections in the notices of appeal, none of which the parties raise, are not jurisdictional defects.

specifically recall what they were. Beketov twice went to Respondents' residence when Ken's paternal grandmother overdosed and required EMS attention on 30 July and 16 September 2020.

¶ 4 Barnes testified that UBS was the collection agency contracted with SCDSS to provide drug screens. Barnes had "[j]ust over 15 years" of experience with UBS collecting both hair and urine specimens, was a "qualified train the trainer under Department of Transportation qualifications"; received training from Omega Laboratories, the lab where UBS submitted its hair follicle specimens; and was "DOT qualified" for 12 years.

¶ 5 Barnes explained UBS' process for collecting, securing, and submitting hair and urine specimens for drug testing as follows: The individual undergoing testing gives a specimen at a UBS facility. For urine specimens, UBS conducts an instant test. If the instant test gives a non-negative result, UBS sends the specimen to a laboratory for confirmatory testing. For hair specimens, Omega Laboratories measures the specimen, "run[s] it through a wash . . . to remove any environmental contaminants," performs an immunoassay screening, and "if there are non-negatives presented in the screen, it is then passed onto the confirmation" with gas chromatography mass spectrometry. Once the tests are complete, a laboratory report is generated and passed onto "a medical review officer who is separate from the lab." The medical review officer's responsibility is to communicate with the specimen donor and determine whether any valid prescriptions explain a positive test result.

¶ 6 According to Barnes, a specimen of Ken's hair was collected at a UBS facility on 16 September 2020 and sent for analysis at Omega Laboratories. Counsel for each Respondent objected to the admission of the results of Ken's tests. Following argument, the trial court concluded that Barnes "qualifies as an expert at least in the area of understanding how tests are performed, not actually doing the performing of them and examining, but certainly analyzing. He's able in his capacity to analyze the data he receives from a lab[.]"

¶ 7 The trial court admitted the reports containing the results of Mother, Father, and Kens' drug screens. The trial court permitted Barnes to testify that Ken's test was positive for marijuana, methamphetamines, 6-AM heroin, and morphine. The trial court likewise permitted Barnes to testify, again over objection, that a urine sample from Mother was positive for fentanyl, norfentanyl, morphine, and tramadol; and a urine sample from Father was positive for marijuana, fentanyl, norfentanyl, morphine, and tramadol.

¶ 8 On 26 April 2021, the trial court entered an order adjudicating Ken a neglected juvenile ("Adjudication Order"). The Adjudication Order included the following pertinent findings of fact:

> 7. During [SCDSS's] assessment of the report, the Department found the juvenile to be 10 months of age, crawling, and pulling up.
>
> 8. The Respondents admitted to previous substance use, including intravenous heroin use, but claimed they had been clean for several weeks. The Respondents admitted that they were both getting subutex or suboxone off the streets.
>
> 9. The Respondents entered into a Safety Plan with the Department that the child would have a safe, sober caretaker at all times, and the child would have no access to drug paraphernalia.
>
> 10. During the ensuing investigation of the report, the Social Worker learned that the Respondent Mother had been found in possession of Schedule I, II, and IV controlled substances, drug paraphernalia, including a burnt spoon and used needle, and stolen property, on or about February 26, 2020, after a search of the home was conducted.
>
> 11. Additionally, it was determined by the Department that an overdose had occurred in the home during July 2020.
>
> 13. [sic] On 9/16/2020, the Respondent Parents submitted to urine drug screens and the instant test results showed the father positive for marijuana, tramadol, benzodiazepine, and fentanyl; the mother's instant screen was positive for fentanyl and tramadol.
>
> 14. On 9/16/2020, a hair drug screen was completed on the juvenile, and on 9/24/2020, the test results indicated the child was positive for marijuana, methamphetamine, opiates, morphine, and 6-am (heroin).
>
> 15. On 9/24/2020, the Respondent Parents' confirmed drug screen results indicated that the father was positive for tramadol, opiates, morphine, marijuana, fentanyl, and norfentanyl, and the mother was positive

for fentanyl, norfentanyl, opiates, morphine, and tramadol; additionally, on 9/16/2020, the Social Worker located a used needle in the front yard, close to the front door of the home.

16. Officer Beketov with the Mount Airy Police Department conducted the search of the home on or about 2/26/2020, and did find and confiscate controlled substances, paraphernalia, and stolen property in the home for which Juvenile Petitions were filed against the Respondent Mother in Juvenile Court due to the mother's minority at the time.

17. Officer Beketov also testified that just prior to her search of the home, the officer observed the Respondent Mother taking the juvenile to the next-door neighbor's home, and as Officer Beketov was leaving the residence, following the search and confiscation of the substances, paraphernalia, and stolen property, the mother retrieved the child from the neighbor.

18. Jonathan Young, Surry County EMS Paramedic, testified that he was dispatched to the home of the Respondent Parents and juvenile on July 30, 2020, due to an unconscious female in the home, and when he arrived, two individuals were performing CPR on the woman.

19. Mr. Young testified that four cans of Narcan were used to revive the unconscious and unresponsive woman, and after she became conscious, the woman identified herself as Jana Torres and she admitted to taking heroin.

20. During her testimony, Officer Beketov corroborated the testimony of Jon[a]than Young as she had also responded to the home . . . on July 30, 2020 and had observed the events there as well.

21. Officer Beketov spoke with the Respondent Father about what had occurred in the home on 7/30/2020, and both he and the paternal uncle, Bryson, provided information to police and EMS, indicating that the woman that was receiving emergency services was

their mother, Jana Torres, and that their mother uses methamphetamine and heroin, but neither knew what substance she had consumed that day.

22. Officer Beketov also testified that Jana Torres overdosed, again, in the home of the Respondents and juvenile, on 9/16/2020, and that Ms. Torres again admitted overdosing on heroin.

23. The Respondent Parents, when asked by the Department about any persons providing care for the juvenile other than themselves, did not provide any information about the child being out of the parents' care for any length of time.

24. On 9/30/2020, the Respondent Mother admitted to the Department that both she and the Respondent Father needed to go to the Crisis Recovery Center in Statesville, for detox treatment.

25. Michael Barnes testified regarding the process and procedures used for collecting and testing specimens for urine and hair drug screens.

26. Mr. Barnes provided a detailed description of the care and safeguards used in collecting drug screen specimens, and the steps employed each time a specimen is provided to avoid contamination, misidentification, and to protect the chain of custody of the specimen to the outside laboratory.

27. Mr. Barnes has been in the field of drug testing for more than 15 years, and through experience and continuing training and education, has become a trainer in the field.

28. While Mr. Barnes was unable to provide an exact description of the science of the method employed in the laboratory testing of the specimens Unique Background Solutions sends to the outside laboratories, he did expand on his duty to the Department and other contracting entities to ensure the techniques, accuracy, and protocols inherent in reliable drug testing.

29. Mr. Barnes also testified that Unique Background Solutions contracts with outside laboratories, Quest

Diagnostics and Omega Laboratories, because both labs are leaders in the industry for being accurate and reliable.

30. Further, Mr. Barnes testified that the method used by Omega Laboratories in testing hair specimens employs a chemical wash to eliminate all outside contaminates before the inside of the hair shaft is tested using Gas Chromatography/Mass Spectrometry ("GC/MS").

31. GCMS is considered to be the criterion standard for confirmatory testing, and has been widely used in the science of forensics such as arson investigations, employment drug testing, used to deny unemployment benefits, probation and parole matters, arbitrations, child custody, random drug testing, and is currently defined as the standard for confirmatory drug screening in the NC Medicaid Drug Testing for Opioid Treatment and Controlled Substance Monitoring . . . .

32. GC/MS screening detects a drug metabolite produced by the body.

33. With the exception of marijuana metabolites, which the Respondent Father tested positive for, the Respondents tested positive for the same substances.

34. The juvenile's hair specimen was approximate 1.5 inches in length, and according to Mr. Barnes, hair grows at an average of 1/2 inch per month, and therefore, a hair drug screen provides a window of approximately 90 days back in time for detecting illicit substances.

35. Mr. Barnes also testified that heroin metabolizes quickly in the body to the first metabolite, 6-AM, and then again, to morphine.

36. The Court found the evidence of the Respondents' and juvenile's drug screens proffered by the Department to be reliable and accurate.

¶ 9 Upon the Adjudication Order, the trial court entered a Juvenile Disposition Order on 26 April 2021 ("Initial Disposition Order"). The trial court maintained legal and physical custody of Ken with SCDSS,

directed that Ken remain in his current relative placement, maintained reunification as the permanent plan, and granted both parents "a minimum of once weekly visitations, for two hours, supervised."

¶ 10 On 29 April 2021, the trial court entered an Amended Juvenile Disposition Order ("Amended Disposition Order") which contained the same custody and visitation provisions as the Initial Disposition Order, but included additional findings of fact.

¶ 11 Both Mother and Father noticed appeal.

II. Discussion

A. Adjudication of Neglect

¶ 12 **[1]** Respondents challenge many of the trial court's adjudicatory findings of fact concerning the drug test results, the presence of controlled substances in the home, and the presence of stolen property in the home. Respondents argue that these findings are based on erroneously admitted evidence and are otherwise unsupported, and that the remaining findings of fact do not support the trial court's conclusion of law that Ken was neglected.

¶ 13 We review an adjudication of abuse, neglect, or dependency to determine whether the trial court's findings of fact are supported by "clear and convincing evidence," N.C. Gen. Stat. § 7B-807(a) (2021), and whether the findings of fact support the trial court's conclusions of law, *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Unchallenged findings of fact are deemed supported by the evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). "[W]hether a trial court's findings of fact support its conclusions of law is reviewed de novo." *In re J.S.*, 374 N.C. 811, 814, 845 S.E.2d 66, 71 (2020) (citation omitted). We otherwise review the trial court's conclusions of law de novo. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

¶ 14 A neglected juvenile is defined, in pertinent part, as one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2021). "[F]or 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).

¶ 15 In the present case, the trial court found that at under one year of age, Ken tested positive for "marijuana, methamphetamine, opiates, morphine, and 6-am (heroin)." The trial court also found that Father's drug screen was "positive for tramadol, opiates, morphine, marijuana, fentanyl, and norfentanyl" and Mother's drug screen was "positive for fentanyl, norfentanyl, opiates, morphine, and tramadol." Respondents argue that these findings are based on incompetent hearsay evidence, but this argument is unavailing.

¶ 16 "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2021). Hearsay is inadmissible unless otherwise provided by statute or the rules of evidence. *Id.* § 8C-1, Rule 802 (2021).

¶ 17 Under the business records exception to the hearsay rule, certain records of regularly conducted activity are not excluded by the hearsay rule, even if the declarant is available as a witness. *Id.* § 8C-1, Rule 803(6) (2021). Such records include "[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation[.]" *Id.*

¶ 18 Business records may be authenticated "by the testimony of the custodian or other qualified witness, or by affidavit or by document under seal . . . made by the custodian or witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." *Id.*; *State v. Miller*, 80 N.C. App. 425, 429, 342 S.E.2d 553, 556 (1986). The term "other qualified witness" under Rule 803(6) "has been construed to mean a witness who is familiar with the business entries and the system under which they are made." *Miller*, 80 N.C. App. at 429, 342 S.E.2d at 556 (citing *State v. Galloway*, 304 N.C. 485, 492, 284 S.E.2d 509, 514 (1981)). It is well-established that a business record need not be authenticated by the person who made it. *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985); *State v. Hicks*, 243 N.C. App. 628, 640, 777 S.E.2d 341, 349 (2015).

¶ 19 In *State v. Miller*, this Court held that the results of an emergency room blood alcohol test were properly admitted under the business records exception to the hearsay rule. 80 N.C. App. at 428-29, 342 S.E.2d at 555-56. A nurse testified that she was present for the collection of

defendant's blood sample, saw the sample being taken to the hospital laboratory, retrieved the test results when they were ready, and returned the report to defendant's bedside for review by a doctor. *Id.* Both the nurse and the doctor testified that the blood test at issue was part of routine treatment for patients such as defendant. *Id.* at 428, 342 S.E.2d at 555. We held that the records of the blood test results fell within the business records exception and the nurse and doctor were proper witnesses to authenticate the records, though they had not personally analyzed the sample. *Id.* at 429, 342 S.E.2d at 556.

¶ 20 In *In re S.D.J.*, 192 N.C. App. 478, 665 S.E.2d 818 (2008), this Court held that the results of a drug test were properly admitted under the business record exception to the hearsay rule. *Id.* at 484, 665 S.E.2d at 822. A social worker employed by the petitioner department of social services testified that

> she collected all but one of the samples used in the drug tests and then sealed and shipped the samples to the laboratory for testing. She further testified that she relied on the reports [of the laboratory] in the ordinary course of her business and that the reports were collected as part of petitioner's record in this particular case.

Id. at 483, 665 S.E.2d at 822. We held that the trial court did not err in admitting the record of the results under the business records exception because the social worker, "in the course of regularly conducted business activity, collected respondent's sample, ordered the drug test and subsequently filed the results of the drug test with her office." *Id.* at 484, 665 S.E.2d at 822.

¶ 21 Like the nurse and doctor in *Miller* and the social worker in *S.D.J.*, Barnes was a qualified witness to authenticate the records of the positive drug test results. Barnes testified that as president and owner of UBS, he acted as custodian of the company's records, and UBS had a policy of retaining records for 12 months. Barnes testified that UBS sends samples it collects to Omega Laboratories and explained the procedures Omega Laboratories employs to maintain chain of custody and test the samples. Barnes explained that Omega Laboratories produces a lab report once the testing process is complete, which then undergoes review by an independent Medical Review Officer prior to transmittal to UBS.

¶ 22 With respect to Ken's test, Barnes testified that UBS collected Ken's hair sample on 16 September 2020, sent the sample to Omega

Laboratories, and received the report of Ken's tests on 23 September 2020 after review by the independent Medical Review Officer. Barnes testified that the reports admitted at the hearing were "true and correct copies of the records that were made," that "to the best of [his] knowledge, these records were all made on persons having knowledge," and the records were made "during the regular course of business at or near the time of the events recorded."

¶ 23 Barnes was qualified to authenticate the results of the tests under the business records exception, though he did not personally perform the drug tests, because his testimony demonstrated that he was "familiar with the business entries and the system under which they are made." *Miller*, 80 N.C. App. at 429, 342 S.E.2d at 556. Barnes' testimony sufficiently demonstrated that the records were made by someone with knowledge, and were transmitted and retained in the course of UBS and Omega Laboratories' regularly conducted business activities. Accordingly, the trial court did not err in admitting the reports containing the results of the drug tests pursuant to the business records exception to the hearsay rule.

¶ 24 The properly admitted drug test results supported the trial court's finding that Ken "was positive for marijuana, methamphetamine, opiates, morphine, and 6-am (heroin)." The finding that Ken was positive for these substances at 10 months old amply demonstrates that Ken lived in an environment injurious to his welfare because "the environment in which [Ken] resided has resulted in harm[.]" *In re K.J.B.*, 248 N.C. App. at 354, 797 S.E.2d at 518.

¶ 25 Even disregarding the findings challenged by Respondents, the trial court's unchallenged findings of fact alone support the trial court's adjudication of neglect. The unchallenged findings reflect that both parents "admitted to previous substance use, including intravenous heroin use" and admitted to "getting subutex or suboxone off the streets." Respondents correctly note that a parent's substance abuse problem alone cannot support an adjudication of neglect. *See id.* at 355, 797 S.E.2d at 518 (citing *In re E.P.*, 183 N.C. App. 301, 645 S.E.2d 772, *aff'd per curiam*, 362 N.C. 82, 653 S.E.2d 143 (2007)). But here, the unchallenged findings reveal further circumstances posing a substantial risk of harm to Ken: Two heroin overdoses necessitating emergency medical response occurred in the home in July and September of 2020. Drug paraphernalia was also present in and about the home on different occasions. Beketov confiscated drug paraphernalia from the home in February 2020 and a SCDSS social worker "located a used needle in the front yard, close to the front door of the home" in September 2020. During SCDSS's investigation in

September 2020, Ken was "10 months of age, crawling, and pulling up." Respondents did not indicate that anyone other than themselves cared for Ken for any length of time. Taken as a whole, these findings show a prolonged period of drug use in the home, by both Respondents and others, during which Ken was placed at risk of exposure to drugs and drug paraphernalia. These findings in turn support the conclusion that Ken was neglected because he lived in an injurious environment—one that posed him a substantial risk of harm. *In re K.J.B.*, 248 N.C. App. at 354, 797 S.E.2d at 518.

¶ 26 The trial court properly admitted the results of Ken's drug tests pursuant to the business records exception to the hearsay rule. The trial court's findings of fact based on this evidence supported its conclusion that Ken was a neglected juvenile. Even disregarding the findings challenged by Respondents, the trial court's unchallenged findings concerning the prolonged use of drugs and presence of paraphernalia in the home support its conclusion that Ken was a neglected juvenile.[2]

B. Disposition Order

¶ 27 **[2]** Mother argues that the disposition order must be reversed because the trial court "abused its discretion by unnecessarily separating Ken from his mother."

¶ 28 "The district court has broad discretion to fashion a disposition from the prescribed alternatives . . . based upon the best interests of the child." *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008). We review a disposition order only for an abuse of discretion. *Id.* "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re A.P.W.*, 2021-NCSC-93, ¶ 15, 378 N.C. 405, 410 (quotation marks and citation omitted).

¶ 29 Because Respondents do not challenge the findings of fact in the trial court's Amended Disposition Order, those findings are binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. The findings reflect that Ken was "thriving in the relative placement," "all of his needs [were] being met," he "ha[d] access to normal childhood activities and developmentally appropriate toys," and was "receiving routine and special medical and dental care." In October 2020, Mother entered into a case

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2. Because the unchallenged findings of fact support the trial court's adjudication of neglect, we do not reach Respondents' challenge to certain findings pertaining to allegedly stolen property and other findings of fact on the ground that they were based upon the trial court's erroneous admission of expert testimony from Barnes.

plan with SCDSS to address "Mental Health/Substance Abuse, Random Drug Screens, Parenting, Housing and basic needs, and Employment." Pursuant to her plan, Mother completed an assessment and began an outpatient therapy program. Mother also secured employment and housing, though the housing was described only as "a building behind her grandmother's home." From November 2020 until the disposition hearing in March 2021, Mother visited Ken only five times. From October 2020 until the disposition hearing, Mother refused drug screens twice, could not be reached by SCDSS for drug screens twice, and tested positive on two drug screens. Mother attended just four of eleven classes with the "Legacy Center" between completing her intake assessment in October 2020 and the disposition hearing.

¶ 30 In light of these findings, the trial court's decision to continue custody of Ken with SCDSS, maintain Ken's relative placement, and maintain reunification as the permanent plan was not "so arbitrary that it could not have been the result of a reasoned decision." *In re A.P.W.*, 2021-NCSC-93, ¶ 15, 378 N.C. at 410 (quotation marks and citation omitted).

III. Conclusion

¶ 31 Because the trial court's findings showed that Ken lived in an environment injurious to his welfare, the trial court did not err in adjudicating Ken a neglected juvenile. The trial court did not abuse its discretion in maintaining Ken's custody with DSS and placement with a relative where Ken was thriving in the placement and Mother had made some progress under her case plan.

AFFIRMED.

Judges DILLON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
GLENN MADISON HOGAN, II

No. COA20-795

Filed 4 January 2022

Jury—selection—motion to strike for cause—bias—abuse of discretion analysis

In a first-degree murder trial that received widespread media attention and in which many jurors had to be excused due to their prior knowledge of the case, the trial court did not abuse its discretion by failing to strike for cause a juror who initially stated she had a bias in favor of law enforcement given that her father was a retired highway patrolman, because the juror, who did not have knowledge of defendant or the case, ultimately agreed that she could be a fair juror and follow the trial court's instructions, including by applying the presumption of innocence to defendant.

Appeal by defendant from judgments entered on or about 7 October 2019 by Judge V. Bradford Long in Superior Court, Montgomery County. Heard in the Court of Appeals 24 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Because the trial court did not abuse its discretion in denying defendant's motion to excuse a juror for cause, we conclude there was no error in defendant's trial. We remand for correction of a clerical error.

I. Defendant's Convictions and Issues on Appeal

¶ 2 Defendant was convicted by a jury of first-degree murder, conspiracy to commit robbery with a dangerous weapon, three counts of robbery with a dangerous weapon, and three counts of first-degree kidnapping. The jury found defendant guilty of first-degree murder based upon four theories: malice, premeditation, and deliberation; torture; lying in wait;

and felony murder. The trial court arrested judgment on the conspiracy conviction, one of the robbery convictions, and all of the kidnapping convictions, and entered sentences on the remaining convictions: first-degree murder and two counts of robbery. Defendant appeals his judgments. Because defendant *only* raises issues regarding a juror and a clerical error in one of his judgments, we will not recount the especially brutal and horrific factual background leading to his convictions.

II. Prospective Juror

¶ 3 Defendant's first argument on appeal is that "[t]he trial court reversibly erred by failing to excuse prospective juror Mary Smith[1] for cause where she indicated she might be unable to apply the presumption of innocence."

A. Standard of Review

> We review a trial court's ruling on a challenge for cause for abuse of discretion. A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision. In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record.
>
> The question that the trial court must answer in determining whether to excuse a prospective juror for cause is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.
>
> . . . .
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> If the record supports the trial court's decision that the juror could follow the law, then the trial court's ruling should be upheld on appeal.
>
> . . . .
>
> Indeed, an appellate court should reverse only in the event that the decision of the trial court is so arbitrary that it is void of reason. . . . [M]erely because a prospective juror holds personal views that do not

1. We use a pseudonym for the juror at issue. We do so throughout the opinion without brackets in portions where the transcript is quoted.

> comport completely with the structure set out in N.C.G.S. § 15A–2000 does not disqualify that person from fulfilling his or her civic responsibility to serve on a jury. Moreover, the General Assembly's intent is to maximize the pool of qualified citizens who can serve as jurors. Determinations of whether a juror would follow the law as instructed are best left to the trial judge, who is actually present during *voir dire* and has an opportunity to question the prospective juror. Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.

State v. Cummings, 361 N.C. 438, 447-50, 648 S.E.2d 788, 794-96 (2007) (citations and quotation marks omitted).

B. Ms. Smith's *Voir Dire*

¶ 4 Defendant moved to strike prospective juror Ms. Smith for cause. The trial court denied this request. Defendant then used a peremptory challenge to remove Ms. Smith. Defense counsel later noted to the trial court that he wanted to use a peremptory challenge on another juror, but had exhausted them, and thus he renewed his motion to remove Ms. Smith for cause. The trial court denied the motion.

¶ 5 To put the jury selection process in context, we note that this case received extensive coverage in the local news due to the horrific facts of the kidnapping and torture of the victim. Because of the pretrial publicity and seriousness of the charged crimes, the jury pool for this case included about 200 jurors. After excusing some prospective jurors for various hardships, the trial court divided the 146 remaining prospective jurors into two panels for *voir dire*. The prospective jurors were questioned individually, and many had prior knowledge of the case from media coverage or word of mouth in the community. Quite a few also knew about defendant's juvenile record and reputation. Many jurors were excused for cause based upon their stated inability to be fair and impartial due to pretrial publicity and others out of concern for the "gruesome" nature of the evidence. The entire jury selection process took five days.

¶ 6 The juror in question in this case, Ms. Smith, unlike many of the prospective jurors, had no prior knowledge of defendant or the case. Defendant argues the trial court abused its discretion in failing to allow him to excuse Ms. Smith for cause because "she indicated she might be

unable to apply the presumption of innocence." During her *voir dire* Ms. Smith stated several times she did not know about this specific case, and her father is a retired state trooper. The Court questioned her:

> THE COURT: Okay. The fact that your dad is a retired highway patrolman – okay? – do you think that would color the way you viewed the evidence in this case?
>
> JUROR MARY SMITH: It would.
>
> THE COURT: How so?
>
> JUROR MARY SMITH: Because I know how loyal my dad was and how – these men mean to him, so I would prefer their judgment.
>
> THE COURT: You think there's a danger that you might give their testimony more weight than another person's.
>
> JUROR MARY SMITH: Yes.

¶ 7 The questioning continued:

> THE COURT: –– okay? -- but what I think I heard you saying was you didn't think you could be fair to Mr. Hogan because you would tend to believe a police officer's testimony over someone else's. Is that a fair summation of what you were saying?
>
> JUROR MARY SMITH: Yeah. But I would be willing to hear it, but it's just, growing up in law enforcement your whole life, you hear all the wrong and bad that happens in your community, and you want justice for everything, so ––
>
> THE COURT: And I appreciate that. But here's where we are: We only have a chance to ask you questions about it now, and what I -- what I think I hear you saying is, "I would do my best." You didn't use that phrase, but I think -- I think ––
>
> JUROR MARY SMITH: Yeah.
>
> THE COURT: –– what you're saying is – you're letting us know you sort of feel like you have a predisposition towards wrongdoers being caught and corrected for their actions.

JUROR MARY SMITH: Yes.

THE COURT: And that -- but you would try and do your best to be fair in this case. Is that fair?

JUROR MARY SMITH: Yes.

¶ 8 The State then questioned Ms. Smith:

MR. NADOLSKI: I heard you say that, you know, because of your kind of slant on things as far as wanting justice for -- and -- but, you know, truthfully, I mean, that's what we all want. I mean, that's the ---

JUROR MARY SMITH: Yeah.

MR. NADOLSKI: --- that's the system of government we live in. We're -- that's what justice is all about. So I just want to be -- just to be clear, I don't want to -- you know, ultimately, you know, it's the highest – it's one of the highest civic duties we have, is to serve as jurors and -- and do our duty as -- so that people that are charged with crimes will have people in the community that will hear their cases and determine their guilt or innocence. And so it's -- you know, it's a longstanding thing that passes down from the English law. And it's – it's important. It makes our system run and makes it work. . . . .

. . . .

MR. NADOLSKI: And so the only question is, really, can you -- and so if you're sat as a juror in this case, your job will be to hear the evidence, and then once you've heard the evidence, the judge would instruct you on the law. Then you would determine whether the defendant was guilty or not guilty of the crimes that are charged.

In that -- in that situation, you will hear testimony from many witnesses, lay witnesses and law enforcement, medical examiners, things like that. And your job will be to gauge the credibility of those witnesses. So that the question is: Can you do that and be fair and not let any predispositions you have have an effect on that?

So, for instance, you know, you use the same things that you use in your common sense, you know ---

JUROR MARY SMITH: Uh-huh.

MR. NADOLSKI: --- in your everyday lives: "Does this make sense, based on that fact? Does this make sense? "And you have to be fair to all the witnesses that testify.

JUROR MARY SMITH: Yeah.

MR. NADOLSKI: Does that make a ---

JUROR MARY SMITH: Yeah.

MR. NADOLSKI: So I guess the question is: If a -- if an officer testified in this case and maybe he said some things that didn't make sense and you thought, "Well, that doesn't really -- that really doesn't go with that," "It doesn't really compute," you're not going to let the fact that just because he's a law-enforcement officer come into play with that.

JUROR MARY SMITH: No.

MR. NADOLSKI: You're going to ---

JUROR MARY SMITH: No.

MR. NADOLSKI: You're going to use your common sense ---

JUROR MARY SMITH: Yes. Yes.

MR. NADOLSKI: Okay. And that's – that's really what this gets down to, is: Can you do that in this case, set those -- set your experiences with your daddy aside ---

JUROR MARY SMITH: Uh-huh.

MR. NADOLSKI: And I know your daddy would want you to be fair in this case, too. Right?

JUROR MARY SMITH: Yeah. Oh, yeah.

MR. NADOLSKI: So – all right. And so that's the – that's the real question: Can you do that? Can you

just push that aside, say, "I'm going to consider the evidence that's presented" –

JUROR MARY SMITH: Uh-huh.

MR. NADOLSKI: --- "I'm going to use the things that I use in my everyday affairs," like the ability of a person to see, hear the things that they're talking about, any apparent bias, things like that? And that's just – that's what ---

JUROR MARY SMITH: Yeah.

MR. NADOLSKI: --- you got to do. You think you can do that?

JUROR MARY SMITH: I think I could, yes.

¶ 9 Defendant's attorney then questioned Ms. Smith:

MR. ROOSE: Okay. All right. Okay. Now, you indicated that you would – because you grew up with law enforcement of course, and have a lot of respect for all those people and everything, you would tend to defer to their side of things, here. Okay. Is that ---

JUROR MARY SMITH: No.

MR. ROOSE: Is that right?

JUROR MARY SMITH: Yeah, like – but like I said, I would, but I want to hear everything to make the right judgment.

MR. ROOSE: Okay. Would – so – all right. Right now, one of the – one of the three cardinal principals of criminal law in a criminal case is that Glenn Hogan sits here at the defendant's table clothed in the presumption of innocence. Can you presume Glenn Hogan to be innocent right now?

JUROR MARY SMITH: I don't know.

MR. ROOSE: Don't know if you can do that.

JUROR MARY SMITH: Yeah, I don't know.

¶ 10 Defendant's counsel continued questioning Ms. Smith, followed again by the State:

MR. ROOSE: But to start out, you have -- you need to be able to presume him to be innocent before you hear anything else. He doesn't have any burden. He doesn't have to prove anything. He doesn't ---

JUROR MARY SMITH: Okay.

MR. ROOSE: --- have to prove his innocence. The burden's 100 percent with the district attorney, here.

JUROR MARY SMITH: Okay.

MR. ROOSE: And they have to prove the case beyond a reasonable doubt.

JUROR MARY SMITH: Okay.

MR. ROOSE: But you don't know if you can presume him to be innocent at this time. Is that right?

JUROR MARY SMITH: I guess not. I don't know.

MR. ROOSE: Okay. That's all the questions I have.

THE COURT: Yes, sir.

MR. NADOLSKI: Can I just follow up?

THE COURT: Yep.

MR. NADOLSKI: And I -- this may not have been – you may not have had clarity on this, but -- so when we talk about this presumption of innocence, it is – the presumption -- basically what you'll be – he's presumed innocent, and he's charged with a crime, but that – that doesn't mean anything. It's just an allegation. Right?

JUROR MARY SMITH: Uh-huh.

MR. NADOLSKI: And the presumption follows him until, until, you've heard all the evidence. And you understand why that is. You – it's fair -- basic fairness.

JUROR MARY SMITH: Yeah.

MR. NADOLSKI: Then the judge will instruct you after you've heard all the evidence, and then

you determine whether the defendant is guilty or not guilty of a crime. Is that ---

JUROR MARY SMITH: Yes.

MR. NADOLSKI: So that's truly what you're going to be asked to do. Can you ---

JUROR MARY SMITH: Yes.

MR. NADOLSKI: --- do that?

JUROR MARY SMITH: Yes.

MR. NADOLSKI: Okay.

THE COURT: Yes, sir.

MR. ROOSE: No further questions.

¶ 11 The *voir dire* concluded:

THE COURT: Of course I remember [your father] Trooper [Smith]. The law presumes Mr. Hogan to be innocent. This is vitally important to this case.

JUROR MARY SMITH: Uh-huh.

THE COURT: And the law says that this protection, this -- however you want to view it, however you can envision it in your head, this shield, this garment, whatever it is, surrounds Mr. Hogan and is never removed from him unless and until the State of North Carolina proves he's guilty beyond a reasonable doubt. There is no burden or duty of any type on Mr. Hogan. The burden rests on this table exclusively.

And, you know, these are tough things to talk about. It's not things we ponder in our everyday lives. I get paid to do this, and I don't ponder it in my everyday life, you know. I've sat in that chair, and it's a different feeling sitting in that chair than sitting in this chair. Sitting up here, you're just -- you talk in a loud voice and tell everybody what they're supposed to do. When you sit over there, you have to think about it. Okay?

So I need to know whether or not you can follow those rules, whether or not you can extend the burden --the -- whether or not you can hold the State to its burden of proof beyond a reasonable doubt

> and whether or not you can presume Mr. Hogan to be innocent and allow this presumption of innocence to remain shield or -- him clothed in this presumption of innocence unless and until the State proves he's guilty beyond a reasonable doubt. Easy to say. It's a little bit harder concept to wrap your mind around. But that's what I need to know whether or not you can do.
>
> JUROR MARY SMITH: I can.
>
> THE COURT: Okay. Anything else, Mr. Nadolski?
>
> MR. NADOLSKI: No.
>
> THE COURT: Mr. Roose?
>
> MR. ROOSE: No.

¶ 12 While Ms. Smith admitted she was generally biased toward the side of law enforcement because her father had served as a law enforcement officer, she ultimately reiterated to the Court many times that she could be a fair juror, applying the presumption of innocence to defendant and the burden of proving guilt beyond a reasonable doubt to the State. While defendant primarily relies on a United States Supreme Court case, we recognize our own extensive case law on this issue. For example, in *Cummings*, our Supreme Court held the trial court did not abuse its discretion in denying the defendant's motion to strike a juror for cause when the prospective juror was a law enforcement officer and made statements regarding his lack of impartiality and an inability to presume the defendant was innocent, but after additional questioning, he ultimately stated he would be fair to this defendant, would follow the trial court's instructions, and consider all of the evidence. *See id.*, 361 N.C. 438, 648 S.E.2d 788.

¶ 13 We also consider the context in which Ms. Smith was selected as a juror. As noted above, this case had extensive pretrial publicity and many prospective jurors had to be excused for cause based upon their prior knowledge of defendant or reports regarding the alleged crimes. The trial court called an especially large pool of prospective jurors and questioned jurors individually. Unlike many of the other prospective jurors, Ms. Smith had no prior knowledge of the case or defendant. We certainly cannot find that the trial court's denial of defendant's motion to strike Ms. Smith for cause was "so arbitrary that it is void of reason." *Cummings*, 361 N.C. at 449-50, 648 S.E.2d at 795. To the contrary, the

trial court conducted the *voir dire* with great care and consideration of the particular challenges presented by this type of case.

¶ 14 We have reviewed the statements of Ms. Smith and are satisfied "that the record fairly supports the trial court's conclusion that [the prospective juror] would follow the law as instructed." *Id.* at 449, 648 S.E.2d at 795. We conclude there was no abuse of discretion. This argument is overruled.

III. Clerical Error

¶ 15 Defendant's only other argument on appeal is that "[r]emand is required to correct a clerical error because the trial court sentenced" defendant incorrectly on one of the judgments (16CRS0050065 – one count of robbery with a dangerous weapon). The State concedes the sentence on the judgment is in error and should be *73* to 100 months rather than *77* to 100 months as is noted. "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and quotation marks omitted). Accordingly, we remand for correction of the clerical error.

NO ERROR and REMANDED.

Judges DIETZ and COLLINS concur.

STATE v. REDMOND

[281 N.C. App. 283, 2022-NCCOA-5]

STATE OF NORTH CAROLINA
v.
ZENA MARIE REDMOND, DEFENDANT

No. COA21-212

Filed 4 January 2022

1. Indictment and Information—injury to personal property—ownership—special property interest—no fatal variance

After an incident at an art gallery where defendant threw a paint balloon at a painting during the artist's live performance, the trial court properly denied defendant's motion to dismiss a charge of injury to personal property because there was no fatal variance between the charging document and the State's evidence regarding ownership of the painting. Although the charging document alleged that the artist owned the painting when, technically, it belonged to a separate legal entity—an S-corporation solely owned by the artist—evidence showed the artist had a "special property interest" in the painting where: the corporation employed him to create paintings; he held out the paintings as his own and regarded himself and the corporation as one and the same; and, at the time it was damaged, the artist had possession of the painting, which had neither been finished nor posted for sale.

2. Damages and Remedies—restitution—fair market value—unsold painting—injury to personal property

After an incident at an art gallery where defendant—with help from an accomplice—threw a paint balloon at a painting during the artist's live performance, the trial court at defendant's trial for injury to personal property did not err in ordering defendant to pay restitution equal to half the painting's market value, which was based on evidence of the gallery's base price for paintings of that size. Contrary to defendant's argument, the fact that the painting had not been sold yet did not mean that the market value assigned by the trial court was speculative.

Appeal by Defendant from judgment entered 18 December 2019 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 17 November 2021.

Attorney General Joshua H. Stein, by Associate Attorney General Brian M. Miller, for the State.

Carella Legal Services, PLLC, by John F. Carella, for the Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Zena Marie Redmond, appeals from the trial court's judgment entering a jury verdict finding her guilty of misdemeanor injury to personal property with a value in excess of $200. Defendant argues the trial court erred by: (1) denying her motion to dismiss based on a fatal variance between the charging document and the evidence presented at trial; and (2) ordering that she pay restitution in an amount based only on speculative values. We discern no error.

I. Factual and Procedural Background

¶ 2 This case arises from damage done to a painting in protest of the painter's alleged bad acts. On 12 January 2019, a magistrate judge entered an order charging Defendant with injury to personal property in excess of $200 and resisting arrest by a public officer. On 23 October 2019, Defendant was tried and found guilty of both charges in district court. Defendant appealed to superior court for a jury trial. Evidence presented during the proceedings in superior court tended to show as follows:

¶ 3 On 12 January 2019, painter Jonas Gerard held a live painting performance at the Jonas Gerard Fine Arts Gallery in Asheville. Gerard regularly held these performances on the second Saturday of every month. During these performances, Gerard would typically paint a few paintings over the course of around three hours. Once the paintings were dry, they would be titled, catalogued, posted on the gallery's sales website, and moved out onto the Gallery's sales floor.

¶ 4 On the morning of January 12, staff at the Jonas Gerard Fine Arts Gallery "heard rumors that there was going to be a protest outside of the building" and discovered a "blackish tar substance" and "busted balloons all over [the] front foyer, front door." Mr. Luzader, an employee who assisted Gerard on stage that day, testified that he "made a point that day to scan the crowd" during the performance and that he was on "high alert because [they] had heard rumors of the protestors." A "section in the crowd caught [Mr. Luzader's] attention a couple times" because "[t]hey looked like they didn't want to be there, they weren't enjoying [the performance]." Mr. Luzader identified Defendant as part of that section in the crowd.

¶ 5 After the performance, Gerard answered questions and invited the audience onto the stage to examine the last painting. Gerard stepped

away from the painting to mingle with the audience. Mr. Luzader testified that he saw Defendant standing near an exit door, partially concealed by a partition. Defendant was looking back and forth at Mr. Luzader and the paintings in the room. Then Mr. Luzader "heard a commotion and some lady screamed[a]nd about that time a balloon came and hit [him] on [his] foot." Mr. Brasington, another gallery employee, testified that he was assisting a woman who had expressed a desire to purchase the painting when the commotion occurred. Mr. Brasington stated that, when "[I and the buyer] got back to the sales desk, I looked back and I saw [Defendant] unleash at least one balloon, if not two" from behind the partition. Mr. Luzader added that, after the event, the painting had "this huge black ink stain in the middle of it that [took] up pretty much the whole painting" and was "still wet with black ink."

¶ 6 Mr. Luzader "looked up and saw [Defendant] run out the exit door." A police officer working event security called for back-up and pursued Defendant out of the gallery and into the street. The responding officers ultimately detained Defendant and an accomplice. At that time, Defendant "had a black mark on her hand and some black paint [on her] as well", and was carrying "a balloon filled with black paint" in her purse.

¶ 7 At the close of the State's evidence, Defendant moved to dismiss the charge of injury to personal property. The court denied Defendant's motion. Defendant did not present evidence at trial. The jury found Defendant guilty of misdemeanor injury to personal property with a value in excess of $200. The superior court sentenced Defendant to thirty days in the custody of the county sheriff, then suspended that sentence and placed Defendant on eighteen months of supervised probation. The trial court also ordered that Defendant pay $4,425.00 in restitution for the damaged painting, over Defendant's objection to the amount. Defendant gave timely written notice of appeal.

II. Analysis

¶ 8 Defendant makes two arguments on appeal: (1) the trial court should have dismissed the charge of injury to personal property due to a fatal variance; and (2) the trial court ordered restitution based upon speculative values.

A. Fatal Variance in Ownership Evidence

¶ 9 **[1]** Defendant contends the "trial court erred by denying [her] motion to dismiss based on a fatal variance between the charging document and the State's evidence at trial regarding ownership of the damaged painting." Our Courts review motions to dismiss to determine whether, in the

light most favorable to the State, there was substantial evidence of each essential element of the crime charged and whether the defendant was the perpetrator of the offense. *State v. Craycraft*, 152 N.C. App. 211, 213, 567 S.E.2d 206, 208 (2002) (citations omitted).

¶ 10 "[A] challenge to a fatal variance between the [charging document] and proof is made by motion to dismiss for insufficiency of the evidence in the trial court." *State v. Jones*, 223 N.C. App. 487, 496, 734 S.E.2d 617, 624 (2012) (citations and quotation marks omitted), *aff'd*, 367 N.C. 299, 758 S.E.2d 345 (2014). "It has long been the law of this state that a defendant must be convicted, if convicted at all, of the particular offense charged in the [charging document]." *State v. Faircloth*, 297 N.C. 100, 107, 253 S.E.2d 890, 894 (1979). "A variance occurs where the allegations in [the charging document], although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citation omitted). To prevail on a motion to dismiss for fatal variance, "the defendant must show a fatal variance between the offense charged and the proof as to [t]he gist of the offense", meaning that the State's evidence contained "a variance regarding an essential element of the offense." *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (citations and quotation marks omitted).

¶ 11 Under N.C. Gen. Stat. § 14-160, "if any person shall wantonly and willfully injure the personal property of another, causing damage in an amount in excess of two hundred dollars ($200.00), [s]he shall be guilty of a Class 1 misdemeanor." N.C. Gen. Stat. § 14-160(b) (2019). "The identity of the owner of the property that the defendant allegedly injured is a material element of the offense of injury to personal property." *State v. Ellis*, 368 N.C. 342, 344–45, 776 S.E.2d 675, 677 (2015) (citations and quotation marks omitted). "[A] criminal pleading seeking to charge the commission of crimes involving theft of or damage to personal property, including injury to personal property, must allege ownership of the property in a person, corporation, or other legal entity capable of owning property." *Id.* The charging document for injury to personal property "must allege a person who has a property interest in the property [injured,] and . . . the State must prove that that person has ownership, meaning title to the property or some special property interest." *See State v. Greene*, 289 N.C. 578, 584, 223 S.E.2d 365, 369 (1976).

¶ 12 The magistrate's charging order in this case stated:

> [T]here is probable cause to believe that . . . [Defendant] named above unlawfully and willfully

> did wantonly injure personal property, A PAINTING, the property of JONAS GERARD. The damage caused was in excess of $200.00.

¶ 13 Defendant contends that although the charging document alleges the painting was "the property of Jonas Gerard", the State's evidence at trial showed that the painting was actually owned by Gerard's corporation, Jonas Gerard Fine Arts, Inc. ("JGFAI"). Additional evidence presented at trial showed that the damaged painting was owned by JGFAI, an S-corporation held in a revocable trust, and that Gerard was both an employee of JGFAI and the sole owner of JGFAI. Therefore, record evidence in this case shows that "Jonas Gerard" and "Jonas Gerard Fine Arts, Inc.," are separate legal persons or entities, each of which is capable of owning property.

¶ 14 Nonetheless, the State presented sufficient evidence that Gerard otherwise had a "special property interest" in the painting. In reaching our holding in this case, we evaluate cases regarding the crime of injury to personal property as well as the crime of larceny. North Carolina case law has acknowledged that these crimes share the requirement that the State allege the owner of injured or stolen property. *Ellis*, 368 N.C. at 344–45, 776 S.E.2d at 677; *State v. Cave*, 174 N.C. App. 580, 582, 621 S.E.2d 299, 301 (2005) ("To convict a defendant of injury to *personal property or larceny*, the State must prove that the personal property was that 'of another,' i.e., someone other than the person or persons accused." (emphasis added)); *State v. Price*, 170 N.C. App. 672, 673, 613 S.E.2d 60, 62 (2005). In application, larceny and injury to personal property both arise from a defendant's acts which deprive the owner of the use and enjoyment of their personal property. The breadth of our state's precedent defining "special property interests" that properly allege ownership appears in cases of larceny.

¶ 15 "[T]he person named in the indictment may be either the person having a 'general interest' in the . . . property—that is, the actual owner—or the person with a 'special interest' in the property—that is, the person who had possession and control of it at the time when it was stolen [or damaged]." *State v. Carr*, 21 N.C. App. 470, 472, 204 S.E.2d 892, 894 (1974); *see State v. Campbell*, 257 N.C. App. 739, 761, 810 S.E.2d 803, 817 (2018), *aff'd as modified*, 373 N.C. 216, 835 S.E.2d 844 (2019) (exploring cases of joint possession, parental responsibility, and bailee/custodian relationships which Courts have held to be "special property interests"). In *Carr*, record evidence showed that a stolen vehicle was actually owned by an electronics business, while the charging document alleged the car was property owned by the business owner's son. *Id.* at

472, 204 S.E.2d at 894. However, the son "regarded [the vehicle] as his car, took it to college with him, and was in possession of it at all times." *Id.* at 471, 204 S.E.2d at 893. This Court held that, based upon this evidence, "it [was] clear that [the son] had a special interest in the stolen automobile." *Id.* at 472, 204 S.E.2d at 894.

¶ 16 Conversely, in *Campbell*, this Court reiterated the rule that "an employee in possession of property on behalf of the employer does not have a sufficient ownership interest in the property" to allege ownership in a charging document. *Campbell*, 257 N.C. App. at 764, 810 S.E.2d at 819. In *Campbell*, the defendant stole audio equipment which belonged only to a church, but the indictment alleged that the equipment was also the property of the church's pastor. *Id.* at 762–64, 810 S.E.2d at 818–19. The evidence showed only that the pastor worked at the church, lived on church property, and benefitted from others' use of the audio equipment in his work; the pastor had no responsibility for or control over the stolen audio equipment. *Id.* The *Campbell* Court held this evidence "did not show that [the pastor] had any special property interest in the stolen items." *Id.* at 766, 810 S.E.2d at 819.

¶ 17 Gerard's relationship to his paintings is similar to the ownership analysis in *Carr*. Record evidence showed that Gerard had authority to use materials owned by JGFAI to create paintings and did so at least once per month. Gerard had actual possession of the damaged painting throughout its creation and walked away from the painting to discuss his work with audience members shortly before the painting was damaged. Though a buyer had expressed interest in this particular painting, evidence showed that Gerard had not yet finished the painting: the painting's ink had not settled, it had not yet been named, and it had not yet been catalogued or added to the sales floor. Even after a painting is catalogued and posted for sale in the gallery, testimony showed that Gerard retained the right to revisit his finished creations and to alter or improve them if he felt they needed "a little more love." JGFAI employed Gerard for the purpose of creating paintings and granted him control over new and finished paintings. Though they were distinct legal entities, Gerard regarded himself and JGFAI as one and the same and certainly held out the paintings as his own. It is clear from the record that Gerard had a special property interest in the paintings he created for JGFAI.

¶ 18 The allegation of ownership by Gerard in the charging order was sufficient to notify Defendant of the particular piece of personal property which she was alleged to have damaged. *See State v. Spivey*, 368 N.C. 739, 743–44, 782 S.E.2d 872, 875 (2016) ("A description of the owner of personal property is useful to differentiate between two similar pieces

of personal property, thereby notifying the defendant of the particular transaction on which the indictment is founded and giv[ing] the [defendant] the benefit of the first acquittal or conviction if accused a second time of the same offense." (citation and internal quotation marks omitted)). The trial court did not err by denying Defendant's motion to dismiss because there was no fatal variance between the charging order and the evidence presented at trial.

B. Evidence Supporting Restitution

¶ 19 **[2]** Defendant next argues the "trial court erred by ordering Defendant to pay $4,425 in restitution by speculating the value of an unsold painting."

¶ 20 "On appeal, we review *de novo* whether the restitution order was supported by evidence adduced at trial or at sentencing." *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011). "In determining the amount of restitution, the court shall consider . . . [i]n the case of an offense resulting in the damage, loss, or destruction of property of a victim of the offense . . . [t]he value of the property on the date of the damage, loss, or destruction[.]" N.C. Gen. Stat. § 15A-1340.35(a)(2)(b)(1) (2019).

¶ 21 "[T]he quantum of evidence needed to support a restitution award is not high." *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011). "Prior case law reveals two general approaches: (1) when there is no evidence, documentary or testimonial, to support the award, the award will be vacated, and (2) when there is specific testimony or documentation to support the award, the award will not be disturbed." *Id.*; *see State v. Cousart*, 182 N.C. App. 150, 154, 641 S.E.2d 372, 375 (2007) (holding restitution award was adequately supported by victim's testimony that stolen stereo was purchased for $787.00); *State v. Price*, 118 N.C. App. 212, 221, 454 S.E.2d 820, 826 (1995) (holding victim's testimony that, due to the defendant's conduct, "he had to purchase a special van costing $19,900 and that he had incurred $1,000 in medical expenses" supported restitution award); *cf. Moore*, 365 N.C. at 285–86, 715 S.E.2d at 849 (remanding for additional determinations on restitution because testimony "that the estimate for repairs was '[t]hirty-something thousand dollars' " was "not specific enough to support the award of $39,332.49").

¶ 22 Here, Mr. Brasington testified that a buyer was interested in the painting and in discussions with sales staff to purchase the painting at the time it was damaged. This buyer asked Gerard during the performance how much the painting would cost, to which Gerard replied "$8,850.00." Mr. Brasington further testified that $8,850.00 was the gallery's base price for all paintings of this size. Gerard testified at trial that he sometimes painted over or added to his paintings, but he could

not paint over the black ink stain or reuse the damaged painting in any way because the canvas was "destroyed completely." Based upon this evidence, and evidence that Defendant was assisted by an accomplice, the trial court ordered that Defendant pay $4,425.00—half the value of the damaged painting—in restitution.

¶ 23 Contrary to Defendant's assertions, the fact that the specific, damaged item had not yet been purchased by a buyer does not mean that the market value assigned by the trial court for restitution was speculative. In *State v. Freeman*, this Court used the sale price of substantially similar lumber from another parcel to determine the amount of restitution awarded for unsold timber illegally cut from the victim's property. *State v. Freeman*, 164 N.C. App. 673, 678, 596 S.E.2d 319, 322–23 (2004); *see also Kaplan v. City of Winston-Salem*, 286 N.C. 80, 83, 209 S.E.2d 743, 746 (1974) ("According to the decided cases in North Carolina, '[t]he measure of damages for injury to personal property is the difference between the market value immediately before the injury and the market value immediately after the injury.' "). In the present case, it was proper for the trial court to consider the base rate for which Gerard's paintings of the same or similar size are sold. The evidence adduced at trial was sufficiently specific to show the market value of the painting prior to damage by Defendant on the date of loss, damage, or destruction, and therefore we will not disturb the trial court's award.

III. Conclusion

¶ 24 We hold the trial court did not err by denying Defendant's motion to dismiss the charge of injury to personal property. The charging order and the evidence at trial showed that Jonas Gerard had a special property interest in the painting. The trial court also did not err by ordering Defendant to pay $4,425.00 as restitution. The State presented sufficient evidence of the market value of the damaged painting.

NO ERROR.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER JASON THOMPSON, DEFENDANT

No. COA20-434

Filed 4 January 2022

Motor Vehicles—fleeing to elude arrest—officers' lawful performance of their duties—disorderly conduct on school property

The State presented sufficient evidence to survive defendant's motion to dismiss the charge of felony fleeing to elude arrest where, in the light most favorable to the State, the officers were acting in lawful performance of their duties. Specifically, the officers had a reasonable articulable suspicion to detain defendant for disorderly conduct at a school in violation of N.C.G.S. § 14-288.4(a)(6) (they found defendant creating a disturbance in the school parking lot when they arrived to investigate a reported disturbance), they had probable cause to arrest defendant (for the misdemeanor of refusing to comply with the officers' request that he provide his driver's license), and they complied with N.C.G.S. § 15A-401(e) (they made reasonable efforts to give defendant notice that he was going to be arrested and attempted to open his vehicle's door and take his keys when he tried to drive away).

Appeal by Defendant from judgment entered 14 March 2019 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 23 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Mark L. Hayes for defendant-appellant.

MURPHY, Judge.

¶ 1 A trial court properly denies a defendant's motion to dismiss a charge of felony fleeing to elude arrest when there is sufficient evidence, in the light most favorable to the State, that, *inter alia*, the arresting officers acted in the lawful performance of their duties. Here, the trial court properly denied Defendant's motion to dismiss where there was sufficient evidence, in the light most favorable to the State, that the officers were acting in lawful performance of their duties because they had

a reasonable articulable suspicion to detain Defendant, had probable cause to arrest Defendant, and complied with N.C.G.S. § 15A-401(e)(1) and (2).

BACKGROUND

¶ 2 On 21 May 2015, Defendant Christopher Thompson drove his son to Liberty Elementary School. The two arrived shortly after the tardy bell rang and a school counselor, Tracey Whatley, had secured the doors. Whatley instructed Defendant's son to go to the front office to obtain a tardy slip. Defendant instead instructed his son to go to class and stated, "I am your tardy note." After Whatley informed Defendant his son would not be let inside the school without a tardy slip, Defendant went to the front office with his son.

¶ 3 At the front office, Defendant yelled, cursed, and argued with school staff, maintaining that his son should not "get a tardy." Defendant's son was taken to class eventually without a tardy, while Defendant remained in the front office. A few minutes later, the principal, Jordi Roman, arrived at the front office and, because there were students in the area and Defendant was still using profanity in a raised voice, asked Defendant to step outside of the building. Defendant did not leave right away and continued using profanity. Roman asked Defendant to step outside a second time, and he instructed his secretary to call the police and clear the office. After this occurred, Defendant complied with the request to go outside. Outside the building, Defendant continued to argue with Roman. Defendant seemingly decided he wanted to leave with his son and requested his son be brought outside. After multiple requests, Defendant's son was brought outside. Several police officers arrived as Defendant got into his truck with his son.

¶ 4 Upon arrival, Liberty Police Chief David Semrad noticed that bystanders were looking towards Defendant's truck and that Roman was standing outside near the truck. In light of the police call for a school disturbance and his observations, Chief Semrad concluded Defendant was the source of the reported disturbance, approached Defendant, and told him he was being detained. Shortly thereafter, Chief Semrad discussed the situation with Roman, and Roman asked Chief Semrad to ban Defendant from the property. Chief Semrad then asked Officer Jason Phillips to obtain Defendant's identification for the ban sheet. Officer Phillips approached Defendant's truck, which was running, and asked Defendant for his identification; however, Defendant stated he was not legally required to provide his identification and provided his full name. Officer Phillips requested Officer Hubert Elder to assist him

at Defendant's truck, and Officer Elder told Defendant he could either provide his license or go to jail. Defendant asked "under what North Carolina state law," and Officer Elder raised his voice, responding for "obstructing my investigation."

¶ 5 When Chief Semrad heard Officer Elder raise his voice, he approached Defendant's truck because he felt they had "reached a point where . . . an arrest may be warranted." Chief Semrad ordered Defendant to get out of his truck. Defendant refused to exit his truck, and Chief Semrad attempted to open the locked truck door. Officer Elder stated he saw Defendant "grab for the gearshift," so he reached inside Defendant's truck and attempted to obtain the keys from the ignition. Defendant pushed Officer Elder's arm into the truck's dash, and Chief Semrad reached into the truck and grabbed Defendant's head and arm in an attempt to break Defendant's grip from Officer Elder. The vehicle abruptly accelerated forward, and Officer Elder testified that "[Defendant's] left arm momentarily came and pinned [Officer Elder] so that [he] could not retract." Defendant then put the vehicle in reverse and backed up, at which point Officer Elder disengaged from the vehicle. Defendant drove away from the school at a high speed, with the police briefly in pursuit. However, after realizing Defendant's son was in the truck, the police stopped pursuing Defendant. Shortly after the police stopped pursuing Defendant, Defendant crashed his truck and was subsequently arrested.

¶ 6 As a result of this incident, Defendant was indicted for feloniously "operat[ing] a motor vehicle on a highway, . . . while fleeing and attempting to elude a law enforcement officer, Officer H. Elder, in the lawful performance of the officer's duties" in violation of N.C.G.S. § 20-141.5.[1] On 7 March 2018, Defendant filed a pre-trial *Motion to Suppress* all evidence obtained, arguing his attempted arrest was unlawful. The motion was denied on 8 March 2019 based on the trial court's finding that Defendant's detention was lawful. At the close of the State's evidence, Defendant made a motion to dismiss based on the insufficiency of the evidence. The trial court denied Defendant's motion to dismiss. At the close of all evidence, Defendant renewed his motion to dismiss,

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1. In the indictment, Defendant's charge for violating N.C.G.S. § 20-141.5 was elevated to a felony based on the aggravated factors of "speeding in excess of 15 miles per hour over the legal speed limit," "driving recklessly in violation of [N.C.G.S. §] 20-140," and "driving with a child under 12 years of age in the vehicle." *See* N.C.G.S. § 20-141.5(b)(1), (3), & (8) (2019).

Defendant was also indicted on multiple counts of assault on a law enforcement officer but was found not guilty of the assault charges. Defendant does not raise any challenge related to the indictments on appeal.

and the trial court again denied his motion. Defendant was convicted of felony fleeing to elude arrest. On 14 March 2019, the trial court sentenced Defendant to a suspended sentence of 6 to 17 months. Defendant timely appealed.

ANALYSIS

¶ 7 On appeal, Defendant argues the trial court erred in denying his motion to dismiss because the State did not present sufficient evidence that the officers were acting in the lawful performance of their duties.[2] Specifically, Defendant argues the officers acted unlawfully because (A) "they had no reasonable suspicion to detain [Defendant]"; (B) "they had no probable cause to arrest [Defendant]"; and (C) "the arrest, even if it was based on probable cause, did not comply with [N.C.G.S.] § 15A-401." We disagree.[3]

¶ 8 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

> Upon [the] defendant's motion for dismissal, the question for [us] is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied.

State v. Fritsch, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences . . . . Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citations omitted).

¶ 9 Defendant was convicted of felonious fleeing to elude arrest pursuant to N.C.G.S. § 20-141.5. N.C.G.S. § 20-141.5 provides in relevant part:

> (a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law

2. We note that Defendant does not challenge the denial of his *Motion to Suppress* on appeal.

3. We emphasize that we come to our conclusion under the standard of review applicable to motions to dismiss. *See State v. Mahatha*, 267 N.C. App. 355, 358, 832 S.E.2d 914, 918 (2019) (applying the standard of review for a motion to dismiss for insufficiency of the evidence, and not discussing the standard of review for a motion to suppress).

> enforcement officer *who is in the lawful performance of his duties*. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.
>
> (b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.

N.C.G.S. § 20-141.5(a)-(b) (2019) (emphasis added). We address only whether the officers were in the lawful performance of their duties as it is the only element that Defendant challenges on appeal. *See* N.C. R. App. P. 28 ("Issues not presented and discussed in a party's brief are deemed abandoned.").

A. Reasonable Articulable Suspicion

¶ 10 Defendant first argues the police officers departed from the lawful performance of their duties because they lacked reasonable articulable suspicion to detain him.

¶ 11 "The Fourth Amendment protects individuals against unreasonable searches and seizures. The North Carolina Constitution provides similar protection." *State v. Hernandez*, 208 N.C. App. 591, 597, 704 S.E.2d 55, 59 (2010) (marks and citations omitted), *disc. rev. denied*, 365 N.C. 86, 731 S.E.2d 829 (2011). "'[B]rief investigatory detentions such as those involved in the stopping of a vehicle' are subject to Fourth Amendment protections." *Mahatha*, 267 N.C. App. at 358, 832 S.E.2d at 918 (quoting *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994)). "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. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007), *aff'd*, 362 N.C. 244, 658 S.E.2d 643, *cert. denied*, 555 U.S. 914, 172 L. Ed. 2d 198 (2008). "To determine whether this reasonable suspicion exists, a court must consider the totality of the circumstances[.]" *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 298 (2001) (citations and marks omitted). Reasonable articulable suspicion "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." *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70; *see also State v. Fleming*, 106 N.C. App. 165, 171, 415 S.E.2d 782, 785 (1992) (holding a violation of the Fourth Amendment occurred when the detaining officer "had 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").

¶ 12 Here, Chief Semrad had a "reasonable, articulable suspicion that a crime"—specifically, disorderly conduct at a school in violation of N.C.G.S. § 14-288.4(a)(6)—"may be underway." *Barnard*, 184 N.C. App. at 29, 645 S.E.2d at 783. N.C.G.S. § 14-288.4(a)(6) reads:

> (a) Disorderly conduct is a public disturbance intentionally caused by any person who . . . :
>
> (6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

N.C.G.S. § 14-288.4(a)(6) (2019). Our Supreme Court has interpreted this language, stating "[w]hen the words 'interrupt' and 'disturb' are used in conjunction with the word 'school,' they mean to a person of ordinary intelligence a substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled." *In re Eller*, 331 N.C. 714, 718, 417 S.E.2d 479, 482 (1992). We recently observed that this rule from *In re Eller* applies to both parts of the disjunctive—"[d]isrupts, disturbs or interferes with the teaching of students at any public or private educational institution" and "engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto"—in N.C.G.S. § 14-288.4(a)(6). *See State v. Humphreys*, 275 N.C. App. 788, 793, 853 S.E.2d 789, 793 (2020) (citing *In re Eller*, 331 N.C. at 718, 417 S.E.2d at 482; *In re Grubb*, 103 N.C. App. 452, 453-54, 405 S.E.2d 797, 798 (1991); *In re Brown*, 150 N.C. App. 127, 129-131, 562 S.E.2d 583, 585-586 (2002); *In re Pineault*, 152 N.C. App. 196, 199, 566 S.E.2d 854, 857, *disc. rev. denied*, 356 N.C. 302, 570 S.E.2d 728 (2002); *In re M.G.*, 156 N.C. App. 414, 416, 576 S.E.2d 398, 400-01 (2003); *In re S.M.*, 190 N.C. App. 579, 582-83, 660 S.E.2d 653, 655-56 (2008)).

¶ 13 Chief Semrad received information about a reported "disturbance" at the school, which "was almost unheard of with [Roman]" as he "had always gone out of his way not to involve law enforcement at the school." Upon his arrival at the school, Chief Semrad noticed parents standing and looking towards Defendant's truck, as well as someone inside the school looking out the window towards the truck, Roman standing near the truck, and Defendant "staring intently at [Chief Semrad] in the side view mirror." Chief Semrad approached Defendant's vehicle, and Defendant asked Chief Semrad if he was being detained. After noting that the police were alerted that there was "a disturbance at the school and

people were staring at the vehicle," Chief Semrad concluded Defendant "was the person involved in the disturbance" and "told [Defendant] that he was not free to leave, that he was detained."

¶ 14 Furthermore, when asked whether he had intended to charge Defendant with anything after he detained him, Chief Semrad testified, "we were still investigating the disturbance. We'd only had – or I'd only had a very brief conversation with an upset principal. I needed more specifics, more details, and I needed to know who else was involved and what the entire situation was." Chief Semrad instructed the other officers to obtain Defendant's identification while he "continued talking to Principal Roman trying to gather information in regard[] to . . . disorderly conduct, and that involves disturbing the school, cussing in the school, threatening actions, threatening behavior, disrupting staff, disrupting students, and that's definitely what I was hearing at the time from Mr. Roman." Chief Semrad was asked about his purpose in detaining Defendant and testified to the following:

> [CHIEF SEMRAD:] It was clear to me that the school was still disrupted.
>
> [THE STATE:] And you talked about the disturbance at school. You've been asked about your familiarity with certain laws this morning -- or this afternoon. Are you familiar with the law regarding public disturbance at school?
>
> [CHIEF SEMRAD:] I believe that's North Carolina General Statute 14-288, Section 4 of that statute.
>
> [THE STATE:] Was that something that you were investigating at the time?
>
> [CHIEF SEMRAD:] Yes, sir.

¶ 15 Considering the evidence in the light most favorable to the State, under the totality of the circumstances Chief Semrad had a reasonable articulable suspicion that there was an ongoing "substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled" in violation of N.C.G.S. § 14-288.4(a)(6).[4] *In re Eller*, 331 N.C. at 718, 417

4. Defendant also argues that we should adopt a rule holding that *Terry* stops for a misdemeanor that has already been completed are per se unreasonable. However, viewing the evidence in the light most favorable to the State, the school disturbance was ongoing at the time of Defendant's detention. As a result, we need not reach this question.

S.E.2d at 482 (1992). Chief Semrad lawfully detained Defendant for a brief investigatory stop. Consequently, for the purpose of the motion to dismiss, Defendant's detention was lawful and Chief Semrad was lawfully performing his duties.

B. Probable Cause

¶ 16 Defendant next argues that, even if the initial detention was lawful, Chief Semrad "still acted beyond the scope of his duties by arresting [Defendant]" without probable cause.

¶ 17 Under N.C.G.S. § 15A-401(b)(1), "[a]n officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense . . . in the officer's presence." N.C.G.S. § 15A-401(b)(1) (2019). "An arrest is *constitutionally* valid whenever there exists probable cause to make it." *State v. Chadwick*, 149 N.C. App. 200, 202, 560 S.E.2d 207, 209, *disc. rev. denied*, 355 N.C. 752, 565 S.E.2d 672 (2002).

> Probable cause is defined as those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense. The [United States] Supreme Court has explained that probable cause does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required. A probability of illegal activity, rather than a prima facie showing of illegal activity or proof of guilt, is sufficient.

State v. Biber, 365 N.C. 162, 168-69, 712 S.E.2d 874, 879 (2011) (marks and citations omitted).

¶ 18 Our Supreme Court has held that

> when a law enforcement officer, by word or actions, indicates that an individual must remain in the officer's presence or come to the police station against his will, the person is for all practical purposes under arrest if there is a substantial imposition of the officer's will over the person's liberty.

See State v. Zuniga, 312 N.C. 251, 260, 322 S.E.2d 140, 145 (1984). Applying this principle here, an attempted arrest of Defendant occurred

when Chief Semrad instructed Defendant to leave the truck, Defendant refused, and Chief Semrad and Officer Elder forcibly attempted to remove Defendant's keys from the ignition. These actions amounting to an attempted arrest occurred within approximately six seconds. After this sequence of events, Chief Semrad and Officer Elder, by their actions, had indicated that Defendant would be coming to the police station against his will. Both Chief Semrad and Officer Elder were attempting to arrest Defendant at this point. *See State v. Tilley*, 44 N.C. App. 313, 317, 260 S.E.2d 794, 797 (1979) ("finding there was more than one arresting officer based on the facts of the case.").

¶ 19 Additionally, although Defendant's argument focuses on Chief Semrad lacking the authority to arrest him, the language of the indictment states Defendant was fleeing to elude Officer Elder, not Chief Semrad.[5] Despite both officers attempting to arrest Defendant, we focus only on the attempted arrest by Officer Elder here because Defendant was only indicted for fleeing to elude Officer Elder.

¶ 20 N.C.G.S. § 20-29 provides:

> [a]ny person operating or in charge of a motor vehicle, when requested by an officer in uniform . . . who shall refuse to write his name for the purpose of identification or to give his name and address and the name and address of the owner of such vehicle, . . . or who shall refuse, on demand of such officer or such other person, to produce his license . . . shall be guilty of a Class 2 misdemeanor.

N.C.G.S. § 20-29 (2019). The Record demonstrates Officer Phillips and Officer Elder both made a lawful request for Defendant's driver's license pursuant to N.C.G.S. § 20-29. Defendant refused these requests and instead stated his full name. Defendant's refusal to comply with the officers' request under N.C.G.S. § 20-29 constituted a misdemeanor.[6] Since a misdemeanor under N.C.G.S. § 20-29 occurred within Officer

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5. We note that Defendant does not raise any argument related to the indictments.

6. Defendant argues that he complied with N.C.G.S. § 20-29 by providing his name. We note that this statute lists several additional items not relevant to the issue here. However, each item listed in N.C.G.S. § 20-29 begins with "or who shall." N.C.G.S. § 20-29 (2019). Contrary to Defendant's reading, a plain reading of this language indicates that each action following "or who shall" is a Class 2 Misdemeanor. *See id.*; *see also State v. Hooper*, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) (citations and marks omitted) ("The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute. The first step in determining a statute's purpose is to examine the statute's plain language. Where the language of a statute is clear and unambiguous, there is no room for

Phillips' and Officer Elder's presence, for the purpose of the motion to dismiss, Officer Elder had probable cause to arrest Defendant pursuant to N.C.G.S. § 15A-401(b)(1).

C. N.C.G.S. § 15A-401(e)

¶ 21 Finally, Defendant argues the police officers failed to comply with N.C.G.S. § 15A-401(e) by failing to provide Defendant with notice of their authority and purpose for arresting him, and improperly using force to enter his vehicle. Defendant maintains that, as a result, the officers were no longer in the lawful performance of their duties when they attempted to arrest him and use force to enter his vehicle.

¶ 22 N.C.G.S. § 15A-401(e) provides in relevant part:

> (1) A law-enforcement officer may enter private premises or a vehicle to effect an arrest when:
>
> a. . . . the officer is authorized to arrest a person without a warrant or order having been issued,
>
> b. The officer has reasonable cause to believe the person to be arrested is present, and
>
> c. The officer has given, or made reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice would present a clear danger to human life.
>
> (2) The law-enforcement officer may use force to enter the premises or vehicle if he reasonably believes that admittance is being denied or unreasonably delayed, or if he is authorized under subsection (e)(1)c to enter without giving notice of his authority and purpose.

N.C.G.S. § 15A-401(e) (2019).

¶ 23 Officer Elder told Defendant to hand his license over or he would go to jail. According to Officer Elder's testimony, Defendant then asked, "under what North Carolina state law," to which Officer Elder replied for "obstructing my investigation" and "attempted to tell [Defendant] that

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judicial construction and the courts must construe the statute using its plain meaning."). As a result, Defendant did not comply with N.C.G.S. § 20-29 by providing his name when his license was requested.

it was [N.C.G.S. §] 14-223. Resisting and obstructing." Officer Elder testified that he "was also going to add that it was under [N.C.G.S. §] 20-29 which requires if you're operating a motor vehicle and a law enforcement officer requests your ID, you must give it," but Defendant "attempted to talk over [Officer Elder and] admonished [him]." In the light most favorable to the State, the requirements of N.C.G.S. § 15A-401(e)(1)(a)-(b) are satisfied here because Officer Elder was authorized to arrest Defendant without a warrant pursuant to N.C.G.S. § 20-29 and N.C.G.S. § 15A-401(b)(1), as discussed in Part B above, and knew Defendant was present. Additionally, Officer Elder made reasonable efforts to give Defendant notice that he was going to be arrested for "unlawfully resist[ing], delay[ing] or obstruct[ing] a public officer in discharging or attempting to discharge a duty of his office" as required under N.C.G.S. § 15A-401(e)(1)(c). N.C.G.S. § 14-223 (2019).

¶ 24 Further, Chief Semrad testified he instructed Defendant to step out of his vehicle and Defendant refused. Chief Semrad then attempted to open Defendant's door; however, it was locked, and Defendant again refused to get out of his vehicle. Thereafter, Officer Elder testified he saw Defendant grab the gearshift, "[a]nd in order to try and prevent any escape [Officer Elder] [instinctively] reached for the keys[.]" Chief Semrad and Officer Elder both testified that Defendant refused their entry into his vehicle on two occasions and Officer Elder believed he needed to confiscate Defendant's keys to prevent Defendant's escape, and the jury could have concluded that the officers reasonably believed admittance was being denied or unreasonably delayed. Accordingly, for the purpose of the motion to dismiss and in the light most favorable to the State, the officers were authorized to "use force to enter the . . . vehicle" and did not act unlawfully in doing so. N.C.G.S. § 15A-401(e)(2) (2019).

¶ 25 Viewing the evidence in the light most favorable to the State, the issue of whether the officers were performing their lawful duties was "sufficient for jury consideration." *Scott*, 356 N.C. at 597, 573 S.E.2d at 869. The trial court did not err by denying Defendant's motion to dismiss. *See Mahatha*, 267 N.C. App. at 360, 832 S.E.2d at 919 (holding the trial court did not err by denying the defendant's motion to dismiss for insufficient evidence when the officer "was lawfully performing his duties at the time of the stop").

CONCLUSION

¶ 26 In the light most favorable to the State, there was sufficient evidence that the officers acted within the lawful performance of their duties, satisfying the challenged element of N.C.G.S. § 20-141.5(a). Accordingly,

the trial court did not err in denying Defendant's motion to dismiss the charge of felony fleeing to elude arrest.

NO ERROR.

Judges DIETZ and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 JANUARY 2022)

ALBRIGHT v. EQUITY LIFESTYLE PROPS., INC. 2022-NCCOA-7 No. 20-900	Rowan (20CVS858)	REVERSED AND REMANDED TO THE TRIAL COURT FOR ENTRY OF AN ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION.
DOTSON v. BARBER 2022-NCCOA-8 No. 21-45	Cabarrus (09CVD2893)	Dismissed
FLEMING v. CEDAR MGMT. GRP., LLC 2022-NCCOA-9 No. 21-213	Mecklenburg (20CVS7460)	Affirmed.
HENDRIXSON v. DIV. OF SOC. SERVS. 2022-NCCOA-10 No. 20-282	Macon (19CVS61)	Affirmed
IN RE D.B. 2022-NCCOA-11 No. 21-426	Wake (19JA70) (19JA71)	Affirmed
IN RE K.T.B. 2022-NCCOA-12 No. 21-435	Forsyth (20JA176)	Affirmed
IN RE T.C.M. 2022-NCCOA-13 No. 21-242-2	Moore (21JA03)	Affirmed
LANTZ v. LANTZ 2022-NCCOA-14 No. 21-168	Pitt (16CVD1595)	Affirmed
REVERSE MORTG. SOLS., INC. v. DUFAULT 2022-NCCOA-15 No. 21-159	McDowell (20CVS426)	Affirmed
STATE v. ACKLIN 2022-NCCOA-16 No. 21-385	Pitt (18CRS53654) (18CRS54341)	Vacated and Remanded

STATE v. BOWENS 2022-NCCOA-17 No. 20-796	Catawba (18CRS1847) (19CRS54644)	Dismissed
STATE v. COX 2022-NCCOA-18 No. 21-290	Onslow (15CRS54665) (15CRS54673)	No Error
STATE v. DAW 2022-NCCOA-19 No. 20-842	Lenoir (18CRS51995-97)	No Error
STATE v. LOCKLEAR 2022-NCCOA-20 No. 20-790	Robeson (16CRS53491) (16CRS53536)	No Error
STATE v. MARION 2022-NCCOA-21 No. 20-729	Swain (08CRS935-36) (08CRS938-40)	Affirmed
STATE v. MILES 2022-NCCOA-22 No. 20-853	Mecklenburg (17CRS235673)	Affirmed
STATE v. RUTH 2022-NCCOA-23 No. 20-657	Forsyth (17CRS55391) (17CRS55399-400) (17CRS56332)	Remand for New Trial
STATE v. STEWART 2022-NCCOA-24 No. 21-101	Mecklenburg (16CRS203419)	Judgment Vacated
VANCE v. LAURELS HEALTHCARE HOLDINGS 2022-NCCOA-25 No. 21-198	N.C. Industrial Commission (18-034508)	Reversed and Remanded

CARMICHAEL v. CORDELL

[281 N.C. App. 305, 2022-NCCOA-26]

DANIEL ALLEN CARMICHAEL, Plaintiff
v.
LEO W. CORDELL, Defendant

No. COA21-317

Filed 18 January 2022

1. Jurisdiction—in personam—in rem—nonresident stepfather —trust account funds in North Carolina

In an action where a North Carolina resident (plaintiff) sought a declaratory judgment naming him the rightful owner of funds that his deceased mother had placed into North Carolina trust accounts, the trial court properly determined that asserting in personam jurisdiction over plaintiff's stepfather (defendant), a California resident who made claims to the funds, was unreasonable because defendant had never conducted any activities in North Carolina and had no ties to the state apart from his relationship with plaintiff. Nevertheless, the court could properly exercise in rem jurisdiction over plaintiff's suit because the subject of the action was personal property located in North Carolina, and plaintiff had demanded relief that would exclude defendant from claiming any interest in that property.

2. Pretrial Proceedings—motion—challenging party's standing and conflicts of interest—notice and calendaring requirements

In plaintiff's declaratory judgment action seeking to exclude his stepfather (defendant) from claiming rights to funds in certain trust accounts, where defendant's daughter and attorney-in-fact was later added as a party, plaintiff's motion challenging his stepsister's standing to sue and alleging she had conflicts of interest was not properly before the trial court where, although plaintiff raised an objection five days before the hearing in the case, the court did not receive notice of the motion until the day of the hearing and the motion had not been calendared with the trial court coordinator beforehand.

Appeal by plaintiff from order entered 14 October 2020 by Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of Appeals 14 December 2021.

Gordon Law Offices, by Harry G. Gordon, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough LLP, by Fred M. Wood, Jr., and Holland & Knight, LLP, by Vivian L. Thoreen and Lydia L. Lockett admitted pro hac vice, for defendant-appellee.

TYSON, Judge.

¶ 1 Daniel Carmichael ("Plaintiff") appeals an order by the trial court granting Leo Cordell's ("Defendant") motion to dismiss. We affirm in part, reverse in part and remand.

I. Background

¶ 2 Defendant has been a California resident since 1954. Defendant married Patricia Cordell ("Decedent") on 8 July 1961. Defendant and Decedent (the "Cordells"), lived in California during the entirety of their marriage until Decedent died on 10 January 2020. The Cordells are parents of two daughters, Caroline P. Condon ("Ms. Condon") and Wendy Cordell. Decedent was the mother of one son, Plaintiff, from a previous relationship. Plaintiff resides in North Carolina. Defendant has never traveled to, conducted business in, or has any other ties to or in North Carolina.

¶ 3 The Cordells acquired assets during their 58 years of marriage, which are purportedly classified as community property under California law. Defendant allegedly discovered after Decedent had died that Decedent had set up separate accounts for Plaintiff and made changes to certain accounts, which affected the disposition of their asserted community property assets. Decedent had purportedly removed the Cordell's two daughters as beneficiaries on some accounts, leaving Plaintiff as the sole beneficiary. Decedent had also purportedly changed the address on the accounts to Plaintiff's address in North Carolina.

¶ 4 Plaintiff claimed ownership of funds from three accounts held by Decedent which named him as the sole beneficiary for twenty years. On 30 April 2020, Defendant sent Plaintiff a letter and threatened to sue Plaintiff. Defendant claimed the transfers Decedent made in trust to Plaintiff should be voided because Defendant did not approve the changes.

¶ 5 On 8 July 2020, Defendant sued Plaintiff in California ("CA action"). Defendant filed a first amended complaint against Plaintiff in the CA action for: (1) aiding and abetting breach of fiduciary duty; (2) elder financial abuse; (3) declaratory relief regarding non-probate transfers; and, (4) declaratory relief regarding transfer of stock. This amended complaint alleges Plaintiff unduly influenced Decedent to change the beneficiary designations of the accounts containing community funds and naming Plaintiff as the sole beneficiary of those accounts upon Decedent's death.

¶ 6 On 14 July 2020, Plaintiff filed his verified complaint as a declaratory judgment action, which initiated the instant litigation against Defendant in North Carolina ("NC Action"). This complaint was served on Defendant in California on 22 July 2020. The NC action arises out of the same facts as alleged in Defendant's CA action, and centers around actions the Decedent took in California involving the purported marital property and Defendant's spousal rights and duties as California residents. Plaintiff amended his complaint on 11 September 2020 and added Ms. Condon, Defendant's daughter, and his attorney-in-fact, as a party. The NC action seeks a declaratory judgment holding Plaintiff is the sole and rightful owner of the funds placed in trust accounts, by Decedent, for his benefit in North Carolina, yet to be paid to him. Plaintiff filed a motion challenging Ms. Condon's standing and alleging conflicts of interest on 2 October 2020.

¶ 7 Plaintiff also filed a petition for probate of lost will in California on 14 August 2020. In that petition, Plaintiff sought to probate a document purported to be a handwritten will of Decedent dated 24 October 2003, along with a document purported to be a handwritten codicil dated 10 July 2011.

¶ 8 Defendant filed his motion to dismiss for lack of personal jurisdiction. Defendant's motion was granted in the superior court on 12 October 2020. Plaintiff appeals.

II. Jurisdiction

¶ 9 This appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 1-277(b) (2021).

III. Issues

¶ 10 Plaintiff challenges whether the trial court erred: (1) by granting Defendant's motion to dismiss for lack of personal jurisdiction; (2) by not finding North Carolina possesses *in rem* jurisdiction over the property and proceeds; and, (3) in failing to rule on Plaintiff's motion challenging the standing of Caroline Condon and asserted conflicts of interest.

IV. Argument

A. Personal Jurisdiction

1. In Personam

¶ 11 **[1]** "Once jurisdiction is challenged, plaintiff has the burden of proving *prima facie* that a statutory basis for jurisdiction exists."

Williams v. Institute for Computational Studies, 85 N.C. App. 421, 424, 355 S.E.2d 177, 179 (1987). For North Carolina courts to exercise *in personam* jurisdiction over a nonresident defendant, there is a two-part test: "first, the court must have jurisdiction over the person of defendant under our State's long-arm statute, and second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment of the United States Constitution." *Id.* (internal quotation marks omitted).

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person
>
> (1) Local Presence or Status.–In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> . . . .
>
> d. Is engaged in substantial activity within this State, whether such activity is wholly *interstate*, *intrastate*, or *otherwise*.

N.C. Gen. Stat. § 1-75.4(1)(d) (2021) (emphasis supplied).

¶ 12 "The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant." *Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC*, 373 N.C. 297, 302, 838 S.E.2d 158, 161-62 (2020) (citations omitted). For North Carolina courts to assert jurisdiction the due process requirements must be satisfied. The primary concern of the Due Process Clause as it relates to a court's jurisdiction over a nonresident defendant is the protection of an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations." *Id.* at 302, 838 S.E.2d. at 162 (citations and internal quotation marks omitted).

> The United States Supreme Court has made [it] clear that the Due Process Clause permits state courts to exercise personal jurisdiction over an out-of-state defendant so long as the defendant has certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Id.

¶ 13 "Specific jurisdiction exists if the defendant has purposely directed its activities toward the resident of the forum and the cause of action relates to such activities." *Havey v. Valentine*, 172 N.C. App. 812, 815, 616 S.E.2d 642, 646 (2005) (citations and internal quotation marks omitted). "[T]he court considers (1) the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the State; (2) whether the plaintiffs' claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable." *Id.* at 815, 616 S.E.2d at 647 (alterations, citations and quotation marks omitted).

¶ 14 "Purposeful availment is shown if the defendant has taken deliberate action within the forum state or if he has created continuing obligations to forum residents." *Id.* "[C]ontacts that are isolated or sporadic may support specific jurisdiction if they create a substantial connection with the forum, the contacts must be more than random, fortuitous, or attenuated." *Id.* (citation and internal quotation marks omitted).

¶ 15 Here, Defendant has never been to North Carolina, he has never conducted any business in North Carolina, and except for his relationship with Plaintiff, he has no other known ties to North Carolina. Defendant has not purposely availed himself of conducting activities in North Carolina sufficient to justify him being haled into a court of this State under *in personam* jurisdiction. Assertion of *in personam* jurisdiction over Defendant is unreasonable because he has no contacts with this forum. This portion of the trial court's order is affirmed.

2. In Rem

¶ 16 Plaintiff argues Defendant may be haled into North Carolina courts based upon *in rem* jurisdiction. Assertions of *in rem* and *quasi in rem* actions should be evaluated in accordance with the minimum contacts standard. *See Ellison v. Ellison*, 242 N.C. App. 386, 390, 776 S.E.2d 522, 525-26 (2015) (stating the defendant and State must possess minimum contacts so the jurisdiction does not offend "traditional notions of fair play and substantial justice").

> Jurisdiction in rem or quasi in rem may be invoked in any of the following cases:
>
> (1) When the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. This

> subdivision shall apply whether any such defendant is known or unknown.

N.C. Gen. Stat. § 1-75.8 (2021).

¶ 17 In *Lessard v. Lessard* this Court held:

> The estate of the defendant's deceased daughter is personal property in this State and the relief demanded is to exclude the defendant from any interest in this property.

68 N.C. App. 760, 762, 316 S.E.2d 96, 97 (1984).

¶ 18 This Court further held in *Ellison*, "[t]he relief sought in the present action, like in *Lessard*, is to exclude [d]efendant from any interest in property located in North Carolina. When the subject matter of the controversy is property located in North Carolina, the constitutional requisites for jurisdiction will generally be met." *Ellison*, 242 N.C. App. at 391, 776 S.E.2d at 526.

¶ 19 Here, Defendant initiated the controversy by threatening to sue Plaintiff by claiming an interest in the accounts in North Carolina. Defendant essentially reached into North Carolina to claim the property being held within this state by a citizen of this state. Plaintiff responded by filing a declaratory judgment to bar Defendant from taking an interest in the accounts in North Carolina. Defendant challenges and asserts a superior interest in the property purportedly owned by a person, who is located in and is a citizen of North Carolina. Plaintiff's complaint demands relief which excludes Defendant from property within North Carolina. This is sufficient and reasonable to establish the *in rem* jurisdiction of North Carolina courts for Plaintiff's declaratory action over funds and accounts held in North Carolina.

B. Standing of Ms. Condon

1. Standard of Review

¶ 20 "It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

2. Analysis

¶ 21 **[2]** Plaintiff argues the trial court erred by declining to hear Plaintiff's Motion Challenging the Standing of Caroline Patricia Condon and

Finding Conflicts of Interest ("Plaintiff's Motion") and instead of granting Defendant's Motion to Dismiss for lack of jurisdiction.

¶ 22 Prior to the hearing, the trial judge emailed counsel for Plaintiff and Defendant and stated: "I do not need to address [Plaintiff counsel's] additional motion. . . . you can cite the G.S. Sec. 32C-2-212, as well as the fact that even though the objection was served more than five days before, it was not calendared with my TCC and the court received no notice of it until the day of the hearing." N.C. Gen. Stat. § 32C-2-212 (2021) permits a power of attorney to "assert and maintain before a court . . . an action to recover property or other thing of value."

¶ 23 Plaintiff amended his complaint to include Ms. Condon as a party and made allegations asserting her power of attorney and her "total control" over Defendant. In his discretion, the trial judge determined Plaintiff failed to comply with the motion's prior notice and calendaring requirements to bar Ms. Condon's standing or find conflict of interest. The trial judge acted within his authority. Plaintiff's argument fails to show any abuse of that discretion and is overruled.

V. Conclusion

¶ 24 The trial court properly ruled assertion of personal jurisdiction over Defendant is unreasonable because he has no contacts with this forum. Plaintiff's interest in the bank accounts and funds located in North Carolina permits the courts of this State to exercise *in rem* jurisdiction over his declaratory judgment action to address his claims. The trial court did not err in refusing to hear Plaintiff's arguments concerning Caroline Condon's standing and asserted conflicts of interest. We affirm in part, reverse in part, and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges CARPENTER and GORE concur.

DAN KING PLUMBING HEATING & AIR CONDITIONING, LLC, PLAINTIFF
v.
AVONZO HARRISON, DEFENDANT

No. COA20-698

Filed 18 January 2022

1. Unfair Trade Practices—dismissal of claims—sufficiency of allegations—actual reliance—injury

In a contractual dispute between an HVAC and plumbing company (plaintiff) and a homeowner (defendant), the trial court's dismissal of defendant's unfair and deceptive trade practices (UDTP) counterclaim was affirmed in part and reversed in part. The dismissal was proper with regard to defendant's allegation that plaintiff forged his signature on an amendment to the contract—because defendant could not prove he actually relied on that contract—and to the allegation that plaintiff was deceptive by filling out an installation checklist form even though work had not yet been completed—because defendant could not prove any injury associated with the checklist. However, defendant's allegation that plaintiff sold him duplicate warranties (which ran concurrently with already-existing manufacturer's warranties that defendant was not made aware of) met each element of a UDTP claim, including injury; the dismissal on that basis was therefore reversed and the matter remanded for further findings of fact on the reasonableness of defendant's reliance on the contractual warranties.

2. Pleadings—denial of motion to amend counterclaim—discretionary ruling—undue delay

In a contractual dispute between an HVAC and plumbing company (plaintiff) and a homeowner (defendant), the trial court did not abuse its discretion by denying defendant's motion to amend his counterclaim for unfair and deceptive trade practices in order to introduce a debt collection notice sent to him by plaintiff. Although the collection notice was not sent to defendant until after he had filed his counterclaim, defendant waited over six months to raise the debt collection issue before the trial court and did not move to amend his pleadings until after the trial had begun.

3. Contracts—breach—common knowledge exception—plumbing work—sufficiency of evidence

In a contractual dispute between an HVAC and plumbing company (plaintiff) and a homeowner (defendant) in which defendant

filed counterclaims alleging that plaintiff breached the contract by (1) installing different equipment, (2) charging a higher price, and (3) performing substandard work, the trial court erred by denying plaintiff's motion for directed verdict on the workmanship claim. Defendant did not introduce any expert evidence showing that the plumbing work did not conform to the customary standard of skill and care and, where the work done was extensive, the common knowledge exception (which would allow a jury to resolve the claim without the aid of an expert) did not apply. The first two claims were properly sent to the jury because they did not require the presentation of expert testimony for the jury to resolve.

4. Appeal and Error—preservation of issues—contract dispute —attorney fees—no hearing or ruling

In a contractual dispute between an HVAC and plumbing company and a homeowner in which the homeowner asserted a counterclaim under the Unfair and Deceptive Trade Practices Act, although both parties indicated to the trial court that they were interested in being heard on attorney fees, since neither party obtained a ruling from the trial court on a request for fees, the issue was not preserved for appellate review.

5. Appeal and Error—preservation of issues—order of closing arguments—purported objection insufficient

In a contractual dispute between an HVAC and plumbing company (plaintiff) and a homeowner (defendant) in which defendant raised multiple counterclaims, plaintiff's argument that the trial court erred by failing to give it the final closing (rebuttal) argument was not properly preserved for appellate review. Plaintiff's purported objection—"If I don't get a rebuttal, I don't get a rebuttal. That's fine, Judge."—did not qualify as an objection sufficient under Appellate Rule 10 for preservation purposes.

Judge MURPHY concurring in result only as to Part II-C without separate opinion.

Appeal by Defendant from judgment entered on 12 March 2020 by Judge Paulina Havelka in Mecklenburg County District Court. Plaintiff filed a cross-appeal. Heard in the Court of Appeals 25 May 2021.

Hull & Chandler, P.A., by A. Joseph Volta, for Plaintiff-Appellee/ Cross-Appellant.

Redding Jones, PLLC, by Joseph R. Pellington, Corey Parton, and Joseph H. Powell, for Defendant-Appellant.

JACKSON, Judge.

¶ 1 This case presents a number of issues stemming from a contractual dispute between homeowner Avonzo Harrison ("Defendant") and the company that installed his HVAC system, Dan King Plumbing Heating and Air Conditioning ("the Company"). The action began when the Company filed suit against Defendant for money owed on the contract, and in response Defendant filed counter-claims against the Company for breach of contract and unfair and deceptive trade practices ("UDTP"). Following a jury trial, the Company was found liable for breach of contract, but the trial court dismissed Defendant's UDTP claim.

¶ 2 In his appeal, Defendant argues that the trial court erred in (1) ruling that the Company's actions did not constitute UDTP; and (2) not allowing him to amend his counterclaim to add a new debt collections UDTP claim. In its cross-appeal, the Company contends that the trial court erred in (1) denying the Company's motion for directed verdict on the breach of contract claim; (2) refusing to consider the Company's claim for attorneys' fees; and (3) denying the Company its right to make a final closing argument. We affirm in full the trial court's rulings as to the amendment of the counterclaim and the ordering of closing arguments. Because we hold that the trial court erred, in part, with regard to its evaluation of Defendant's UDTP claims and the Company's motion for directed verdict, we affirm in part, reverse in part, and remand on these issues.

I. Factual and Procedural Background

¶ 3 This case arises from a dispute between Defendant and the Company regarding plumbing, heating, and air conditioning services that the Company provided to Defendant in 2017—2018. Defendant is the owner of a home located on Symphony Woods Drive in Charlotte, North Carolina. Defendant decided to have a number of renovations done to the plumbing and HVAC systems in the home, and hired the Company for the task. On 25 October 2017, an employee of the Company, Adam Whal, visited Defendant's home to provide estimates for the work—which included new water heaters, a new HVAC system, a water filtration system, and extensive piping replacement. Defendant was charged $227.37 for the initial site visit and inspection.

¶ 4 On 1 November 2017, Defendant went to the Company's office in-person to meet with Paul Stefano, the general manager, and Ernie

Rodriguez, the sales manager. The managers outlined options and prepared written quotes for the plumbing and HVAC work to be performed on Defendant's home. After performing some independent research, Defendant returned to the office the following day and ultimately signed two separate contracts: a $16,324 contract for the plumbing work, and a separate $17,076 contract for the HVAC work. The work and warranties included, among other items not relevant to this appeal:

(1) Plumbing

a. Installing a whole-house water filtration system.

i. 10-year parts, 5-year media, and 2-year labor warranty.

b. Installing a tankless hot water heater and heat exchanger.

i. 5-year parts and 5-year labor warranty, and 5-years of required maintenance.

c. Replacement of all polybutylene piping with PEX piping "within reason," not to include drywall repair.

i. 2-year guarantee, including parts and labor.

(2) HVAC

a. Removing, replacing, and installing a 2-ton HVAC system upstairs and a 5-ton HVAC system downstairs.

i. 12-year parts and labor warranty, and 1-year of maintenance.

b. Insulating the attic.

¶ 5 Following the finalization of the contract on 2 November 2017, the Company began performing plumbing work in the home in early November 2017.[1] The Company obtained a permit for the plumbing work, and the plumbing work was completed and ultimately passed its final inspection on 4 December 2017.

¶ 6 During the time that the Company was performing the plumbing work, Defendant was engaged in several other on-site home renovation projects, such as removing the old bathroom vanities and installing new ones, and removing the old kitchen cabinets and installing new ones. Defendant brought in outside workers from Habitat for Humanity to assist in this work.

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1. During the time period that the plumbing and HVAC work was being performed, Defendant was not residing at the property and the property was unoccupied.

¶ 7 Sometime during this period, the Company ran into unanticipated difficulties in installing the tankless water heaters that were specified in the contract. Two employees of the Company, Tommy Rea and Adam Whal, spoke with Defendant, and recommended that they install traditional tank-based water heaters instead. Defendant agreed, and the parties then entered into a modified oral agreement for the water heaters.

¶ 8 The modified agreement was memorialized in a written document, dated 7 November 2017, which specified that the filtration system and re-piping work would remain the same, but the tankless water heater would be replaced with two 50-gallon, tank-based water heaters. The modified written agreement was $437 more than the original plumbing contract, and did not mention any warranties.

¶ 9 Defendant, however, denies having ever seen or signed the 7 November written agreement. He asserts that the discussion surrounding the tank-based water heaters was only an oral agreement, and was never presented with a new written contract for the plumbing work. He believes that his signature was forged on the 7 November document.

¶ 10 On the 7 November written agreement, there appears to be a second signature visible underneath Defendant's. The Company asserts that Chad Cockerill, the employee who filled out and signed the 7 November written agreement, accidentally signed the agreement in the wrong place and used white-out to correct the mistake, and that Defendant then signed on top of Chad's whited-out signature. Adam Whal maintains that he witnessed Defendant signing the new contract over the whited-out portion. At trial, the jury agreed with Defendant and found that the Company "superimpose[d] Mr. Harrison's signature onto a document Mr. Harrison did not sign."

¶ 11 Adam Whal returned to Defendant's home on 8 November 2017 to conduct a final inspection and test of the completed plumbing work. The inspection revealed that all plumbing was functional; however, a 40-gallon tank heater had been installed upstairs and a 50-gallon tank heater had been installed downstairs—despite the fact that the amended agreement specified two 50-gallon heaters.

¶ 12 The Company also began work on the HVAC system during the first week of November 2017. The Company obtained a permit for the HVAC work on 3 November 2017, and on this date the Company also completed an "Installation Excellence Checklist" regarding the HVAC work. The Checklist included a list of approximately 50 tasks related to the HVAC work on the home, and indicated that all relevant HVAC tasks had been completed. However, according to the testimony of both Defendant and

employees of the Company, the HVAC work had not, in fact, been completed as of 3 November 2017. Defendant asserts that none of the tasks were complete as of that date, while the Company maintains that some of the tasks were completed as of that date. It is unclear from the record when the HVAC work was actually completed, though it was completed at least by February 2018 when it passed inspection.

¶ 13 On 19 November 2017, Defendant emailed Paul Stefano a "punch list" listing several uncompleted plumbing and HVAC tasks, and expressing concern over the completeness of the re-piping work and the professionalism exhibited by the Company. On 30 November 2017, the Company returned to Defendant's residence to conduct a final walkthrough of the plumbing work, prior to inspection. The plumbing work passed County inspection on 4 December 2017. In February of 2018, the HVAC work passed County inspection. The Company visited Defendant's residence several more times between 18 December 2017 and 3 July 2018 to complete various miscellaneous items the parties had contracted for, including the attic insulation.

¶ 14 On several occasions during 2018, Defendant hired or requested quotes from third-party contractors to complete or remediate some of the work performed by the Company, such as replacing one of the water heaters that had begun to leak. He chose to use third-parties, rather than contract any further with the Company or make a claim under the warranty, because their relationship had deteriorated and he did not trust the quality of their work. Defendant also personally registered the manufacturers' warranties for the equipment purchased through the Company, contrary to his expectations.

¶ 15 When it came time to make payments, under the original two 2 November contracts, Defendant owed the Company $33,400. Under the 7 November amended contract, the amount due was slightly higher, $33,702.97. Defendant paid $30,000 of the amount due on 15 November 2017, via funds obtained from a third-party creditor. The Company calculated Defendant's outstanding balance as the remaining $3,702.92, less a $227 difference crediting the cost of the 25 October visit to Defendant's account, as the parties had agreed to. This amount was not paid by Defendant.

¶ 16 On 18 August 2018, the Company commenced a small claims action against Defendant in Mecklenburg County, requesting money owed for contractual services rendered. The magistrate dismissed the action with prejudice on 17 October 2018, finding that the Company had failed to prove the case by the greater weight of the evidence. The Company timely filed a notice of appeal to the District Court on 25 October 2018.

¶ 17 On 14 November 2018, Defendant filed an answer denying all allegations in the complaint, and also filed a counterclaim against the Company, alleging various misrepresentations and contractual breaches. The Company replied, denied all of Defendant's allegations, and moved to dismiss the countersuit on 17 December 2018. On 20 February 2019, Defendant moved to file an amended counterclaim. The District Court granted Defendant's motion to amend on 29 March 2019. In his amended counterclaim, Defendant added claims for breach of contract, unfair and deceptive trade practices, fraud, and breach of the implied warranty of workmanship. The Company answered the amended counterclaim on 29 July 2019, substantially denying all allegations and raising a number of affirmative defenses.

¶ 18 On 3 September 2019, the Company moved for summary judgment and attorneys' fees. On 20 December 2019, a summary judgment hearing was held before the Honorable Kimberley Y. Best. During this hearing, Defendant voluntarily dismissed the fraud counterclaim. On 7 January 2020, the trial court issued an order granting in part and denying in part the Company's motion for summary judgment. The court awarded summary judgment to the Company with respect to one aspect of Defendant's UDTP claim—namely, his claim that the Company had "[generated] the altered invoice reflecting a 4-ton unit versus a 5-ton unit"—but the court denied summary judgment with respect to the remainder of the parties' claims and counterclaims.

¶ 19 A jury trial was held beginning on 18 February 2020, presided over by the Honorable Paulina Havelka. During trial, the court rejected a motion by Defendant to amend his counterclaim to include a UDTP claim for unfair debt collection practices by the Company, ruling that Defendant had not raised the issue properly prior to trial.

¶ 20 The trial concluded on 24 February 2020, and the jury returned a verdict in favor of Defendant on all breach of contract claims and findings of fact concerning the UDTP claims. The jury awarded Defendant damages in the amount of $15,572 for the breach of contract and $15,000 for injuries associated with the UDTP claims.

¶ 21 On 26 February 2020, an additional hearing was held before Judge Havelka, in order to determine whether the facts found by the jury amounted to UDTP as a matter of law. The court ultimately ruled that none of the jury's findings amounted to unfair or deceptive trade practices, and dismissed all remaining claims with prejudice. Before the hearing adjourned, the parties also discussed the possibility of scheduling a further post-trial hearing to determine potential awards of attorneys' fees, but the fee hearing never occurred.

¶ 22 On 11 March 2020, the Company filed a motion requesting to set aside the jury's verdict, and requesting to be heard on attorneys' fees. Later that same day, the trial court entered its written judgment in favor of Defendant, awarding him damages of $15,572 plus interest on the breach of contract claims, in accord with the jury's verdict. The judgment noted that none of the jury's findings amounted to unfair or deceptive trade practices, and dismissed all of the parties' remaining claims with prejudice.

¶ 23 On 3 April 2020 and 8 April 2020, the Company and Defendant, respectively, noticed appeal from the trial court's judgment.

II. Analysis

¶ 24 We first address Defendant's appeal, and then proceed to discuss the Company's appeal.

A. Whether the Jury's Findings Amounted to UDTP

¶ 25 **[1]** Defendant first contends that the trial court erred by ruling that the jury's findings of fact did not, as a matter of law, amount to unfair and deceptive trade practices. We agree with respect to the duplicate warranties claim, but disagree with respect to the forged signature and installation checklist claims. We accordingly affirm in part and remand in part.

¶ 26 Under North Carolina law, a consumer may bring a private cause of action against businesses who engage in unfair and deceptive trade practices. *See* N.C. Gen. Stat. § 75-1.1 (2019). The statute is intended to "provide consumers with a remedy for injuries done to them by dishonest and unscrupulous business practices." *Hester v. Hubert Vester Ford, Inc.*, 239 N.C. App. 22, 30, 767 S.E.2d 129, 136 (2015).

¶ 27 "In order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs." *Gray v. N. Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). Ordinarily, in a UDTP case, the jury will determine the facts of the case, and the trial court, "based on the jury's findings, then determines, as a matter of law, whether the defendant engaged in unfair or deceptive practices in or affecting commerce." *Id.* This Court reviews the trial court's conclusions of law on unfair or deceptive trade practices *de novo*. *See Terry's Floor Fashions, Inc. v. Crown Gen. Contractors, Inc.*, 184 N.C. App. 1, 21, 645 S.E.2d 810, 823 (2007).

¶ 28 This case requires us to examine two corollary doctrines under our UDTP caselaw—the "aggravating circumstances" doctrine, and the

"reliance" doctrine. The first doctrine comes into play when a plaintiff's UDTP claim is centered around the defendant's breach of a contract. Our courts have long held that a mere breach of contract, standing alone, is not sufficient to maintain a UDTP claim. *See, e.g.*, *Branch Banking & Tr. Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992) ("[A] mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1.").

¶ 29 When a plaintiff alleges a UDTP violation based upon a breach of contract, the plaintiff "must show substantial aggravating circumstances attending the breach to recover under the Act[.]" *Id.* (internal marks and citation omitted). Tortious conduct must be shown. "Fraud or deception" can constitute aggravating circumstances, when it rises to the level of a practice that is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 230-31, 768 S.E.2d 582, 598-99 (2015).

¶ 30 The second doctrine—the reliance doctrine—holds that in order to satisfy proximate cause, a plaintiff must demonstrate that they detrimentally relied on the defendant's alleged misrepresentation or deception in order to recover under the statute. *See DC Custom Freight, LLC v. Tammy A. Ross & Assocs., Inc.*, 273 N.C. App. 220, 233, 848 S.E.2d 552, 562 (2020); *Pearce v. Am. Defender Life Ins. Co.*, 316 N.C. 461, 471, 343 S.E.2d 174, 180 (1986). Reliance, in turn, is comprised of two factors—actual reliance and reasonableness. *Bumpers v. Cmty. Bank of N. Virginia*, 367 N.C. 81, 89, 747 S.E.2d 220, 227 (2013). The first element—actual reliance—requires a showing that "the plaintiff [] affirmatively incorporated the alleged misrepresentation into his or her decision-making process: if it were not for the misrepresentation, the plaintiff would likely have avoided the injury altogether." *Id.* at 90, 747 S.E.2d at 227. In other words, the plaintiff must have "acted or refrained from acting in a certain manner due to the defendant's representations." *Williams v. United Cmty. Bank*, 218 N.C. App. 361, 368, 724 S.E.2d 543, 549 (2012 (internal marks and citation omitted). The second element—reasonableness—requires a showing that the plaintiff's reliance on the defendant's "allegedly false representations [was] reasonable." *Bumpers*, 367 N.C. at 90, 747 S.E.2d at 227. A plaintiff's reliance is not reasonable when "the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Id.*

¶ 31 Here, Defendant contends that the Company committed UDTP in three respects: (1) by superimposing Mr. Harrison's signature on the amended contract; (2) by selling him duplicate warranties; and (3) by misrepresenting the completeness of the work via the installation

checklist. The Company, in response, argues that Defendant has no UDTP claim because he is unable to show that he detrimentally relied on any purported misrepresentation by the Company, and because he is unable to show that the Company's conduct rose to the level of aggravating circumstances.

¶ 32 With respect to the superimposition of the signature, we affirm, as Defendant cannot show actual reliance. With respect to the installation checklist, we also affirm, as Defendant cannot show injury. However, with respect to the asserted fraud in duplicate warranties, we remand for further fact-finding regarding the reasonableness of Defendant's reliance.

1. Superimposition of Defendant's Signature

¶ 33 Defendant first argues that the Company committed UDTP by superimposing his signature on the 7 November contract. To review, Defendant and the Company entered into a contract for the plumbing work on his home on 2 November 2017. Several days later, after the Company had begun work on the project, unanticipated difficulties arose with the installation of the tankless water heater. So, Defendant and the Company reached an oral agreement to install two 50-gallon, tank-based water heaters in place of the tankless water heater. The Company then created a new written contract on 7 November 2017, which contained two key differences—a $437 difference in the contractual cost, and a provision for the installation of two 50-gallon, tank-based heaters. However, Defendant testified that he was never presented with the 7 November contract (at least until after this litigation began), and maintains that his signature on the contract was forged. The jury sided with Defendant and found that his signature had been superimposed on the 7 November contract.

¶ 34 We must now address whether these actions amounted to UDTP, above and beyond a mere breach of contract. The first element of a UDTP claim requires proof that the business engaged in "an unfair or deceptive trade practice." A practice is deceptive when "it has the capacity or tendency to deceive." *Walker v. Fleetwood Homes of N. Carolina, Inc.*, 362 N.C. 63, 72, 653 S.E.2d 393, 399 (2007). The act of signing someone else's name to a document without their authorization constitutes an act with the capacity to deceive, thus satisfying the first element. The second element of a UDTP claim requires proof that the conduct was "in or affecting commerce," and both parties here agree that a contract for plumbing services satisfies this element.

¶ 35 The third element of a UDTP claim requires proof that the unfair or deceptive acts "proximately caused injury" to the plaintiff. As explained above, our courts have interpreted this proximate cause element as requiring proof of detrimental reliance by the plaintiff—reliance which causes injury, and which is both actual and reasonable. As for actual reliance, Defendant here must show that he incorporated the Company's misrepresentation into his decision-making process, or that he "acted or refrained from acting in a certain manner" due to the Company's deceptive acts. *Williams*, 218 N.C. App. at 368, 724 S.E.2d at 549. As for reasonable reliance, Defendant must show that his reliance on the company's deceptive acts was reasonable. Both of these inquiries require "examin[ing] the mental state of the plaintiff." *Bumpers*, 367 N.C. at 89, 747 S.E.2d at 227.

¶ 36 The Company argues that Defendant cannot show actual reliance because, according to his own admission, Defendant "never saw the 7 November Plumbing Contract until approximately twelve to fourteen months after he initially met with [the Company]." Accordingly, because Defendant never received the allegedly forged contract until long after the work was completed, he could not have relied upon its contents to his detriment—i.e., he could not have relied upon a document that he did not know existed.

¶ 37 Defendant, in contrast, appears to argue that he detrimentally relied upon the price and terms that the Company provided to him in the *original* contract—and that the damage he suffered was reflected in the increased price of the second (forged) contract, and the installation of different equipment than he had originally contracted for.

¶ 38 We agree with the Company that this set of facts does not ultimately amount to UDTP. Even if we accept as fact that the Company forged the second contract, Defendant still cannot show that he actually relied on this misrepresentation by the company. A helpful precedent here is *Fazzari v. Infinity Partners, LLC*, 235 N.C. App. 233, 762 S.E.2d 237 (2014). In that case, a planned subdivision development failed after the properties were significantly over-appraised in representations made to lenders. *Id.* at 234-36, 762 S.E.2d at 238-39. The plaintiffs (who had all purchased lots in the planned subdivision) brought suit against the developers for UDTP, claiming that they relied on misrepresentations by the developer and appraisers "in making their decisions to take out the loans on which they later defaulted." *Id.* at 244, 762 S.E.2d at 244. On appeal, we held that the trial court had properly denied summary judgment to the plaintiff purchasers, as they were unable to demonstrate they actually relied on the deceptive appraisals. *Id.* at 243, 762 S.E.2d at 243.

¶ 39 We noted that the plaintiffs had testified that the developer "did not make any misrepresentations to them in regard to their loans[,]" apart from stating that the development project "should do well" and was "the real deal." *Id.* at 244, 762 S.E.2d at 244 (internal marks omitted). More importantly, even if these puffering or noncommittal statements "could be construed as factual misrepresentations," these remarks were not made until *after* the plaintiffs had already purchased their lots—and so the plaintiffs could not have relied on these statements. *Id.*

¶ 40 Likewise, with regard to the over-appraisal of the lots, we similarly concluded that no actual reliance was shown. *See id.* at 245, 762 S.E.2d at 244. We summed up the evidence as follows:

> the plaintiffs were purchasers of lots in [a] real estate investment scheme in which [the appraiser] appraised a large number of lots at an identical, inflated value to meet the loan-to-value conditions required to obtain bank loans. The scheme . . . involved contracts that promised repurchase of lots with a guaranteed profit for the investors. [However], the development was never completed, and investors were left with large loans and lots worth only a fraction of their appraised values.

Id. (internal marks and citations omitted).

¶ 41 Despite this unsavory behavior by the developers and appraisers, we nevertheless held that the plaintiffs could not show actual reliance because "[a]ll of the evidence show[ed] that the plaintiffs made their decisions to invest in the development and contracted to do so without any awareness of, much less reliance on, the appraisals." *Id.* This is because the misleading appraisals did not occur until *after* the plaintiffs had already signed their purchase contracts. *Id.* Thus, we concluded that the plaintiffs "cannot have relied on information they did not see and did not know existed (some of which did not, in fact, yet exist) at the time of their decisions." *Id.*, 762 S.E.2d at 245. Accordingly, in light of the plaintiffs' "inability to show either misrepresentations [by the developers] or reliance on the allegedly negligent appraisals," we held that the trial court properly denied their UDTP claims. *Id.* at 246-47, 762 S.E.2d at 245.

¶ 42 Here, like the plaintiffs in *Fazzari*, Defendant likewise attempts to base his UDTP claim on a deceptive act of which he had no awareness at the time he made his contractual decision. Defendant testified that he did not learn of the existence of the 7 November contract (with the

forged signature) until twelve to fourteen months after he had initially met with the Company—long after he signed the first contract, and long after the work had been completed. Thus, as in *Fazzari*, we conclude that Defendant could not have detrimentally relied on information which he did not know existed at the time of his decision, and that Defendant cannot satisfy the actual reliance element of his UDTP claim.[2] The trial court accordingly did not err in concluding that the forged signature on the second contract did not constitute UDTP.

2. Sale of Duplicate Warranties

¶ 43 Defendant next argues that the Company committed UDTP by selling him duplicate warranties for the plumbing and HVAC work—in essence, arguing that the Company duplicitously sold him warranties that he automatically received from the product manufacturer at the time of purchase. To review, as part of the 2 November contract, the Company sold Defendant two relevant warranties: (1) a warranty for the tankless water heater for "10 years parts, 5 years media, and 2 years labor," and (2) a warranty for the HVAC equipment for "12 years parts & labor" and "one year maintenance." However, evidence was presented at trial showing that the HVAC equipment which Defendant purchased already came with an included 10-year parts warranty from the manufacturer.

¶ 44 During trial, Defendant testified that he was not informed about the existence of the manufacturer's warranty at the time of the 2 November contract, and that he was "unaware at that time that [the Company's] warranties ran concurrently with the manufacturer's warranty." Defendant maintained, that by including the manufacturer warranty as part of the purchase price, the Company had misrepresented what it was selling to him. The jury sided with Defendant, and concluded in its findings of fact that "Dan King [sold] Mr. Harrison duplicate warranties."

¶ 45 We now address whether these actions amounted to UDTP. The sale of duplicate warranties may constitute an act which has the tendency

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2. Even if we were to accept Defendant's theory of the case—that the original 2 November contract was the source of the misrepresentation, in that he detrimentally relied upon the price and terms that the Company provided to him in this first contract—Defendant's UDTP claim still fails. As we have previously explained, "[a] broken promise, standing alone, is not enough to establish a UDTP claim, unless the evidence shows the promisor intended to break its promise at the time that it made the promise." *Hills Mach. Co., LLC v. Pea Creek Mine, LLC*, 265 N.C. App. 408, 421, 828 S.E.2d 709, 718 (2019) (internal marks and citation omitted). Here, Defendant has presented no evidence showing that, at the time of the 2 November contract, the Company intended to break its promise to install the tankless water heater or intended to deviate from the originally agreed-upon price.

to deceive, and which occurs in or affecting commerce. It is the third element of UDTP that is in true contention here—i.e., whether or not Defendant suffered injury due to the Company's misrepresentations by detrimentally relying on any duplicity in the warranties.

¶ 46 We note that under this aspect of Defendant's UDTP claim, the aggravating circumstances doctrine is not triggered. As explained above, this doctrine holds that a "mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1"—thus, when a plaintiff's UDTP claim stems from a breach, the plaintiff must show aggravating circumstances in order to recover. *Thompson*, 107 N.C. App. at 62, 418 S.E.2d at 700. However, the duplicate warranties claim here does not stem from a *breach* of contract by the Company—rather, it is based on the idea that selling a warranty while withholding information regarding the existence of other applicable warranties with potentially overlapping coverage constitutes an UDTP. This scenario is distinct from the traditional aggravating circumstances and breach analysis, because it does not center around any contractual obligation that the Company failed to perform.

¶ 47 Under the first element of reliance, Defendant must show that he actually relied on the misrepresentation—that, but for the Company's actions, he would have "acted or refrained from acting in a certain manner." *Williams*, 218 N.C. App. at 368, 724 S.E.2d at 549. Here, we conclude that this element is satisfied because the Company did not disclose or identify the fact that these products carried pre-included manufacturer warranties, and because Defendant testified that he would not have purchased the warranty from the Company had he known that the HVAC products already came with an included manufacturer warranty.

¶ 48 Under the second element of reliance, Defendant must show that his reliance on the Company's misrepresentation was reasonable. *Bumpers*, 367 N.C. at 90, 747 S.E.2d at 227. Reliance is not reasonable when "the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Id.*

¶ 49 The Company argues that Defendant's reliance on the warranties was not reasonable because he failed to perform due diligence before signing the contract. The Company contends that Defendant should have researched the products that he was purchasing before he signed the contract, in which case he would have discovered that certain products had pre-included manufacturer's warranties. Moreover, the Company maintains that it is common knowledge that many HVAC products carry manufacturer's warranties.

¶ 50 Defendant, in response, argues that his reliance was reasonable because this was a transaction between a professional HVAC company and a layperson. Defendant contends that it would be unfair and irrational to hold that a consumer of HVAC or plumbing services must independently research every single product set to be installed in their home in order to determine whether the business they are contracting with might be selling them a duplicate warranty. Defendant contends that the existence of manufacturer warranties tied to certain HVAC parts is far from common knowledge, and that in this scenario he acted perfectly reasonably in relying on the Company's assurances regarding the warranties it sold.

¶ 51 In explaining the concept of "reasonable diligence," we have previously held that "a plaintiff cannot simply ignore facts which should be obvious to him or would be readily discoverable upon reasonable inquiry." *S.B. Simmons Landscaping & Excavating, Inc. v. Boggs*, 192 N.C. App. 155, 162, 665 S.E.2d 147, 151 (2008). On the other hand, we also think it true that a layperson consumer should not be held to the same standard of due diligence as a sophisticated commercial entity. *See DC Custom Freight*, 273 N.C. App. at 233, 848 S.E.2d at 562 (holding that it was unreasonable for the plaintiff, "a sophisticated business" specializing in trucking, to simply assume, without investigation, that the trucks it rented from the defendant were covered under the defendant's insurance policy).

¶ 52 Here, we are unable to determine based on the record whether Defendant would have discovered the existence of the duplicate warranties through reasonable diligence at the time of the original contract, and we do not have the benefit of any jury findings on this issue. During trial, no evidence was presented regarding whether the existence of HVAC manufacturer warranties is considered "common knowledge" (especially to a layperson); no evidence was presented regarding how it was that Defendant ultimately came to discover the existence of the manufacturer warranties; and no evidence was presented regarding whether it was a common practice in the HVAC industry to sell parts warranties for products that were already covered by a manufacturer warranty.

¶ 53 It is relevant whether Plaintiff provided new, additional, or extended warranties beyond those provided by the manufacturer. For example, if the manufacturer's warranties were for parts only or limited to a stated time, and Plaintiff extended those times, added maintenance or repair of excluded items or provided labor, these would be separate and independent warranties beyond what the manufacturer provided and would not be duplicative. It is also relevant that Plaintiff provided a warranty

as a member of the local community resulting in Defendant obtaining a more ready source for the resolution of any problems. "Though the risk to [Plaintiff's] separate assets may have been slight, said risk is consideration." *Poythress v. Poythress*, 2021-NCCOA-589, ¶ 16 (citing *Young v. Johnston Cnty.*, 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 agreement, and not for the court when it is sought to be enforced.")). Accordingly, we remand for further fact-finding on the issue of Defendant's reasonable diligence in discovering the existence and coverage of the duplicate warranties.[3]

3. Installation Checklist

¶ 54 Finally, Defendant argues that the Company committed UDTP by filling out an "Installation Excellence Checklist" indicating that it had completed all work on the project, when in fact much of that work had yet to be completed. To review, on 3 November 2017 an employee of the Company filled out and signed the checklist, which contains over three pages of specific plumbing and HVAC tasks related to the project. The Checklist contains the following representation: "I certify all of the items that have been checked are either complete or not applicable to this work site." It is undisputed that the majority of the tasks listed on the Checklist had not been completed by 3 November 2017. In fact, 3 November 2017 was the day that the Company first obtained the work permits and began work on Defendant's home, and the evidence showed that it was unfeasible that a project of this scope could have been completed in a single day.

¶ 55 We now address whether these actions amounted to UDTP. As with the forged signature claim, it is clear that Defendant can easily satisfy the first two elements of UDTP. The creation of a construction checklist that falsely represents the status of the Company's work on the project is an act which has the tendency to deceive and that occurs in or affecting commerce. It is part of the third element of UDTP that is in contention—i.e., whether or not Defendant suffered injury due to this misrepresentation.

¶ 56 The Company contends that Defendant suffered no injury stemming from the checklist because the Company continued its work on

3. The Company also argues that Defendant's UDTP claims are barred by the economic loss rule. As the Company cites no relevant, binding precedent to show that the economic loss rule applies in the context of UDTP claims, we decline to address this argument.

the project for several more months after the checklist was created, and that the end result was a functional HVAC and plumbing system that passed state inspection. Defendant contends that he was injured because the checklist contained misrepresentations about the true circumstances and completeness of the project.

¶ 57 Here, we agree with the Company that Defendant has not produced sufficient evidence that he was injured by the existence of this document. We have previously defined legal injury as "a wrongful act which causes loss or harm to another." *Heron Bay Acquisition, LLC v. United Metal Finishing, Inc.*, 245 N.C. App. 378, 384, 781 S.E.2d 889, 894 (2016) (citations omitted). Defendant has failed to produce any evidence of a harm or loss that he suffered as a result of this checklist—it caused him no monetary or economic injury, it did not cause any delay in the completion of the work, nor any lessening of the quality of the work. Moreover, it is not clear from the record when Defendant even discovered the existence of this checklist. As stated above, a person cannot detrimentally rely on a document he did not know existed. Accordingly, we conclude that Defendant cannot meet all elements of a UDTP claim and that the trial court did not err in ruling against him on this issue.

B. Denial of the Motion to Amend

¶ 58 **[2]** Defendant next argues that the trial court erred by refusing to allow him to amend his counterclaim to introduce a collection notice that was sent to him as a result of the Company's debt collection practices, which he asserts amounted to UDTP. We disagree, and hold Defendant has failed to show the trial court abused its discretion in refusing to allow the amendment.

¶ 59 Following Defendant's failure to pay the remaining balance on the plumbing and HVAC contracts, the Company sent his bill to an outside collections company. The collections company sent Defendant a collection notice on 5 June 2019. However, Defendant's amended counterclaim, which was filed on 29 March 2019, did not mention the collections notice as the basis of any potential claim. The Company then filed its motion for summary judgment on 3 September 2019. At the summary judgment hearing on 20 December 2019, Defendant argued (for the first time) that the issuance of the collection notice amounted to UDTP, and identified the collection notice as a potential trial exhibit.

¶ 60 During trial, Defendant attempted to introduce the collection notice. The Company objected to the introduction of the collection notice and any associated testimony, asserting that it had not received sufficient notice of this new claim. The trial court similarly expressed its

concern that the collections issue had not been included in Defendant's pleadings. Ultimately the trial court's ruling precluded Defendant from introducing the collection notice or from discussing any collection attempts—reasoning that introducing this evidence this late into the litigation would amount to bringing a new claim, of which the Company did not receive proper notice.

¶ 61 Defendant had attempted to introduce this collections evidence because he believed it amounted to an additional unfair and deceptive act by the Company, which would bolster his UDTP claim. Under our General Statutes, a debt collector can be held liable for attempting to collect a debt by contacting the adverse party directly, when the collector knows that the adverse party is represented by counsel. *See* N.C. Gen. Stat. §§ 75-55(3), 58-70-115(3) (2019). Defendant argued that the Company violated this law by having the collections agency contact him directly, when they knew he was represented by an attorney.

¶ 62 Regardless of the potential merit of Defendant's claims, we conclude that the trial court did not err in refusing to admit the collections evidence. We review the trial court's evidentiary rulings—including rulings on a motion to amend—for abuse of discretion. *Fintchre v. Duke Univ.*, 241 N.C. App. 232, 239, 773 S.E.2d 318, 323 (2015). An abuse of discretion is as a "ruling [] so arbitrary that it could not have been the result of a reasoned decision[.]" *Ferguson v. DDP Pharmacy, Inc.*, 174 N.C. App. 532, 535, 621 S.E.2d 323, 326 (2005) (internal marks and citation omitted).

¶ 63 Amendment of pleadings is governed by Rule 15 of the North Carolina Rules of Civil Procedure, which provides in pertinent part that "[a] party may amend his 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) (2019). However, after a party makes their amendment as a matter of course, further amendments are allowed "only by leave of court or by written consent of the adverse party." *Id.* Moreover,

> [i]f evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

Id., Rule 15(d).

¶ 64 In adjudicating a party's motion to amend, the trial court abuses its discretion when it "refuses to allow an amendment" without providing any "justifying reason for denying the motion to amend." *Ledford v. Ledford*, 49 N.C. App. 226, 233, 271 S.E.2d 393, 398 (1980). In contrast, a trial court acts properly in denying a motion to amend for reasons of "(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Strickland v. Lawrence*, 176 N.C. App. 656, 666-67, 627 S.E.2d 301, 308 (2006) (internal marks and citation omitted).

¶ 65 When a trial court denies a party's motion to amend based on undue delay, "the trial court may consider the relative timing of the proposed amendment in relation to the progress of the lawsuit." *Id.* at 667, 627 S.E.2d at 308. For example, in *Strickland* we held that the trial court did not abuse its discretion in denying the plaintiffs' motion to amend to add a new claim, because of undue delay by the plaintiffs. *Id.* We noted that the plaintiffs' motion "was filed seven months after the institution of their action," and that at that point discovery had almost entirely concluded. *Id.* Similarly, in *Wilkerson v. Duke Univ.*, 229 N.C. App. 670, 679, 748 S.E.2d 154, 161 (2013), we held that the trial court did not abuse its discretion in denying the plaintiff's motion to amend to add three additional claims, because of both undue delay and prejudice. We noted that the defendant had received no notice of the three additional claims, and that the motion to amend was made "thirteen months after [the plaintiff] filed the initial complaint and only five days before the [summary judgment] hearing" was set to begin. *Id.*

¶ 66 In the present case, we likewise conclude that the trial court did not abuse its discretion in denying Defendant's motion to amend. During trial, the court engaged in extensive discussion with Defendant and the Company regarding the potential amendment of Defendant's pleadings to add the new collections claim. When Defendant asked whether a motion to amend would be permitted, the trial court responded "[n]ot in the middle of trial, no." When Defendant went on the argue that he could not have possibly included this claim in his original amended counterclaim because the collection notice was not sent until after the filing of the counterclaim, the court noted that it likely "would have allowed [Defendant] to amend the [counterclaim]" at an earlier date "since [Defendant] did not learn of [the collection notice] until after the discovery process," but that the court could not imagine allowing the amendment "midway after we started the trial."

¶ 67 The trial court's reasoning here is apt—while it is true that the collections notice was not sent until 5 June 2019, after Defendant's

amended counterclaim had already been filed, this does not change the fact that Defendant was aware of the existence of the collections notice all throughout the summer and fall of 2019 but failed to take any action to add this claim to the litigation. The first occasion that Defendant brought this collections issue to the trial court's attention was at the summary judgment hearing on 20 December 2019, and Defendant did not move to amend his pleadings to include this new claim until trial had already begun in February 2020. Thus, we conclude that the trial court did not abuse its discretion by denying Defendant's motion for leave to amend his complaint in the middle of trial.

C. Directed Verdict on Breach of Contract Claims

¶ 68 **[3]** We now turn to the issues raised by the Company in its cross-appeal. The Company first argues that the trial court erred in failing to grant a directed verdict on Defendant's breach of contract claims. We agree in part, and remand for a new trial on Defendant's claim for failure to perform in a workmanlike manner under a construction or building contract.

¶ 69 To review, Defendant argued at trial that the Company committed a breach of contract in three main respects: (1) by installing different equipment than was originally called for (such as the water heaters); (2) by charging a higher price than was originally called for; and (3) by performing substandard work, such as on the re-piping and insulation projects. During trial, the Company moved for a directed verdict at the close of all the evidence, and the trial court heard extensive arguments from both parties regarding whether the breach of contract claims should go to the jury. The trial court ultimately denied the Company's motion, concluding that there was sufficient evidence presented that would allow the jury to reach their own conclusions on whether the contract had been breached.

¶ 70 Following the close of all evidence during a jury trial, a party may move for a directed verdict in order to "test[] the sufficiency of the evidence to support a verdict for the non-moving party." *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 344, 626 S.E.2d 716, 728 (2006). If the trial court allows the motion for directed verdict, judgment is awarded in favor of the moving party and the matter will not be decided by the jury—however, if the trial court denies the motion, then the case moves forward to be decided by the jury. *See* N.C. Gen. Stat. § 1A-1, Rule 50(a) (2019).

¶ 71 "In reviewing a direct verdict, this Court must determine whether the evidence taken in the light most favorable to the non-moving party is sufficient as a matter of law to be submitted to the jury." *Delta Env't*

Consultants of N. Carolina, Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 168, 510 S.E.2d 690, 695 (1999). On appeal, we conduct a *de novo* review of a trial court's denial of a motion for directed verdict. *Denson v. Richmond Cnty.*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003).

¶ 72 We first address the Company's claim that the trial court should have issued a directed verdict as to Defendant's claim that the Company performed substandard work on the re-piping and insulation projects. The Company's primary argument here is that, as a matter of law, Defendant's evidence could not have been sufficient to survive a motion for directed verdict because he did not present any expert testimony showing that the Company's work was substandard. During trial, the only evidence presented by Defendant tending to show substandard work by the Company was Defendant's own testimony about the quality of the work and photos that Defendant had taken of the work.

¶ 73 "To state a claim for breach of contract, the complaint must allege that a valid contract existed between the parties, that defendant breached the terms thereof, the facts constituting the breach, and that damages resulted from such breach." *Jackson v. Associated Scaffolders & Equip. Co.*, 152 N.C. App. 687, 692, 568 S.E.2d 666, 669 (2002). In actions for breach of building or construction contracts, a plaintiff may bring a claim for "failure to construct in a workmanlike manner." *Cantrell v. Woodhill Enters., Inc.*, 273 N.C. 490, 497, 160 S.E.2d 476, 481 (1968). Under such a claim, "[t]he law recognizes an implied warranty that the contractor or builder will use the customary standard of skill and care" based upon the particular industry, location, and timeframe in which the construction occurs. *Kenney v. Medlin Const. & Realty Co.*, 68 N.C. App. 339, 343, 315 S.E.2d 311, 314 (1984). When pleading this claim, "plaintiff's pleading should allege wherein the workmanship was faulty or the material furnished by defendant was not such as the contract required." *Cantrell*, 273 N.C. at 497, 160 S.E.2d at 481 (internal marks and citation omitted).

¶ 74 The Company contends that, in order to bring a proper claim for failure to construct in a workmanlike manner, the plaintiff must put on expert testimony to establish the relevant standard of care. Defendant contends that no such requirement exists, as the quality of the work is an issue that can be properly determined by the jury without the aid of an expert. On balance, we agree with the Company that at least some expert evidence must be presented to sustain a claim such as this.

¶ 75 We find two cases to be most instructive on this issue. First, in *Kenney v. Medlin Const. & Realty Co.*, 68 N.C. App. 339, 341, 315 S.E.2d

311, 313 (1984), we addressed a breach of contract action in which the plaintiff homeowner sued the defendant builder for failure to construct in a workmanlike manner when building the plaintiff's new home. Plaintiff retained two experts to testify regarding the structural problems with the home, and both testified that "the construction of plaintiff's house did not meet the standard of workmanlike quality prevailing in Cabarrus County in December, 1978." *Id.* at 340, 315 S.E.2d at 312. On appeal, the defendant argued that the testimony of the two witnesses was inadmissible because they were not sufficiently qualified, but we disagreed. *Id.* at 342, 315 S.E.2d at 313.

¶ 76 We noted that "opinion testimony of an expert witness is admissible if there is evidence that the witness is better qualified than the jury to form such an opinion." *Id.* Given that one of the witnesses had "built most of the houses in plaintiff's subdivision," and that the other "had been involved in building more than 200 residences," we held that both witnesses qualified as experts who were "better qualified than the jury to form an opinion as to the quality of the workmanship" on the home. *Id.* at 342-43, 315 S.E.2d at 313-14. Moreover, in evaluating whether the trial court properly denied the defendant's motion for directed verdict, we held that there was "plenary evidence supporting plaintiff's claim of breach"—given that "two expert witnesses testified to the various structural defects rendering the quality of construction of plaintiff's house below the standard prevailing in the area." *Id.* at 343, 315 S.E.2d at 314.

¶ 77 Second, in *Delta Env't Consultants of N. Carolina, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 163, 510 S.E.2d 690, 692 (1999), the defendant (a factory owner) hired the plaintiff (an environmental consultant) to help the factory deal with pollution and soil contamination. The plaintiff sued the defendant for unpaid bills, and the defendant counter-claimed that the plaintiff had breached the contract by "fail[ing] to perform its remedial work to the level of skill ordinarily exercised by members of its profession." *Id.* During trial, the defendant apparently put on no expert testimony to prove its workmanship claim, and as a result the trial court granted a directed verdict in favor of plaintiff, ruling that defendant's "failure to offer expert testimony made its evidence insufficient to prove the standard of care owed by [plaintiff] as a matter of law." *Id.* at 168, 510 S.E.2d at 695.

¶ 78 On appeal, the defendant challenged this ruling by the trial court, arguing that under the "common knowledge" exception, it need not introduce expert testimony to prove its workmanship claim. *Id.* This exception holds that "where the common knowledge and experience of the jury is sufficient to evaluate compliance with a standard of care,

expert testimony is not needed." *Id.* However, we disagreed with the defendant, concluding that a case such as this fell far outside the bounds of the common knowledge exception. *Id.* We explained that this exception was reserved for cases where the complained-of professional conduct "is so grossly negligent that a layperson's knowledge and experience make obvious the shortcomings of the professional"—such as a medical malpractice case in which "an open wound was not cleansed or sterilized" before being placed in a cast. *Id.* at 168, 510 S.E.2d at 696 (citing *Little v. Matthewson*, 114 N.C. App. 562, 442 S.E.2d 567 (1994)).

¶ 79 In contrast, we held that a case involving the workmanship "utilized by professional engineers for environmental cleanup" was not the type of common-sense issue that could be determined by a jury alone. *Id.* Thus, given the lack of "required expert testimony to explain and prove the standard of care," we held that the trial court did not err in granting the motion for directed verdict. *Id.*

¶ 80 The core of a workmanship claim is a claim that a professional failed to utilize "the customary standard of skill and care" in completing a project, based upon the particular industry, location, and timeframe in which the project occurred. *See Kenney*, 68 N.C. App. at 343, 315 S.E.2d at 314. And in most cases, the average juror would not have the requisite knowledge and experience to evaluate the prevailing professional standards in a particular industry and area.

¶ 81 As recognized by the "common knowledge" exception, there are certainly some types of workmanship claims that can routinely be determined by a jury without the aid of an expert. *See Delta*, 132 N.C. App. at 168, 510 S.E.2d at 696. These are matters where the workmanship is so grossly subpar that it is obvious to any layperson that the work does not live up to a professional standard of care—such as a surgeon "[leaving] a sponge in a patient's body during surgery," or a lawyer "who is ignorant of the applicable statute of limitations or who sits idly by and causes the client to lose the value of his claim." *Little*, 114 N.C. App. at 569, 442 S.E.2d at 571.

¶ 82 This case is not like those cases. This case involved $16,324 worth of extensive plumbing work done throughout an entire home, encompassing removing and replacing all polybutylene piping with PEX piping "within reason." An employee of the Company testified that "the scope of the work was massive." Moreover, the contract expressly stated that the Company was under no obligation to repair or replace the drywall that would inevitably be cut open during the re-piping.

¶ 83 It is undisputed that Defendant did not offer any expert testimony to demonstrate that the plumbing work was not performed in a workmanlike manner. Instead, Defendant offered his own lay-testimony of why he believed the plumbing work was inadequate, and he introduced 12 photographs showing the allegedly inadequate piping and insulation work. We have examined these photographs, and we see no evidence that would indicate to a layperson that the plumbing work was obviously or grossly defective. Accordingly, as in *Delta*, we conclude that the common knowledge exception does not apply, and that expert testimony was required as a matter of law in order to prove Defendant's workmanship claim against the Company. Because Defendant presented no expert testimony, we hold that the trial court erred in failing to grant the Company's motion for directed verdict. We reverse and remand for a new trial on this claim.

¶ 84 As for Defendant's remaining breach of contract claims—failure to provide the correct water heater called for in the contract, and charging a higher price than called for—we conclude sufficient evidence was presented to allow these claims to proceed to the jury. These claims were based in a standard breach of contract cause of action (as opposed to a workmanship claim) and thus did not require the presentation of expert testimony. Defendant presented competent testimonial evidence tending to show that a 40-gallon tank was installed instead of a 50-gallon tank, and that the price of the 7 November contract was higher than the price of the 2 November contract. While the Company presented contrary evidence, the evidence presented by Defendant on these claims was sufficient to allow those claims to proceed to the jury. We accordingly hold that the trial court did not err in refusing to grant a directed verdict on Defendant's remaining breach of contract claims.

D. Attorneys' Fees

¶ 85 **[4]** The Company next argues that the trial court erred in failing to allow the parties to be heard regarding the award of attorneys' fees, and Defendant agrees. However, because neither party obtained a ruling on the request for attorneys' fees, this issue has not been preserved for our review.

¶ 86 Our General Statutes provide as follows regarding the award of attorneys' fees in a UDTP action:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the

> prevailing party, such attorney fee to be taxed as part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. Gen. Stat. § 75-16.1 (2019).

¶ 87 However, under Rule 10 of the North Carolina Rules of Appellate Procedure, "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). In addition, Rule 10 requires that "the complaining party [] obtain a ruling upon the party's request, objection, or motion." *Id.*

¶ 88 Here, though both Defendant and the Company had previously indicated on multiple occasions that they wished to be heard on attorneys' fees, the trial court never held a hearing on attorneys' fees, and never ruled on Defendant's request for attorneys' fees. This issue therefore has not been preserved for appellate review.

E. Closing Arguments

¶ 89 **[5]** Finally, the Company argues that the trial court erred when it implicitly disallowed the Company to make the final closing argument to the jury. We disagree, and hold that the trial court did not abuse its discretion in its ordering of the closing arguments in this case.

¶ 90 The basis of the Company's argument is that the unique procedure posture of this case—in which the Company acted as both plaintiff and defendant—resulted in the Company not being able to make its final argument to the jury regarding its defense to Defendant's counterclaims. The Company contends this resulted in unfair prejudice, as it left the jury with the false impression that the Company had no defense to Defendant's UDTP and breach of contract claims.

¶ 91 The Company's argument is based in Rule 10 of the General Rules of Practice for the Superior and District Courts. *See* N.C. Super. and Dist. Ct. R. 10 (2020). Rule 10 provides, in pertinent part, as follows:

> In all cases, civil and criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final.

N.C. Super. and Dist. Ct. R. 10 (2020).

¶ 92 This Rule means that, generally, after the plaintiff introduces their evidence, and the defendant chooses to introduce no rebuttal evidence, then the defendant is entitled to be the final party to make arguments to the jury. Here, trial arguments proceeded in the following order: (1) the Company presented evidence on its breach of contract claims; (2) Defendant presented evidence on his breach of contract and UDTP counterclaims; (3) the Company made closing arguments on its breach of contract claims; and (4) Defendant made closing arguments on his breach of contract and UDTP counterclaims.

¶ 93 At the end of the Company's initial closing, counsel for the Company indicated that he intended to "come back up and talk to" the jury one more time in order to put forth the Company's rebuttal to Defendant's counterclaims. Defendant's counsel objected, asserting that the Company did not have the right to make a rebuttal argument, and that "anything he has [for closing], he says now." The following exchange then occurred:

> **[The Court]:** Was that your closing, sir?
>
> **[Counsel for the Company]:** If I don't get a rebuttal, I don't get a rebuttal. That's fine, Judge.
>
> **[The Court]:** All right.
>
> **[Counsel for the Company]:** I was under the presumption of a rebuttal, but okay.

¶ 94 Counsel for Defendant then proceeded to make his closing, and no further discussion occurred regarding the Company's desire for a rebuttal.

¶ 95 This exchange demonstrates the Company did not adequately object to this issue to preserve it for appellate review, and arguably waived any challenge. To recapitulate, under Rule 10, 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." N.C. R. App. P. 10(a)(1). If a party fails to object to a certain ruling or action by the trial court, then the matter is deemed waived. *See State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002).

¶ 96 Here, it would strain credulity to conclude that the Company's statements regarding the rebuttal argument amounted to an objection. When Defendant stated that the Company was not entitled to a rebuttal, the Company could have easily objected and asserted that it was, indeed, entitled to a rebuttal under Rule 10 of the General Rules of Practice. However, the Company did not make such an objection—instead, counsel stated "If I don't get a rebuttal, I don't get a rebuttal. That's fine, Judge." We hold that this did not qualify as an objection within the meaning of Rule 10 of the Rules of Appellate Procedure, especially given that counsel did not "stat[e] the specific grounds for the ruling the party desired the court to make." N.C. R. App. P. 10(a)(1).

III. Conclusion

¶ 97 In sum, we hold as follows:

(1) **UDTP Claims:** The trial court correctly concluded that Defendant's UDTP claims must fail as to the superimposition of the signature (given that Defendant cannot show actual reliance on the 7 November contract), and as to the installation checklist (given that Defendant cannot show any injury associated with the checklist). However, the trial court erred in concluding that Defendant's UDTP claim must fail as to the duplicate warranties, and we remand for further fact-finding as to the reasonableness of Defendant's reliance on the contractual warranties.

(2) **Amendment of the Counterclaim**: The trial court did not abuse its discretion in refusing to allow Defendant to amend his counterclaim during trial to add a new collections claim, because Defendant acted with undue delay.

(3) **Directed Verdict**: The trial court erred as a matter of law in failing to grant the Company's motion for directed verdict as to Defendant's workmanship claim, as Defendant failed to present any supporting expert testimony as required under our precedent. As for Defendant's remaining breach of contract claims, the trial court correctly refused to grant a directed verdict as sufficient supporting evidence had been presented.

(4) **Attorneys' Fees**: This issue has not been preserved for our review.

(5) **Closing Arguments**: Defendant has not preserved this argument for appellate review, and in any event the trial court did not abuse its discretion in the ordering of closing arguments.

AFFIRMED IN PART, REMANDED IN PART.

Judge TYSON concurs.

Judge MURPHY concurs in Parts I, II-A, II-B, II-D, II-E, and III; and concurs in result only in Part II-C.

JOHN L. DAVIS, PLAINTIFF
v.
LAKE JUNALUSKA ASSEMBLY, INC., DEFENDANT

No. COA21-333

Filed 18 January 2022

Real Property—retreat community—Planned Community Act—retroactive provisions—applicability

A retreat community established before the year 1999 was not subject to the Planned Community Act where plaintiff, who had purchased a lot within the community in 2011 (which was subject to the community's protective covenants recorded in the chain of title), failed to assert any events or circumstances occurring after 1 January 1999 to invoke the retroactive provisions of the Act (N.C.G.S. § 47F-1-102(c)). The community therefore was not subject to the Act's financial disclosure requirements.

Appeal by plaintiff from order entered 10 February 2021 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 14 December 2021.

John L. Davis pro se.

McGuire, Wood & Bissette, PA, by Matthew S. Roberson, for defendant-appellee.

TYSON, Judge.

¶ 1 John L. Davis ("Plaintiff") appeals from orders entered granting summary judgment in favor of Lake Junaluska Assembly, Inc. ("Defendant"). We affirm.

I. Background

¶ 2 Plaintiff is the owner of real property located in the Lake Junaluska Assembly Conference and Retreat ("Retreat"). Defendant is a non-profit, non-stock company, which manages, owns, develops, and sells real property in the Retreat. The Retreat contains more than 700 private residences. The Retreat also contains a lake, meeting facilities, event auditoriums, a campground, rental accommodations, and outdoor recreation facilities. The Retreat is used for meetings, events, religious conferences, and retreats.

¶ 3 In 1913, Defendant's predecessor-in-interest began selling lots for private residential use. The Retreat "was established for the benefit of the United Methodist Church" as "a resort for religious, charitable, educational and benevolent purposes[.]" In the declaration of the protective covenants, conditions, restrictions and easements, Defendant states the Retreat "is dedicated to the training, edification and inspiration of people who are interested in and concerned with Christian principles and concepts."

¶ 4 Plaintiff purchased his lot within the Retreat in 2011. Plaintiff's property was first conveyed in 1950 to Plaintiff's predecessor-in-interest, Eugene L. de Casteline. The following covenants are contained within Plaintiff's chain of title:

> Second: That said lands shall be held, owned and occupied subject to the provisions of the charter of the Lake Junaluska Assembly, Inc. and all amendments thereto, heretofore, or hereafter enacted, and to the bylaws and regulations, ordinances and community rules which have been or hereafter may be, from time to time, adopted by said Lake Junaluska Assembly, Inc., and its successors.
>
> . . . .
>
> Fifth: That it is expressly stipulated and covenanted between said party of the first part and that said party of the second part his heirs and assigns, that

> the bylaws, regulations, community rules and ordinances heretofore or hereafter adopted by the said Lake Junaluska Assembly, Inc. shall be binding upon all owners and occupants of said lands as full and to the same extent as if the same were fully set forth in this Deed, and all owners and occupants of said lands shall be bound thereby.

¶ 5 Plaintiff filed an action alleging: (1) the Retreat is a planned community pursuant to N.C. Gen. Stat. § 47F (2021); (2) Defendant made expenditures from assessments collected for purposes not stated in the Retreat's Rules; (3) an amendment in the Retreat's Rules conflicted with established case law; (4) Defendant improperly adopted Amendments to the Rules for the Retreat; and, (5) the lien practices of Defendant in the Retreat are not authorized by law.

¶ 6 The trial court granted Defendant's motion for summary judgment on 5 August 2020 holding the Planned Community Act, N.C. Gen. Stat. § 47F, does not apply to Defendant. Plaintiff filed a motion seeking Defendant to release detailed financial records on the collection and expenditures of assessments within the Retreat. Following a hearing, the trial court allowed in part and denied in part Plaintiff's disclosure motion. Plaintiff filed a motion for reconsideration pursuant to North Carolina Rule of Civil Procedure 59, which was denied following a hearing by order on 10 February 2021.

¶ 7 Defendant filed a motion for summary judgment on all remaining issues on 21 January 2021, which the trial court allowed on 10 February 2021. Plaintiff appealed.

II. Jurisdiction

¶ 8 Jurisdiction in this Court lies pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issue

¶ 9 Plaintiff argues the trial court erred when it granted summary judgment in favor of Defendant.

IV. Analysis

A. Standard of Review

¶ 10 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) (2021).

¶ 11 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).

¶ 12 Our Court has held:

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004) (citation and internal quotation marks omitted).

¶ 13 When reviewing the allegations and proffers 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). Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979).

¶ 14 "[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Pacheco v. Rogers and Breece, Inc.*, 157 N.C. 448, 445, 579 S.E.2d 505, 507 (2003) (citation 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. 5 August 2020 Order

¶ 16 The North Carolina Planned Community Act was enacted in 1999 and "applies to all planned communities created within this State on or after January 1, 1999." N.C. Gen. Stat. § 47F-1-102(a) (2021). Certain provisions of the Planned Community Act apply to planned communities created prior to 1999, "unless the articles of incorporation or the declaration expressly provides to the contrary." N.C. Gen. Stat. § 47F-1-102(c) (2021).

¶ 17 N.C. Gen. Stat. § 47F-1-102(c) enumerates sections of the Planned Community Act that apply to planned communities created prior to 1999, but "only with respect to events and circumstances occurring on or after January 1, 1999, and *do not invalidate existing provisions of the declaration, bylaws, or plats and plans of those planned communities*." *Id.* (emphasis supplied).

¶ 18 Our Supreme Court examined the bylaws of the Retreat in *Southeastern Jurisdictional Admin. Council, Inc. v. Emerson*, 363 N.C. 590, 599-600, 683 S.E.2d 366, 372 (2009). The Court reviewed whether an amendment, which imposed an annual service charge "in an amount fixed by the SEJ Administrative Council for garbage and trash collection, police protection, street maintenance, street lighting, drainage maintenance, administrative costs and upkeep of the common areas," was reasonable. Nowhere in *Southeastern Jurisdictional* does the majority's opinion address the applicability of the Planned Community Act to the Retreat nor does it cite N.C. Gen. Stat. § 47F.

¶ 19 Plaintiff argues the trial court erred by holding "*Southeastern Jurisdictional Admin. Council v. Emerson*, 363 N.C. 590, 683 S.E.2d 366 (2009) is controlling for this case." Plaintiff asserts this conclusion of law constitutes reversible error. Contrary to Plaintiff's argument and presuming error, this ruling is not *per se* reversible error. Even if the trial court cited an incorrect basis for the judgment, this Court "will not disturb a judgment where the correct result has been reached." *Atlantic Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc.*, 175 N.C. App. 339, 344, 623 S.E.2d 334, 338 (2006). Defendant, as appellee, is "free to argue on appeal any ground to support the trial court's grant of summary judgment regardless of the fact the trial court specified the grounds for its summary judgment decision." *Id.* at 344, 623 S.E.2d at 339 (citations omitted).

¶ 20 Our Court has held:

> The purpose of the entry of findings of fact by a trial court is to resolve contested issues of fact. This is

> not appropriate when granting a motion for summary judgment, where the basis of the judgment is 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.

War Eagle, Inc. v. Belair, 204 N.C. App. 548, 551-52, 694 S.E.2d 497, 500 (2010) (citations and quotation marks omitted). Summary judgment orders should not include contested findings of fact. "[A]ny findings should clearly be denominated as 'uncontested facts' and not as a resolution of contested facts." *Id.*

¶ 21 Plaintiff has not asserted any "events or circumstances" occurring after 1 January 1999 to invoke the retroactive provisions of N.C. Gen. Stat. § 47F-1-102(c). Plaintiff purchased the property with prior record notice of the covenants recorded within the chain of title. Plaintiff's argument is overruled.

C. 10 February 2021 Order on Plaintiff's Motion for Reconsideration

¶ 22 The trial court denied Plaintiff's motion for summary judgment in part and granted Plaintiff's motion for summary judgment in part by ordering Defendant to "make available to property owners in the Lake Junaluska Retreat, an annual profit and loss statement, a balance sheet, capital budget, and annual audit (if one is prepared)" for each year beginning with 2020.

¶ 23 "The labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review." *Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012). Our Court has held:

> The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified as a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.

In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations and quotation marks omitted).

¶ 24 The trial court stated "the following non-controverted facts:"

> 1. This Court, following a hearing on July 27, 2020 on cross-motions for summary judgment by Plaintiff and Defendant, ruled that that (sic) the North Carolina Planned Community Act (N.C. Gen. Stat. § 47F-1-101 et. seq) does not apply to Defendant or the Lake Junaluska Development;
>
> 2. Defendant and the Lake Junaluska development is a unique community;
>
> 3. The North Carolina Supreme Court's opinion and ruling in *Southeastern Jurisdictional Admin. Council v. Emerson*, 363 N.C. 590, 683 S.E.2d 366 (2009) does not address the issue concerning the disclosure of financial records of Defendant; and
>
> 4. Because the North Carolina Planned Community [Act] does not apply to the Defendant or the Lake Junaluska development, and given the unique character and long-standing history of covenant-imposed regulations, there is a gray area and ambiguity concerning the disclosure of financial records by Defendant and the entitlement of Plaintiff and other similarly situated property owners in the Lake Junaluska development who pay service charges imposed by Defendant to view financial records of Defendant.

¶ 25 Plaintiff argues these findings of fact are controverted. Number one is a recitation of the trial court's 5 August 2020 order. Number two does not have any legal significance. Numbers three and four involve the "application of legal principles" and are conclusions of law and not controverted or "non-controverted facts." *Id.*

¶ 26 Plaintiff argues the trial court erred in holding "The North Carolina Supreme Court's opinion and ruling in *Southeastern Jurisdictional Admin. Council v. Emerson*, 363 N.C. 590, 683 S.E.2d 366 (2009) does not address the issue concerning the disclosure of financial records of Defendant[.]" Our Supreme Court's holding in *Southeastern Jurisdictional*, only addresses the validity of service charges imposed on lot owners within the Retreat and not Defendant's disclosure responsibilities or lot owners' rights to disclosure of records. *Southeastern Jurisdictional Admin. Council Inc.*, 363 N.C. at 601, 683 S.E.2d at 373. Plaintiff's argument is overruled.

¶ 27 Plaintiff further argues the trial court erred in its holding of finding of fact four. As is held above, the Retreat is not subject to the Planned Community Act. Plaintiff is not entitled to disclosures pursuant to the Planned Community Act. Plaintiff's argument is overruled.

¶ 28 Plaintiff argues the trial court erred by denying him discovery of records and legers pursuant to Rule 26 of our Rules of Civil Procedure by denying his motion for summary judgment. *See* N.C. Stat. § 1A-1, Rule 26 (2021). Plaintiff sought the release of information pursuant to the Planned Community Act, which the trial court properly held was inapplicable to the Retreat. Plaintiff filed a motion for summary judgment, not a motion to compel Defendant's production of documents. The record on appeal does not contain any motion for discovery pursuant to Rule 26 of our Rules of Civil Procedure. Plaintiff's argument is overruled.

D. 10 February 2021 Order on Defendant's Summary Judgment Motion

¶ 29 The trial court granted summary judgment to Defendant on all remaining claims by order entered 10 February 2021. As is held above, the Retreat is not subject to the Planned Community Act. N.C. Gen. Stat. § 47F-1-102(c). Defendant is not subject to the Planned Community Act's disclosure requirements. *Id.*

¶ 30 Plaintiff argues summary judgment was improper because witness testimony is required to sort through conflicts of information to establish material facts. Plaintiff failed to present a forecast of evidence to the trial court to show any genuine factual dispute exists. *See Pacheco*, 157 N.C. at 448, 579 S.E.2d at 507. Plaintiff's argument is overruled.

V. Conclusion

¶ 31 The trial court properly granted summary judgment for Defendant on all remaining claims by order entered 10 February 2021. The trial court did not err in denying Plaintiff's motion for summary judgment in part. Plaintiff's forecast of evidence does not establish a genuine issue of material fact exists. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges CARPENTER and GORE concur.

IN RE A.P.

[281 N.C. App. 347, 2022-NCCOA-29]

IN THE MATTER OF A.P.

No. COA21-310

Filed 18 January 2022

1. Child Abuse, Dependency, and Neglect—permanency planning order—reunification efforts—in light of mother's disability—sufficiency of evidence and findings

In a permanency planning matter, the trial court's conclusion that the department of social services (DSS) made reasonable efforts to prevent the need for placement of the child was supported by its findings of fact, which in turn were supported by the testimony of social workers, the guardian ad litem's report, and a psychological assessment. DSS provided services as recommended by the assessment, but respondent either declined to participate in or did not make sufficient improvement after using those services. Although respondent argued that DSS did not accommodate her intellectual disability, where DSS satisfied the reasonable efforts requirement under state law, DSS also met the reasonable accommodation requirement of the Americans with Disabilities Act.

2. Appeal and Error—waiver—adequacy of DSS services—compliance with disability laws—raised for first time on appeal

In a permanency planning matter, where respondent-mother claimed on appeal that the department of social services violated the Americans with Disabilities Act by not providing adequate services to accommodate her intellectual disability, but had not raised the issue either before or during the permanency planning hearing, she waived the argument for appellate review.

3. Child Visitation—permanency planning order—improper delegation of authority to custodial parent

In a permanency planning matter, the portion of the trial court's order granting respondent-mother two hours of supervised visitation with her child every other week was vacated and the matter remanded because the trial court improperly delegated the other terms of visitation (the location and the supervisor) to the child's father to whom legal and physical custody was granted.

4. Child Abuse, Dependency, and Neglect—permanency planning—ceasing further review hearings—statutory requirements

In a permanency planning matter in which legal custody of the child was granted to the father, the trial court met the requirements

of N.C.G.S. §§ 7B-906.1(k) and 7B-905.1(d) when it stated in its visitation decree that no further regular review hearings would be held but that the parties could file a motion for review of the visitation plan. Although respondent-mother had an intellectual disability, the Americans with Disabilities Act did not impose additional requirements on the trial court before cessation of further review hearings.

Appeal by respondent-mother from order entered 16 February 2021 by Judge Carole A. Hicks in Iredell County District Court. Heard in the Court of Appeals 17 November 2021.

Lauren Vaughan for Petitioner-Appellee Iredell County Department of Social Services.

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

No brief filed for Respondent-Appellee-Father.

Womble Bond Dickinson (US) LLP, by Jessica L. Gorczynski, for Guardian ad Litem.

CARPENTER, Judge.

¶ 1 Respondent-Mother appeals from a permanency planning order (the "Order"), entered on 16 February 2021 following an initial permanency planning hearing. The Order granted legal and physical custody of the juvenile to Respondent-Father; ordered two hours of supervised visitation every other weekend to Respondent-Mother, allowing Respondent-Father to choose the place and supervisor of visitation; and waived further review hearings. On appeal, Respondent-Mother argues the Order was not consistent with her need for reasonable accommodations based on her intellectual disability, and therefore, violated Title II of the Americans with Disabilities Act of 1990 ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("Section 504"). Furthermore, she contends the Order gave Respondent-Father "too much discretion" over the visitation plan. For the reasons set forth below, we affirm the Order in part; we vacate and remand the visitation provisions of the Order for the trial court to enter an appropriate visitation plan.

I. Factual & Procedural Background

¶ 2 On 19 November 2019, the date of A.P.'s birth, the Iredell County Department of Social Services ("DSS") received a report, from the

hospital where Respondent-Mother gave birth, alleging neglect of A.P. on the basis Respondent-Mother has brain damage due to a past car accident and is unable to care for the newborn infant. On 6 December 2019, DSS filed a juvenile petition alleging A.P. was a neglected juvenile. The petition alleged Respondent-Mother failed to provide basic care for the infant—including changing diapers and feeding—even with hands-on assistance from hospital staff. The petition further alleged Respondent-Mother was under the guardianship of her paternal aunt, S.L., who had cared for her since she was four years old and was the payee on Respondent-Mother's disability benefits. Respondent-Mother was reported as being previously diagnosed with "mild mental retardation" and as having an IQ similar to that associated with a ten-year-old child. The petition described an emergency assessment held by DSS on 22 November 2019 in which Respondent-Mother admitted to participating in concerning behaviors including having unsafe, one-time sexual encounters with men whom she met online and intentionally killing cats. The assessment also revealed Respondent-Mother was jealous of the attention A.P. received from S.L., and Respondent-Mother had been found in her room with a knife explaining she "was going to hurt herself and just wanted to make everything go away." The day after the assessment, Respondent-Mother and A.P. were released from the hospital to the care of S.L. Respondent-Mother and S.L. signed a safety plan in which Respondent-Mother agreed to be supervised at all times when with A.P., and S.L. agreed to provide "eyes-on" supervision.

¶ 3 On 15 January 2020, a hearing was held for determining whether a guardian *ad litem* should be appointed for Respondent-Mother. At the hearing, DSS made an oral motion to appoint a guardian *ad litem* in accordance with N.C. Gen. Stat. § 1A-1, Rule 17 for Respondent-Mother. The trial court found, *inter alia*, Respondent-Mother: is incompetent and cannot adequately act in her own interest, waived notice of the hearing and consented to the appointment of a guardian *ad litem* for her, is incompetent within the meaning of N.C. Gen. Stat. § 35A-1101 (2019), and lacks capacity due to mental retardation. Accordingly, the trial court appointed a guardian *ad litem* for Respondent-Mother.

¶ 4 On 12 February 2020, pre-adjudication and adjudication hearings were held before the Honorable Edward L. Hedrick, IV. On the same day, the trial court entered its adjudication order, making findings of fact by clear and convincing evidence and concluding A.P. was a neglected juvenile. A dispositional hearing was also held on 12 February 2020. The guardian *ad litem* for A.P. filed a court report for the dispositional hearing in which she expressed concerns for A.P. continuing to

live with S.L. and Respondent-Mother. She noted "if [S.L.'s] belittling behavior [toward Respondent-Mother] continues or escalates, the nexus of [Respondent-Mother's] mental deficit, jealousy, and propensity for violence will push [Respondent-Mother] to the limits of her tolerance and result in harm to [A.P.]". The guardian *ad litem* recommended A.P. be placed with S.L. and a new guardian be found for Respondent-Mother.

¶ 5 On 12 February 2020, the trial court entered its dispositional order in which it found, *inter alia*, that the primary conditions in the home that led to or contributed to the juvenile's adjudication and to the Court's decision to remove custody of the juvenile are the Respondent-Mother's mental health status and her inability to provide care for the infant juvenile. It further found that placement of A.P. with S.L. would be in the juvenile's best interest. The trial court concluded, *inter alia*, DSS made reasonable efforts to reunify and to prevent the need for placement of the juvenile outside of the juvenile's own home. The trial court then ordered, *inter alia*, Respondent-Mother remedy the conditions in the home that led to or contributed to the juvenile's adjudication and to the Court's decision to remove custody of the juvenile by: (1) entering into and complying with the terms of a case plan; (2) cooperating with DSS and the guardian *ad litem*; (3) signing all releases of information necessary for DSS and the guardian *ad litem* to exchange information with their providers and monitor progress; (4) providing DSS and the guardian *ad litem* with a comprehensive list of all living adult relatives; and (5) not living in the home of A.P. The trial court also ordered legal and physical custody of A.P. to DSS and supervised visitation to Respondent-Mother for two hours per week.

¶ 6 On 8 July 2020, a review hearing was held pursuant to N.C. Gen. Stat. § 7B-906.1(a) (2019). The trial court entered an order the same day, finding, *inter alia*, Respondent-Mother had entered but not completed a case plan, and DSS had become aware of a potential father whom it found to be a potential placement provider for the juvenile. The trial court then concluded that legal and physical custody of the juvenile should continue with DSS. While paternity results were pending, the trial court allowed the putative father ("Respondent-Father") to have two-hour weekly unsupervised visits with A.P. and continued supervised visitation for Respondent-Mother. On 24 July 2020, Respondent-Father confirmed paternity of A.P. and entered into a case plan with DSS. DSS held a child and family team meeting on 28 July 2020 and placed A.P. with Respondent-Father and the paternal grandmother.

¶ 7 On 27 August 2020, Dr. George Popper, Ph.D., P.A., ("Dr. Popper") performed a comprehensive psychological evaluation on Respondent-

Mother as requested by her 12 March 2020 DSS case plan, which consisted of multiple examinations to determine her cognitive and academic achievements, social-emotional development, personality, parenting skills, and mental health status. Respondent-Mother performed "extremely low" in the areas tested in the cognitive assessment. She received a full-scale IQ of 53 on the Weschsler Adult Intelligence Scale, Fourth Edition (WAIS-IV), which falls in the "intellectually disabled – moderate" range. Her test results on her mental status assessment were consistent with depression and anxiety disorder. In Dr. Popper's view, it was "unrealistic for [Respondent-Mother] to assume the role of full-time parent" because "[s]he has not yet demonstrated she has the skills needed for self-care, nor has she demonstrated the skills needed to care for a young child." Based on the examinations, Dr. Popper recommended Respondent-Mother to: (1) continue with supervised visits and with her parenting classes and modify visits if progress is noted; (2) attend individual counseling and possibly seek medication for her depression and anxiety; (3) train to improve domestic skills; (4) obtain innovation services; and (5) find a supported work placement or placement in a sheltered workshop.

¶ 8 An initial permanency planning hearing was held on 20 January 2021 before the Honorable Carole A. Hicks. Social worker Latoya Daniels testified Respondent-Mother participated in Pharo's Parenting parent classes and parental coaching program for at least four months. DSS also offered Respondent-Mother the opportunity to be placed at the Thelma Smith Foundation, an assisted living facility, where she could work on "independent skills" and learn how to provide her basic needs, which she declined.

¶ 9 Krista McMillan, a foster care supervisor with DSS also testified. According to Krista McMillan, Respondent-Mother did not want to participate in the services of the Thelma Smith Foundation although they were offered to her, and DSS set up an intake appointment. DSS made referrals for Respondent-Mother to receive mental health treatment at Daymark; Respondent-Mother also declined those services. Additionally, DSS assisted Respondent-Mother with applying for innovation services, as recommended by Dr. Popper.

¶ 10 The remainder of the testimony during the permanency planning hearing focused primarily on Respondent-Mother's visitation with A.P. According to Respondent-Father, A.P. had lived with him in the paternal grandmother's home since the end of July 2020. Respondent-Father has held consistent employment, has had no issues providing care for A.P., and feels bonded with A.P. When Respondent-Father was asked

by counsel for DSS if he would be willing to facilitate visits or supervise visits for Respondent-Mother, he replied, "I mean, due to the past, I don't [sic] willing just because of, you know, prior history. So I kind of stay away from everything." Although Respondent-Father confirmed he did not want to supervise visits for Respondent-Mother himself, he did testify that his mother and other friends or family would be willing to supervise visits. On cross-examination, Respondent-Father testified he did not want Respondent-Mother to be part of A.P.'s life due to allegations she harmed the child, and he did not want Respondent-Mother to have supervised visits.

¶ 11 On 16 February 2021, the trial court entered the permanency planning Order, which granted legal and physical custody of A.P. to Respondent-Father and awarded supervised visitation to Respondent-Mother every other weekend for a minimum of two hours, giving Respondent-Father discretion to choose the location and supervisor of the visitation. Respondent-Mother gave timely notice of appeal.

II. Jurisdiction

¶ 12 This Court has jurisdiction to address Respondent-Mother's appeal from the Order pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2019) and N.C. Gen. Stat. § 7B-1001(a)(4) (2019).

III. Issues

¶ 13 The issues before the Court are whether: (1) the trial court's findings of fact support its conclusion of law that DSS made reasonable efforts to unify and to eliminate the need for placement of the juvenile in light of Respondent-Mother's intellectual disability; (2) the trial court's finding of fact regarding DSS's reasonable efforts are supported by competent evidence; (3) the trial court made reasonable accommodations for Respondent-Mother, consistent with ADA and Section 504 requirements; (4) the trial court erred in allowing A.P.'s father to choose the place and supervisor of visitation; and (5) the trial court erred in waiving future reviews and informing all parties of their right to file a motion for review of the ordered visitation plan given Respondent-Mother's disability.

IV. Standard of Review

¶ 14 "Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) (citation omitted). "The trial court's findings of fact are conclusive on appeal if supported by any

competent evidence." *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013) (citation omitted).

V. Permanency Planning Order

¶ 15 On appeal, Respondent-Mother argues DSS failed to make the necessary accommodations for her under the ADA and Section 504 when making efforts to reunify and eliminate the need for placement of the juvenile outside the juvenile's own home. Specifically, Respondent-Mother asserts she "was entitled to reunification services specially tailored to accommodate her intellectual disability." For the reasons set forth below, we are unpersuaded by Respondent-Mother's arguments relating to the ADA and Section 504.

A. DSS's Compliance with the ADA and Section 504 when Making Reasonable Efforts

¶ 16 **[1]** The parties do not dispute Respondent-Mother has a disability within the meaning of the ADA and Section 504 and is a qualified individual with a disability eligible for protection under these statutes.

¶ 17 Section 504 and Title II of the ADA "protect parents and prospective parents with disabilities from unlawful discrimination in the administration of child welfare programs, activities, and services." U.S. Dep't Health & Human Servs. & U.S. Dep't Justice, Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, (Aug. 2015), https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html. The ADA provides: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination of any such entity." 42 U.S.C. § 12132. The ADA defines a "qualified individual with a disability" as

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131. Likewise, Section 504 provides: "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by

reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . ." 29 U.S.C. § 794(a).

1. Sufficiency of Conclusion regarding DSS's Reasonable Efforts

¶ 18 We first consider whether there are findings of fact to support the trial court's conclusion that DSS made reasonable efforts to prevent the need for placement of A.P. This Court has previously considered ADA protections afforded to parents in the context of the Juvenile Code. In *In re C.M.S.*, we addressed the issue of whether the ADA precludes the State from terminating parental rights of an intellectually disabled parent. 184 N.C. App. 488, 646 S.E.2d 592 (2007). After considering persuasive authority from other jurisdictions, we held the ADA does not prevent the State's termination of parental rights so long as the trial court made its statutorily required findings to show "the department of social services has made reasonable efforts to prevent the need for placement of the juvenile." *Id.* at 491–93, 646 S.E.2d at 594–95; *see also* N.C. Gen. Stat. § 7B-507(a)(2) (2019). Thus, when a department of social services, such as DSS in the instant case, satisfies this requirement, it complies with the ADA's mandate that individuals with disabilities be reasonably accommodated. *Id.* at 492–93, 646 S.E.2d at 595. We noted "Congress enacted the ADA to eliminate discrimination against people with disabilities and to create causes of action for qualified people who have faced discrimination. Congress did not intend to change the obligations imposed by unrelated statutes." *Id.* at 492, 646 S.E.2d at 595 (citations omitted).

¶ 19 We find the holding of *In re C.M.S.* on point in the case *sub judice*. *Id.* at 491, 646 S.E.2d at 594; *see also In re S.A.*, 256 N.C. App. 398, 806 S.E.2d 81 (2017) (unpublished) (rejecting a respondent-parent's argument that the trial court ignored the requirements of the ADA and Section 504 when it awarded custody of the juvenile to the child's father because the trial court made the proper findings under N.C. Gen. Stat. § 7B-507(a)(2) in its permanency planning order). Because the trial court in this case concluded "DSS has made reasonable efforts to reunify and to eliminate the need for placement of the juvenile," it necessarily complied with the ADA's directive that a parent not be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program." *See In re C.M.S.*, 184 N.C. App. at 492–93, 646 S.E.2d at 595; *see also* 42 U.S.C. § 12132. Additionally, we find this conclusion of law is supported by findings of fact 5, 6, and 8, which state:

5. [DSS] made reasonable efforts to reunify and to eliminate the need for placement of the juvenile outside of the juvenile's own home. Said efforts are as described in the social worker's report and prior court orders.

6. DSS has made reasonable efforts to identify an appropriate permanent plan for the juvenile. Said efforts are as described in the social worker's report and the prior court orders. DSS initiated DNA testing to determine paternity in this matter; approved [Respondent-Father's] home for placement; monitored [Respondent-Father's] trial home placement; made referrals for [Respondent-Mother] to complete her case; attempted to engage [Respondent-Mother] in services specifically recommended in the Parenting Assessment by Dr. Popper; attempted to monitor [Respondent-Mother's] compliance with her case plan and progress on completing the objectives in the Parenting Assessment.

. . . .

8. DSS attempted to enroll [Respondent-Mother] at the Thelma Smith Foundation in Salisbury to no avail. The Thelma Smith Foundation would provide training in domestic skills, help [Respondent-Mother] with transportation and employment, and provide [Respondent-Mother] with some level of independence. [Respondent-Mother] has continued to attend parenting classes and have her visits supervised by parenting skills teachers, yet she still is unable to consistently and properly change the juvenile's diaper and feed him.

¶ 20 The record and transcripts reveal DSS made reasonable efforts, consistent with Dr. Popper's recommendation, to assist Respondent-Mother with her supervised visits, mental health issues, parenting and home skills, and innovation services; thus, these findings of fact are supported by competent evidence.

2. Sufficiency of Factual Findings

¶ 21 Respondent-Mother next challenges findings of fact 6, 12, 13, and 15, on the ground these findings are unsupported by competent evidence. We disagree and consider each finding in turn.

a. Finding of Fact 6

¶ 22 Finding of fact 6 states in pertinent part, "[DSS] made referrals for [Respondent-Mother] to complete her case [and] attempted to engage [Respondent-Mother] in services specifically recommended in the Parenting Assessment by Dr. Popper . . . ."

¶ 23 As stated above, social worker Latoya Daniels and foster care supervisor Krista McMillan testified as to the services to which Respondent-Mother was referred including parenting coaching and classes, mental health services, supervised visitation, innovation services, and assisted living where Respondent-Mother could learn independent skills. These services were consistent with those recommended by Dr. Popper. We conclude finding of fact 6 is supported by competent evidence. *See In re J.C.S.*, 164 N.C. App. at 106, 595 S.E.2d at 161.

b. Finding of Fact 12

¶ 24 Finding of fact 12 states in pertinent part: "Respondent Mother is not making adequate progress within a reasonable period of time under the plan."

¶ 25 Respondent-Mother expressly declined mental health services and services to assist her in improving independent skills despite Dr. Popper's finding that she suffered from depression and anxiety, lacked basic parenting skills, and was unable to live independently. Additionally, social worker Latoya Daniels testified that DSS "had attempted to . . . assist [Respondent-Mother] to the best of [its] ability at this point" through Pharos parenting classes. Placing a diaper on the child, a basic skill, had been "cover[ed] for a significant amount of time." Therefore, Respondent-Mother's argument is without merit. We conclude there was competent evidence in the record to support finding of fact 12. *See In re J.C.S.*, 164 N.C. App. at 106, 595 S.E.2d at 161.

c. Finding of Fact 13

¶ 26 Finding of fact 13 states in pertinent part, "Respondent Mother is not actively participating in or cooperating with the plan, DSS, and the GAL for the juvenile."

¶ 27 Respondent-Mother argues finding of fact 13 is a conclusory finding not supported by the evidence. We disagree. The trial court determined

a fact of consequence, that Respondent-Mother had not actively participated in or cooperated with her case plan, DSS, and the guardian *ad litem* for the juvenile—and this finding is supported by competent evidence. The guardian *ad litem's* 20 January 2021 court report stated Respondent-Mother had not complied with DSS requests to maintain visits nor the court's orders to adhere to a case plan and was "combative on the topic of information flow" during the case review meeting. The guardian *ad litem* concluded Respondent-Mother "continues to have shown little growth in her ability to care for a child." The testimony of the social workers also supports this finding. Therefore, we conclude finding of fact 13 is supported by competent evidence. *See In re J.C.S.*, 164 N.C. App. at 106, 595 S.E.2d at 161.

d. Finding of Fact 15

¶ 28 Finding of fact 15 states in pertinent part, "The Court finds by clear and convincing evidence that the Respondent Mother is acting in a manner inconsistent with the health or safety of the juvenile."

¶ 29 In DSS's 20 January 2021 court summary prepared for the permanency planning hearing, it reported there were continuing "concerns regarding diaper changes and feedings." Additionally, Dr. Popper noted in his August 2020 assessment Respondent-Mother had not demonstrated skills needed to care for the juvenile child or herself and has a history of threatening self-harm. He further stated, "her limited cognitive resources, her lack of basic parenting skills, her emotional stability, and her inability to live independently are issues that impact her ability to safely and responsibly care for a young child at this time." We conclude finding of fact 15 is supported by competent evidence.

¶ 30 Although there may have been evidence to support findings to the contrary, we hold findings of fact 5, 6, 8, 12, 13, and 15 are "supported by . . . competent evidence," and therefore, are conclusive on appeal. *See In re L.M.T.*, 367 N.C. at 168, 752 S.E.2d at 455.

B. Adequacy of Services under the ADA

¶ 31 **[2]** Next, Respondent-Mother challenges the adequacy of services offered by DSS in its case plan and at the permanency planning hearing. DSS and the guardian *ad litem* for A.P. contend Respondent-Mother waived the issue of ADA compliance by DSS because she failed to challenge the adequacy of services before or during the permanency planning hearing. After careful review, we conclude Respondent-Mother waived her argument on this issue by failing to raise it in a timely manner after receiving services under her DSS case plan.

¶ 32 In the unpublished case of *In re S.A.*, our Court adopted the reasoning found in *In re Terry*, 240 Mich. App. 14, 27, 610 N.W.2d 563, 570–71 (2000) to hold the respondent-parent waived her argument as to adequacy of services offered by DSS. *In re S.A.*, 256 N.C. App. 398, 806 S.E.2d 81, 2017 N.C. App. LEXIS 906, at *6. We also cited to *In re Terry* as persuasive authority in our published case of *In re C.M.S.*, 184 N.C. App. at 492–93, 646 S.E.2d at 595, discussed *supra*. In *In re S.A.*, the respondent-parent did not participate in the services offered by DSS. *In re S.A.*, 256 N.C. App. 398, 806 S.E.2d 81, 2017 N.C. App. LEXIS 906, at *6–7. In holding the respondent-mother waived her argument on appeal, we reasoned that at no time did she object to the adequacy of the services being offered by DSS—neither before nor during the permanency planning hearing. *Id.* at *6.

¶ 33 Respondent-Mother attempts to distinguish *In re S.A.* from the instant case on the grounds the parent in *In re S.A.* "had a physical disability rather than an intellectual one." This argument is without merit. We are again persuaded by the Michigan Court of Appeals case of *In re Terry*. 240 Mich. App. at 26, 610 N.W.2d at 570. In *In re Terry*, the respondent-parent alleged she was a "qualified individual with a disability" as defined by the ADA because of her intellectual limitations. The court in *In re Terry* stated "[a]ny claim that the [social services agency] is violating the ADA must be raised in a timely manner . . . so that any reasonable accommodations can be made." 240 Mich. App. at 26, 610 N.W.2d at 570. Further, "[t]he time for asserting the need for accommodation in services is when the court adopts a service plan . . . ." *Id.* at 27, 610 N.W.2d at 571. The *In re Terry* court concluded that the respondent-parent's challenge of the accommodations in the closing argument of the termination of parental rights proceeding was "too late . . . to raise the issue." *Id.* at 27, 610 N.W.2d at 570–71.

¶ 34 Here, Respondent-Mother, like the mothers in *In re S.A.* and *In re Terry*, cannot show she raised an issue regarding the adequacy of services provided by DSS before or during the permanency planning hearing; therefore, we hold Respondent-Mother waived her argument by raising it for the first time on appeal. *See In re S.A.*, 256 N.C. App. 398, 806 S.E.2d 81, 2017 N.C. App. LEXIS 906, at *6; *In re Terry*, 240 Mich. App. at 27, 610 N.W.2d at 570–71.

C. Visitation Order

¶ 35 **[3]** In her next argument, Respondent-Mother maintains the trial court's visitation order "was not an adequate accommodation for an individual with an intellectual disability" because it gave A.P.'s father and

custodian too much discretion by allowing him to choose the place and the supervisor of visitation. She contends "this Court should remand the dispositional order for entry of an order that grants [her] appropriate visitation at a consistent location, to be supervised by a neutral third party." In light of our case precedent, we agree the trial court improperly gave Respondent-Father substantial discretion to choose the location and supervisor for Respondent-Mother's visitation; however, we reject Respondent-Mother's contention that the visitation order did not provide her with reasonable accommodations, because she failed to provide any support for that argument. *See* N.C. R. App. P. 28(b)(6) ("The body of the argument . . . shall contain citations of the authorities upon which appellant relies.").

¶ 36 We review visitation determinations for abuse of discretion. *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007). "When reviewing for abuse of discretion, we defer to the trial court's judgment and overturn it only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *In re K.W.*, 272 N.C. App. 487, 495, 846 S.E.2d 584, 590 (2020) (citation omitted).

¶ 37 In decree 3 of the Order, the trial court mandated in pertinent part:

> The Respondent Mother shall be entitled to visit with the juvenile for a minimum of two hours every other weekend. These visits shall be supervised by [Respondent Father] or someone he approves. If the visiting Respondent Parent and the custodial Respondent Parent cannot agree regarding the specifics, visits shall take place from Noon-2pm at allocation [sic] [Respondent Father] chooses. [Respondent Father] shall arrange transportation for the juvenile to and from visits. Additionally, [Respondent Mother] shall be entitled to visitation of two hours surrounding major holidays such as Thanksgiving and Christmas. The Parents may agree on different times, locations, and frequency of visits if they desire.

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

> (a) An order that removes custody of a juvenile from a parent . . . shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation."
>
> . . . .

> (c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, *any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised.* The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1(a), (c) (2019) (emphasis added).

¶ 39 We stated in *In re Custody of Stancil*:

> When the custody of a child is awarded by the court, it is the exercise of a judicial function. [N.C. Gen. Stat. §] 50-13.2. In like manner, when visitation rights are awarded, it is the exercise of a judicial function. We do not think that the exercise of this judicial function may be properly delegated by the court to the custodian of the child. Usually those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian.

10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971).

¶ 40 Here, the Order specified the minimum frequency—every other weekend—as well as the length of visits—two hours. Furthermore, the Order specified that the visits shall be supervised. Therefore, the Order met the minimum requirements for a visitation plan under N.C. Gen. Stat. § 7B-905.1.

¶ 41 Nevertheless, Respondent-Mother cites to *In re C.S.L.B.*, 254 N.C. App. 395, 400, 829 S.E.2d 492, 495 (2017) and *In re J.D.R.*, 239 N.C. App. 63, 75–76, 768 S.E.2d 172, 180 (2015) in arguing that the visitation plan in the Order must be reversed because it gives Respondent-Father too much discretion over her visits.

¶ 42 In *In re C.S.L.B.*, this Court vacated a visitation order because it "improperly delegate[d] the court's judicial function to the guardians by allowing them to unilaterally modify [r]espondent-mother's visitation" by deciding if there was a "concern" she was using substances. 254 N.C.

App. at 400, 829 S.E.2d at 495. In *In re J.D.R.*, we concluded the visitation plan "delegate[d] to [the respondent-father] substantial discretion over the kinds of visitation" the respondent-mother would receive. 239 N.C. App. at 75, 768 S.E.2d. at 179. Additionally, the order placed conditions on the respondent-mother's visitation rights and gave respondent-father discretion to decide whether the respondent-mother "complied with the trial court's directives." *Id.* at 75, 768 S.E.2d at 179.

¶ 43 After careful review, we agree the trial court improperly gave Respondent-Father substantial discretion over the circumstances of Respondent-Mother's visitation by allowing him to choose the location and supervisor of the visitation. *See In re J.D.R.*, 239 N.C. App. at 75, 768 S.E.2d at 179 (concluding the trial court's "disposition order delegates to [respondent-father] substantial discretion over [some] kinds of visitation" by allowing him to determine whether the respondent-mother could eat lunch with the minor child at his school); *In re K.W.*, 272 N.C. App. at 496, 846 S.E.2d at 591 ("We have consistently held that [t]he court may not delegate [its grant of] authority [over visitation] to the custodian.") (internal quotation marks omitted). Moreover, Respondent-Father testified he was not willing to facilitate or supervise Respondent-Mother's visits and did not want Respondent-Mother to be part of A.P.'s life. This is precisely the scenario we cautioned against in *Stancil*: the trial court's grant of authority to a custodian-parent to decide the circumstances of the other parent's visitation plan, which could completely deny that parent of his or her right to visit with the minor child. *See In re Custody of Stancil*, 10 N.C. App. at 552, 179 S.E.2d at 849. Therefore, we hold the trial court's visitation order improperly delegated a judicial function to Respondent-Father by allowing him the sole discretion to decide where and by whom Respondent-Mother would be supervised during her visitations with the minor child. We vacate the visitation order and remand to the trial court for a proper visitation plan.

D. Future Review Hearings

¶ 44 **[4]** In her final argument, Respondent-Mother asserts the trial court erred by waiving further review hearings pursuant to N.C. Gen. Stat. § 7B-906.1 because such a result "does not comport with fundamental fairness, the ADA, or A.P.'s best interest." She further contends the trial court erred by "[m]erely informing" the parties of their right to file a motion for review of the visitation plan by notifying the parties in writing in the Order. As such, Respondent-Mother argues the Order should be remanded to require regular review hearings and continuous appointment of a guardian *ad litem* for Respondent-Mother for the pendency of the juvenile proceeding. We disagree.

¶ 45 N.C. Gen. Stat. § 7B-906.1(k) provides: "[i]f at any time a juvenile has been removed from a parent and legal custody is awarded to either parent . . ., the court shall be relieved of the duty to conduct periodic judicial reviews of the placement." N.C. Gen. Stat. § 7B-906.1(k) (2019). N.C. Gen. Stat. § 7B-905.1(d) states "[i]f the court waives permanency planning hearings and retains jurisdiction, all parties shall be informed of the right to file a motion for review of any visitation plan entered pursuant to this section." N.C. Gen. Stat. § 7B-905.1(d) (2019).

¶ 46 Here, the trial court stated in its visitation decree of the Order that "[a]ll parties are informed of the right to file a motion for review of this visitation plan. Upon motion of any party and after proper notice and a hearing, the Court may establish, modify, or enforce a visitation plan that is in the juvenile's best interest." It also retained jurisdiction and notified the parties that "no further regular review hearings [are] scheduled" after awarding legal custody to Respondent-Father.

¶ 47 In *In re C.M.S.* we adopted the rule followed by a majority of jurisdictions that "termination proceedings are not 'services, programs or activities' under the ADA." 184 N.C. App. at 491, 646 S.E.2d at 595 (citations omitted); *see* 42 U.S.C. § 12132. Similarly, we conclude abuse, neglect, and dependency proceedings are not "services, programs or activities" within the meaning of the ADA, and therefore, the ADA does not create special obligations in such child protection proceedings. *See In re Joseph W.*, 305 Conn. 633, 651, 46 A.3d 59, 69–70 (2012) (stating the ADA does not act as a defense or create special obligations in neglect proceedings); *M.C. v. Dep't of Child. & Families*, 750 So. 2d 705 (Fla. Dist. Ct. App. 2000) (explaining dependency proceedings are held for the benefit of the child rather than the parents; thus, parents may not assert the ADA as a defense in such a proceeding); 42 U.S.C. § 12132.

¶ 48 We hold the trial court met the statutory requirements set out in N.C. Gen. Stat. § 7B-906.1(k) and N.C. Gen. Stat. § 7B-905.1(d), and the ADA did not "change the obligations imposed by [these] unrelated statutes." *See In re C.M.S.*, at 492, 646 S.E.2d at 595.

VI. Conclusion

¶ 49 We affirm the Order in part because the trial court's findings of fact are supported by competent evidence, and the findings of fact in turn support its conclusions of law. We hold Respondent-Mother waived her argument regarding the adequacy of services provided by DSS by raising the issue for the first time on appeal. We vacate the visitation portion of the Order and remand for entry of an order prescribing a proper visitation plan, because the court's order on visitation gives

Respondent-Father substantial discretion to decide the circumstances of Respondent-Mother's visits. Finally, we hold the trial court met the statutory requirements imposed by N.C. Gen. Stat. § 7B-906.1(k) and N.C. Gen. Stat. § 7B-905.1(d), and the ADA does not expand the trial court's obligations to Respondent-Mother under those sections.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges INMAN and ZACHARY concur.

WENDY MONROE, EMPLOYEE, PLAINTIFF
v.
MV TRANSPORTATION, EMPLOYER, SELF-INSURED
(BROADSPIRE, THIRD-PARTY ADMINISTRATOR) DEFENDANT

No. COA21-316

Filed 18 January 2022

Workers' Compensation—disability—futility of seeking employment—evidentiary burden—improper conclusion

After plaintiff's workplace injury, the Industrial Commission erred by concluding that plaintiff presented no evidence of disability and by failing to consider whether the evidence she did present established the futility of seeking other employment due to preexisting conditions. Plaintiff's evidence showed she was in her fifties; had been receiving Social Security disability benefits for an unrelated medical condition for several decades; was working a part-time job earning less than the minimum wage at the time she was injured (despite having a bachelor's degree); and, after her injury, had several work restrictions and suffered from persistent pain, culminating in a need for knee surgery. Notably, the Commission made no findings regarding evidence of plaintiff's medical records in which multiple medical providers described her post-injury "work status" as "unable to work secondary to dysfunction."

Appeal by plaintiff from opinion and award entered 3 March 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 December 2021.

The Sumwalt Group, by Vernon Sumwalt and Christa Sumwalt, for plaintiff-appellant.

Wilson Ratledge, PLLC, by Kristine L. Prati, for defendant-appellee.

ARROWOOD, Judge.

¶ 1 Wendy Monroe ("plaintiff") appeals from the North Carolina Industrial Commission's (the "Commission") opinion and award concluding plaintiff had not satisfied her burden of proof to establish that she was entitled to disability benefits. For the following reasons, we vacate the Commission's opinion and remand for additional findings.

I. Background

¶ 2 Plaintiff began working for MV Transportation ("defendant-employer") in April 2016 as a part-time dispatcher and bus driver, where she earned $10.50 per hour. At the time, plaintiff was in her late forties, had a bachelor's degree, and had been receiving Social Security disability benefits since 1994 for an unrelated medical condition.[1]

¶ 3 Around 5:00 a.m. on 4 November 2016, plaintiff was performing a routine bus inspection. While checking the emergency windows, plaintiff "placed her left knee and part of her body weight on [a] bus seat and leaned towards the windows." Because the floor of the bus was wet and slippery, when plaintiff "stepped back with her right foot to reenter the bus aisle, she lost her footing, hit her left shin, and twisted her back and right knee." Plaintiff was able to catch herself, but "ended up leaning slightly backwards in an awkward position, with her left knee still on the seat."

¶ 4 Initially, plaintiff did not report the incident as she thought she had merely lightly injured her shin. However, "[w]ithin an hour" of the incident, plaintiff noticed "back pain, left shin pain, and pain in both her knees[,]" all of which interfered with her work. Thereafter, plaintiff reported the injury to her supervisor, who instructed plaintiff to seek treatment at "Med First Immediate Care and Family Practice."

¶ 5 Plaintiff made multiple visits to Med First Immediate Care and Family Practice. Plaintiff complained of pain in her lower back and knees; x-rays were performed on her lumbar spine, which "showed spondylosis," and on her knees, which "were both negative." On 7 November 2016, plaintiff "attempted to work, but had so much pain and difficulty that she returned to Med First" and was referred to the emergency room. Plaintiff received various restrictions for her work, including, among

1. Plaintiff had been diagnosed with having PTSD.

others, alternating between sitting and standing, and avoiding lifting over 20 pounds. On a few occasions, plaintiff tried returning to work; however, she continued to experience pain and was ultimately relieved by her supervisor on 15 November 2016. After that, plaintiff never returned to work.

¶ 6 For the three years that followed, plaintiff attended many medical appointments, throughout which she was given multiple referrals, as well as physical therapy and injection therapy to manage her persistent pain. Particularly, an MRI of her right knee performed 15 February 2018 revealed "complete cartilage loss in the medial compartment and a root tear avulsion of the posterior horn of the medial meniscus." On 14 January 2019, plaintiff "presented with severe progressive right knee pain[,]" which she found at times intolerable, and "walked with a limp"; at this point, a doctor deemed plaintiff "an appropriate candidate for a right total knee arthroplasty."

¶ 7 After seeking opinions regarding partial knee replacement surgery versus a full knee replacement, plaintiff "was scheduled for a partial knee replacement on March 21, 2019, but . . . had to reschedule it because of the availability of a home health care nurse." The surgery was then scheduled for 11 April 2018; however, due to a "miscommunication" and "complication with one of her medications," the surgery was canceled.

¶ 8 Plaintiff's claim, which was originally denied, was ultimately heard before Deputy Commissioner Lori A. Gaines (the "Deputy Commissioner") on 14 June 2019. At that time, "[p]laintiff was waiting to schedule the partial knee replacement surgery."

¶ 9 At the hearing, plaintiff introduced as her exhibits, among other things, medical records pertaining to her injury. Many of these medical records showed that multiple medical providers described plaintiff's "work status" following her injury as: "Unable to work secondary to dysfunction." After the hearing, "the parties took depositions of Dr. Arlene Hallegado, Stephen Free, PA-C, and Dr. Robert Boswell." During their respective depositions, all three medical professionals opined that they would have recommended work restrictions for plaintiff as a result of her injury and ongoing treatment.

¶ 10 In an opinion and award filed 7 February 2020, the Deputy Commissioner concluded that plaintiff had proven her injury was caused by an accident, and, "[b]ased upon a preponderance of the evidence in view of the entire record, . . . that [p]laintiff ha[d] proven a causal connection between her November 4, 2016 work-related accident and the

injuries to her low back and right knee." Then, the Deputy Commissioner found that "[f]rom November 7, 2016 to November 14, 2016 until her release to limited duty with restrictions, [p]laintiff was written entirely out of work." "Therefore," the Deputy Commissioner concluded that plaintiff had "met her burden of proving disability for that period of time."

¶ 11 The Deputy Commissioner continued:

> Plaintiff was given limited duty restrictions on November 11, 2016 but was not written out of work after that date. However, in order to determine Plaintiff's loss of wage-earning capacity, the Commission must take into account the significant restrictions Plaintiff has been provided, her age, her work history, her ongoing back and right knee pain, and her education . . . . Taking these factors into account, the undersigned concludes that because of her compensable injuries, Plaintiff has been unable to earn wages in the same or similar employment, and therefore she *is entitled to total disability compensation* beginning November 15, 2016, and continuing until she returns to work, until further order of the Industrial Commission, or until compensation is otherwise legally terminated.

(Emphasis added.) Then, the Deputy Commissioner concluded that plaintiff was "entitled to medical compensation for such treatment as is reasonably necessary to effect a cure, provide relief, or lessen the period of disability associated with [her] conditions related to the November 4, 2016 injuries."

¶ 12 The Deputy Commissioner awarded plaintiff the following: that defendant-employer "shall pay temporary total disability compensation to plaintiff at the rate of $131.24 per week[2] for the period from November 15, 2016 and continuing until plaintiff returns to work or further order of the Commission, [and] any amounts having accrued shall be paid in lump sum"; that plaintiff was entitled to have defendant-employer "provide all medical treatment, incurred or to be incurred, necessitated by the compensable 4 November 2016 injuries by accident, including but not limited to the proposed surgery for plaintiff's right knee

2. This monetary amount was consistent with plaintiff's weekly compensation rate of $131.24, derived from her average weekly wage of $196.86 while employed by defendant-employer.

replacement surgery"; and "[a] reasonable attorney's fee in the amount of twenty-five percent . . . ."

¶ 13 Defendant filed notice of appeal on 10 February 2020 to the Full Commission. The appeal was heard on 21 July 2020.

¶ 14 In an Opinion and Award filed 3 March 2021, the Commission found, among other things, that plaintiff was 51 years old at the time of the second hearing, had begun working for defendant-employer in 2016 as a part-time dispatcher and bus driver, where she earned $10.50 per hour, and had been receiving Social Security disability benefits for an unrelated medical condition since 1994.

¶ 15 The Commission found that, on 4 November 2016, plaintiff incurred an injury as described before the Deputy Commissioner, as a result of which plaintiff received work restrictions. Plaintiff had returned to work on 15 November 2016, but was relieved by her supervisor due to pain; thereafter, she never worked again. The Commission also found that, between November 2016 and November 2019, plaintiff underwent multiple medical examinations with multiple doctors, which included MRIs, physical therapy, injection therapy, referrals, use of a knee brace, and recommendations for surgery.

¶ 16 The Commission found that, at the time of the hearing, plaintiff had not yet undergone surgery "for various reasons, including a complication with her medications and a miscommunication with scheduling," but intended to do so. The Commission also found plaintiff had not looked for work, or "worked in any capacity," since 15 November 2016. The Commission made no findings pertaining to the medical records included in plaintiff's exhibits regarding plaintiff's work status as being described as "[u]nable to work secondary to dysfunction."

¶ 17 Then, the Commission found, "[b]ased upon the preponderance of the evidence in view of the entire record," that plaintiff's "low back and right knee conditions and current need for treatment [we]re causally related to her incident at work on November 4, 2016." It further found that plaintiff's "treatment for her low back and right knee conditions, and her need for additional treatment, [were] reasonably necessary to effect a cure or provide relief of [her] conditions." The Commission then found that, although plaintiff "ha[d] some work restrictions related to her low back and right knee conditions[,] . . . she is not restricted from all work."

¶ 18 The Commission concluded plaintiff's 4 November 2016 incident constituted an "accident" under North Carolina law, and that plaintiff had "met her burden of proving a causal relationship between her

medical conditions and the accident." Thus, "plaintiff [wa]s entitled to payment of medical treatment for her right knee and low back conditions, including pain management for her low back and orthopedic treatment for her right knee, for so long as such treatment is reasonably necessary to either effect a cure or provide relief."

¶ 19 Next, the Commission addressed the issue of whether plaintiff had met her burden of proving she had a disability as a result of her injuries. The Commission stated: "The burden of proof rests with [p]laintiff to establish disability as a result of her compensable injury." Then, citing *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982), it continued: "To satisfy this burden, [p]laintiff must show that, due to her compensable injury, she is incapable of earning her pre-injury wages in her pre-injury job or any other form of employment."

¶ 20 The Commission listed the following four factors, as provided by *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (the "*Russell* factors") as what plaintiff may use "to establish disability":

> (1) the production of medical evidence that [plaintiff] is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that [s]he is capable of some work, but that [s]he has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment; (3) the production of evidence that [s]he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that [s]he has obtained other employment at a wage less than that earned prior to the injury.

(Alterations in original.) Then, however, the Commission followed this by stating: "The *Russell* factors are not exhaustive and do not preclude the Commission from considering other means of satisfying the ultimate standard of disability set forth in *Hilliard*."

¶ 21 The Commission found that plaintiff "failed to establish that she conducted a reasonable job search after she was placed on unpaid medical leave by Defendant-Employer," "ha[d] not worked in any other employment since November 15, 2016, and . . . *has not otherwise presented evidence to establish disability*." (Emphasis

added.) Accordingly, the Commission concluded that plaintiff "was not entitled to disability compensation."

¶ 22 The Commission awarded plaintiff that defendant-employer "pay for all medical treatment incurred or to be incurred for [p]laintiff's compensable right knee and low back conditions . . . for so long as such treatment is reasonably necessary to either effect a cure or provide relief." Then, the Commission denied "plaintiff's claim for temporary total disability compensation[,]" as well as plaintiff's request for attorney's fees and defendant-employer's motion to dismiss.

¶ 23 Plaintiff filed written notice of appeal on 29 March 2021.

II. Discussion

¶ 24 "Our review of an opinion and award of the Commission is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Griffin v. Absolute Fire Control, Inc.*, 269 N.C. App. 193, 198, 837 S.E.2d 420, 424 (2020) (citation and quotation marks omitted), *discretionary review improvidently allowed*, 376 N.C. 727, 2021-NCSC-9. "The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is evidence to support a contrary finding." *Id.* (citation and quotation marks omitted). "The Commission's conclusions of law are reviewed *de novo*." *Id.*, 837 S.E.2d at 425 (citation omitted).

¶ 25 Plaintiff argues the Commission's findings of fact are insufficient to support, and for this Court to review, the conclusion that plaintiff did not meet her burden of proving disability. Specifically, plaintiff argues "the entire record contains evidence of the futility of making [plaintiff] look for work[,] considering her restrictions from the injury combined with preexisting factors unrelated to the injury[,] under the third *Russell* method." Accordingly, plaintiff requests this Court to remand to the Commission for further findings of fact. We agree.

¶ 26 "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2021). "Under *Russell*," specifically the third *Russell* factor, "an employee may meet h[er] burden of proving disability by showing 'the employee is capable of some work, but that it would be *futile* because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment.' " *Griffin*, 269 N.C. App. at 202, 837 S.E.2d at 427 (emphasis added) (quoting *Russell*, 108 N.C. App. at 766, 425 S.E.2d at 457).

¶ 27 In *Griffin*, we reviewed the Commission's opinion and award in which it had found as fact that the plaintiff in question was 49 years old, had a ninth-grade education, had worked "primarily in the construction industry building houses or as a pipefitter[,]" had been assigned "permanent restrictions of no lifting more than twenty pounds, alternate sitting and standing, no bending, and to wear a brace while working[,]" and at times had needed to "leave work because of increased pain." *Id.* at 203, 837 S.E.2d at 427-28. Then, in the same award and order, the Commission, "[b]ased upon a preponderance of the evidence in view of the entire record," concluded that the plaintiff had not shown he was disabled, because "[*n*]*o evidence* was presented that [the] [p]laintiff [wa]s capable of some work, but that seeking work would be futile because of preexisting conditions, such as age, inexperience, or lack of education . . . ." *Id.*, 837 S.E.2d at 427 (emphasis added).

¶ 28 This Court made note of the discord between the Commission's findings of fact and its conclusion, stating: "It is unclear how the Commission concluded that [the] [p]laintiff presented 'no evidence' on futility given its findings reflect factors our appellate courts have found to support a finding of futility." *Id.*, 837 S.E.2d at 428.

¶ 29 In fact, in *Griffin*, this Court listed a myriad of examples of cases in which our appellate courts have previously found evidence tending to prove a plaintiff's disability by way of futility under *Russell*, including: *Thompson v. Carolina Cabinet Co.*, 223 N.C. App. 352, 734 S.E.2d 125 (2012), in which the plaintiff in question "was 45 years old, had only completed high school, [had] work experience . . . limited to heavy labor jobs, and . . . was restricted to lifting no more than 15 pounds"; *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 656 S.E.2d 608 (2008), in which an "effort to obtain sedentary light-duty employment, consistent with doctor's restrictions, would have been futile given [the] plaintiff's limited education, limited experience, limited training, and poor health"; and *Weatherford v. Am. Nat'l Can Co.*, 168 N.C. App. 377, 607 S.E.2d 348 (2005), in which the plaintiff in question "was 61, had only a GED, had worked all of his life in maintenance positions, was suffering from severe pain in his knee, and was restricted from repetitive bending, stooping, squatting, or walking for more than a few minutes at a time." *Griffin*, 269 N.C. App. at 202, 837 S.E.2d at 427.

¶ 30 In *Griffin*, this Court concluded that "the Commission's conclusion that there was no evidence to support [the] [p]laintiff's claim of futility reflects a misapplication of the governing precedent and is undermined by its own findings (or lack thereof)." *Id.* at 204, 837 S.E.2d at 428. Accordingly, we reversed and remanded the opinion in part "for

additional findings as to whether [the] [p]laintiff made a showing of disability[,] since the only factual findings in the record [we]re consistent with a conclusion of disability under the futility method from *Russell*." *Id.* at 207, 837 S.E.2d at 430.

¶ 31 Plaintiff's case is analogous. Plaintiff introduced the following evidence of "preexisting conditions" before the Commission: that she was in her fifties at the time the hearings began, had been receiving Social Security disability benefits unrelated to the incident in question for several decades, and, in spite of her bachelor's degree, was working a part-time job in transportation earning $10.50 per hour, equivalent to less than minimum wage. *See id.* at 202, 837 S.E.2d at 427 (quoting *Russell*, 108 N.C. App. at 766, 425 S.E.2d at 457).

¶ 32 The record also reflects that, after incurring her injury, from November 2016 through November 2019, plaintiff received work restrictions, including to alternate between sitting and standing, to limit stooping, bending, and twisting, and to avoid lifting more than 20 pounds. Then, plaintiff underwent innumerable medical evaluations and procedures, including MRIs, referrals, physical therapy, injections, and the use of a brace, culminating in a need for surgery. Furthermore, plaintiff continued to suffer persistent and worsening pain, with her knee frequently giving way.

¶ 33 Despite the Commission considering all of the above as findings of fact, it concluded that plaintiff had "*not otherwise presented evidence to establish disability*." (Emphasis added.) Moreover, the Commission made no findings whatsoever regarding plaintiff's exhibits containing copies of medical records in which plaintiff's "work status" following her injury was labeled as "[u]nable to work secondary to dysfunction."

¶ 34 The Commission's conclusion that plaintiff presented no evidence of disability ignores the evidence plaintiff actually introduced during both hearings. In addition to this mistake, the Commission failed to consider whether plaintiff had, under *Russell*, met her burden of establishing her disability by showing that, though she was capable of some work following her injury, it would be futile to seek other employment at the time due to preexisting conditions, such as age, inexperience, lack of education, or a previous disability. *See Griffin*, 269 N.C. App. at 202, 837 S.E.2d at 427 (quoting *Russell*, 108 N.C. App. at 766, 425 S.E.2d at 457).

¶ 35 "[G]iven its findings reflect factors our appellate courts have found to support a finding of futility[,]" and the fact that the Commission itself cited the futility method under *Russell* as a means by which a plaintiff may show disability, we are unable to reconcile the Commission's

findings, "or lack thereof[,]" to its conclusion that plaintiff failed to present *any* evidence showing disability. *See id.* at 203-204, 837 S.E.2d at 428. Accordingly, we must vacate the opinion and award and remand for additional findings as to whether, under *Russell*, the evidence plaintiff presented is sufficient to establish disability by way of futility. *See id.* at 207, 837 S.E.2d at 430.

III. Conclusion

¶ 36 We vacate and remand to the Commission to make further findings under the *Russell* tests.

VACATED AND REMANDED.

Judges INMAN and HAMPSON concur.

DONNA SPLAWN SPROUSE, Employee, Plaintiff
v.
TURNER TRUCKING COMPANY, Employer, and ACCIDENT FUND GENERAL INSURANCE COMPANY, Carrier, Defendants

No. COA20-874

Filed 18 January 2022

Workers' Compensation—lack of written notice of injury—delay in treatment—excuse—prejudice

Where plaintiff-employee was injured in a serious accident while driving a tractor trailer for defendant-employer, and more than a year later underwent corrective spinal surgery—without first providing written notice of her injury or treatment to defendant—the opinion and award entered by the Industrial Commission in plaintiff's favor was reversed. The Commission's conclusion that plaintiff's condition was causally related to her work accident was not supported by the findings of fact (plaintiff had a pre-existing back condition); plaintiff failed to show a reasonable excuse for failing to timely notify defendant of her injury and failed to show that defendants were not thereby prejudiced; and the date of disability determined by the Commission was unsupported by the findings of fact (it should have begun the date the doctor recommended that she stop working).

Judge JACKSON dissenting.

Appeal by defendants from opinion and award entered 10 September 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 September 2021.

Roberts Law Firm, P.A., by Scott W. Roberts, for plaintiff-appellee.

Holder Padgett Littlejohn + Prickett, LLC, by Laura L. Carter, for defendants-appellants.

TYSON, Judge.

I. Background

¶ 1 Donna Sprouse ("Plaintiff") has been employed as a long-haul tractor trailer driver by the Mary B. Turner Trucking Company, LLC ("Defendant-Employer") for more than 18 years. The Accident Fund General Insurance Company ("Defendant Carrier") provides workers compensation coverage for Defendant-Employer (together "Defendants"). Plaintiff's husband ("Mr. Sprouse") is also employed by Defendant-Employer.

¶ 2 On 24 September 2016, Plaintiff was driving a tractor trailer for Defendant-Employer when the front right tire suddenly blew out. The tractor trailer crashed into an embankment on the side of the road. The truck remained upright, while the trailer turned onto its side. Plaintiff's head was severely jerked in the crash and her glasses and headset flew off. Mr. Sprouse, who was also inside the truck, suffered a foot and shoulder injury. Mr. Sprouse underwent shoulder surgery after the accident, and neither Plaintiff nor Mr. Sprouse worked from 24 September 2016 to January 2017. Plaintiff verbally notified Defendant of the accident the day it happened.

¶ 3 Plaintiff experienced pain and soreness and visited, E. Gantt, ANP-C ("Nurse Gantt"), two days after the accident. Plaintiff reported all-over soreness, but particularly in her neck and back, muscle spasms from her mid to low back, and pain in her right buttock down to her foot. Nurse Gantt prescribed Plaintiff an anti-inflammatory and muscle relaxer for her pain. On 13 October 2016, Plaintiff presented for a follow-up appointment with Nurse Gantt and appeared to be improving. Plaintiff testified that she was still experiencing neck, shoulder, and leg pain at that time. Plaintiff did not provide written notice of her injury by accident to Defendant or that she was seeking or undergoing medical treatment.

¶ 4 Plaintiff's pain continued to worsen after the 13 October appointment. Plaintiff's history of intermittent sciatica had never caused her to miss significant time at work prior to the accident. Plaintiff did not complain to Nurse Gantt about experiencing pain at her 26 January 2017, 13 February 2017, or 18 May 2017 appointments. Plaintiff testified she believed the pain was caused by her history of sciatica and was unrelated to the work accident.

¶ 5 On or about 28 September 2017, approximately about one year following the accident, Plaintiff presented for another appointment with Nurse Gantt. Plaintiff complained of constant weakness in her arms, with a numbness and tingling sensation in her fingers and reported persistent pain in her cervical and lumbar spine. Nurse Gantt believed Plaintiff's symptoms resembled cervical pain and acute left lumbar radiculopathy and she referred Plaintiff for a lumbar and cervical spine MRI. Plaintiff stopped working after this appointment and filed for short-term and long-term disability. This disability she filed for in September 2017 was apparently unrelated to the one at issue in this case. The Commission found Plaintiff was unable to work from 28 September 2017 until 21 April 2018 when she returned to work for Defendant.

¶ 6 On 29 November 2017, Plaintiff returned to Nurse Gantt and reported the same cervical and lumbar pain, in addition to her dragging her leg when walking. An MRI of Plaintiff's lumbar spine, taken on 7 December 2017, exhibited spinal stenosis. Plaintiff reported that she had fallen twice since her last visit because her leg gave way at a follow-up appointment. Nurse Gantt referred Plaintiff to Dr. M.J. McGirt, a neurosurgeon and practitioner in spinal neurosurgery. Defendants were not aware of any of these complaints or treatments, nor of Nurse Gantt's referral to Dr. McGirt.

¶ 7 Plaintiff presented to Dr. McGirt on 27 December 2017. Dr. McGirt recommended and referred her for another MRI of Plaintiff's cervical spine, suspecting cervical stenosis after a physical examination. On 8 January 2018, Plaintiff's cervical MRI showed multiple spinal disc extrusions, and spinal abnormalities including neural foraminal stenosis. Defendants were not informed of this treatment or referral.

¶ 8 On 10 January 2018, Dr. McGirt explained the MRI results to Plaintiff and recommended corrective surgery. He noted Plaintiff "definitely has myelopathy with weakness in her hands[,] numbness in her hands[,] dropping things[,] and significant gait abnormalities all which progressed over the last year." Dr. McGirt opined Plaintiff's

symptoms would worsen without surgery, given the severity of her spinal cord condition.

¶ 9 On 12 February 2018, Dr. McGirt performed a two-level anterior cervical discectomy and fusion on Plaintiff and removed "two large, herniated discs which had herniated back and compressed the spinal cord." He "rebuilt that by putting in two cages and some screws and a plate to hold that together for the two-level fusion." The surgery was successful. At Plaintiff's 17 April 2018 check up with Dr. McGirt, she felt stronger and reported no neck pain. Dr. McGirt released Plaintiff from her work restrictions, and on 21 April 2018, Plaintiff returned to work with Defendant-Employer.

¶ 10 Plaintiff submitted a post-surgical claim for her asserted work injury to Defendant-Carrier on 20 February 2018, while she was recovering from her spinal surgery. She told the adjuster she did not report an injury following the 24 September 2016 accident because she did not believe her injuries were that serious and presumed her claim would be dropped at that time.

¶ 11 Deputy Commissioner A.W. Bruce filed an Opinion and Award in favor of Plaintiff on 22 May 2019. Defendants appealed. After hearing the parties' arguments on 15 October 2019, the Full Commission entered an Opinion and Award affirming Deputy Commissioner Bruce's decision. The Commission made the following relevant findings of fact:

> 21. At his deposition, Dr. McGirt testified that the symptoms documented in Plaintiff's medical records prior to September 24, 2016, were different from neurological dysfunction and loss of function (i.e. "weaknesses and numbness") for which he treated Plaintiff. Dr. McGirt further opined that it was more likely than not that the September 24, 2016 tractor trailer wreck caused the two levels of herniated discs in Plaintiff's spine and that the herniations necessitated the surgery he performed. . . .
>
> 22. According to Dr. McGirt, Plaintiff was "pretty tough because . . . she had some pretty darn significant weakness that she was not coming in and screaming nor did we have a long drawn out workers [sic] comp conversation nor a causation conversation." Dr. McGirt further testified that "she didn't realize that she had a spinal cord issue" and that such

> a delay in symptoms is not "out of the realm of what we typically see in spinal cord compression."
>
> 23. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff sustained an injury by accident arising out of and in the course of her employment with Defendant-Employer when she was injured in the wreck of September 24, 2016. . . .
>
> 24. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds the medical treatment Plaintiff received from Dr. McGirt was reasonable and necessary to effect a cure, give relief, and lessen the period of disability from the cervical spine injury Plaintiff sustained on September 24, 2016.
>
> 25. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff was unable to work from September 28, 2017 until April 21, 2018, the date she returned to work for Defendants.

¶ 12 The Commission concluded: (1) Plaintiff's injury was caused by the September 2016 accident; (2) Plaintiff had reasonable excuse for her delayed written notice; (3) Defendants were not prejudiced by the delay; and, (4) Plaintiff was temporarily totally disabled from 28 September 2017 to 21 April 2018. The Commission made the following specific conclusions of law:

> 2. . . . the greater weight of the credible evidence establishes that Plaintiff's cervical spine injury was caused by Plaintiff's September 24, 2016 work accident. N.C. Gen. Stat. § 97-2(6) (2019).
>
> . . .
>
> 4. . . . Plaintiff had reasonable excuse for not providing written notice within 30 days because Plaintiff communicated with her employer on the date of the accident and because she did not reasonably know of the nature or seriousness of her injury immediately following the accident.
>
> 5. . . . Defendants have failed to show prejudice resulting from the delay in receiving written notice because

> Defendant-Employer had actual, immediate notice of Plaintiff's accident on the day of the accident. The actual notice provided to Defendant-Employer allowed ample opportunity to investigate Plaintiff's condition following the violent truck accident and direct Plaintiff's medical care. Thus, Defendants were not prejudiced by the delay in receiving written notice. Because Plaintiff has shown a "reasonable excuse" for not providing written notice of her accident to Defendants within 30 days, and because the evidence of record fails to show Defendants were prejudiced by not receiving written notice within 30 days, Plaintiff's claim is not barred pursuant to N.C. Gen. Stat. § 97-22 (2019).
>
> 6. . . . Dr. McGirt opined that Plaintiff was unable to work from September 27, 2017 to April 20, 2018, which prevented her from working at her job as a long-haul tractor trailer driver or any other employment. Plaintiff was temporarily totally disabled from September 28, 2017 until April 21, 2018.

Defendants timely filed notice of appeal.

II. Jurisdiction

¶ 13 This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 97-86 (2021).

III. Issues

¶ 14 Plaintiff raises six issues on appeal. We have consolidated them into three issues: (1) whether Plaintiff failed to establish her condition is causally related to the trucking accident; (2) whether Plaintiff provided timely notice to her employer; and, (3) whether Plaintiff's disability began when her physician removed her from work.

IV. Analysis

A. Standard of Review

¶ 15 Plaintiff bears the burden of proving a causal relationship between the injury and work-related incident for compensability by a preponderance of the evidence under the worker's compensation statute. *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003). Plaintiff's "evidence must be such as to take the case out of the realm of conjecture and remote possibility" to carry her burden

to prove causation. *Id.* at 350, 581 S.E.2d at 785 (citation and internal quotation marks omitted).

¶ 16 Where the evidence is stipulated, or the facts are uncontroverted, there are no credibility determinations for the Commission to make. The Commission's conclusions must be based upon the proper application of those facts to the statute. *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965) ("The Commission is the sole judge of the credibility of the witnesses and weight to be given their testimony.").

¶ 17 We review the Commission's conclusions of law and statutory interpretations *de novo*. *See Clark v. Burlington Industries., Inc.*, 78 N.C. App. 695, 698, 338 S.E.2d 553, 555 (1986) ("While the Industrial Commission's interpretation of [N.C. Gen Stat.] 97-53(28) is entitled to due consideration, the final say rests with the courts." (citation omitted)).

B. Causal Relation

¶ 18 Defendants argue that the Commission erred by concluding: (1) Plaintiff's injury was caused by the 24 September 2016 accident; (2) Plaintiff was temporarily totally disabled from 28 September 2017 to 21 April 2018; and, (3) Plaintiff had reasonable excuse for her delayed written notice, which did not prejudice Defendants.

¶ 19 It is uncontested Plaintiff suffers from a long history of back, neck, and limb pain. Prior to the accident, Plaintiff suffered from a documented history of intermittent sciatica. Two days after the 26 September 2016 accident, Plaintiff reported soreness in her neck and back, muscle spasms from her mid-to-low back, and pain in her right buttock down to her foot. Despite these complaints, Plaintiff failed to provide written notice of her injury by accident to Defendants within 30 days as is statutorily required pursuant to N.C. Gen. Stat. § 97-22.

¶ 20 Plaintiff did not present nor complain to Nurse Gantt about the pain at her next three visits on 26 January 2017, 13 February 2017, or 18 May 2017. Plaintiff now asserts she believed the pain was caused by her history of sciatica and it was unrelated to the work accident. *More than a year after* the accident on 28 September 2017, Plaintiff attended another appointment with Nurse Gantt. Plaintiff did not consult Dr. McGirt until 27 December 2017. Defendants were never put on notice of these complaints or treatments.

¶ 21 Defendants argue Dr. McGirt's treatment was only related to Plaintiff's long history of chronic back and neck pain. Dr. McGirt also testified he knew from Plaintiff's records that she had a history

of pre-existing neck and back discomfort. Uncontested facts show Plaintiff's chronic medical conditions pre-existed the work accident. Plaintiff's argument is overruled.

C. Timely Notice

1. 30 Days

¶ 22 Plaintiff is statutorily required to have provided written notice of her injury by accident to Defendants within thirty days pursuant to N.C. Gen. Stat. § 97-22.

¶ 23 N.C. Gen. Stat. § 97-22 provides:

> Every injured employee . . . *shall immediately* on the occurrence of an accident, or as soon thereafter as practicable, *give or cause to be given* to the employer a *written notice of the accident*, and the *employee shall not be entitled to physician's fees nor to any compensation* which may have accrued under the terms of this Article prior to the giving of such notice, unless it can be shown that the employer . . . had knowledge of the accident, . . . *but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident* or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

N.C. Gen. Stat. § 97-22 (2021) (emphasis supplied).

¶ 24 Our Supreme Court reviewed this statute and held the "purpose of the notice-of-injury requirement is two-fold. It allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury." *Booker v. Duke Medical Center*, 297 N.C. 458, 481, 256 S.E.2d 189, 204 (1979).

¶ 25 The evidence and record are uncontested that Plaintiff failed to provide timely notice, despite asserting a timely written notice and claim for her husband, who was injured in the same accident. Under the statute, Plaintiff is also required to provide a "reasonable excuse" for not so providing timely notice within thirty days, and must also show Defendants were not prejudiced by Plaintiff's admitted failure to provide

her employer written notice within thirty days. Otherwise, the statute provides "*no compensation shall be payable*," and Plaintiff's claim is barred pursuant to N.C. Gen. Stat. § 97-22.

2. Prejudice

¶ 26 Defendants argue they were prejudiced by Plaintiff's lack of notice and delays in two ways: (1) "by forcing a course of treatment that may not have been required, as [Plaintiff's] cervical stenosis began in 2010;" and, (2) lack of written notice of injury until 471 days after the accident is prejudicial "regardless of the circumstances." The Commission erred by not applying and enforcing the plain statutory written notice mandate and by shifting the burden from Plaintiff onto Defendants to prove they were prejudiced by Plaintiff's failure after more than a year and four months to comply with the clear timelines and mandates of the statute. *See* N.C. Gen. Stat. § 97-22.

¶ 27 Under *de novo* review, the Commission's conclusions: (1) Plaintiff's injury was caused by the 24 September 2016 accident; (2) Plaintiff was temporarily totally disabled from 28 September 2017 to 21 April 2018; and, (3) Plaintiff had reasonable excuse for her 471 days delayed written notice of accident, which did not prejudice Defendants are erroneous. These conclusions are not supported by the uncontested and admitted facts and by its findings of fact.

¶ 28 There are no credibility determinations for the Commission to make when stipulated, objective, and uncontested facts and evidence are admitted, and the statutory mandates are clear and unambiguous. If the General Assembly had not considered the statutory 30 days written notice to be mandatory and enforced as a matter of public policy, verbal or actual notice to the employer alone under the statute would be sufficient. The statute allows the Plaintiff to show a "reasonable excuse" and no prejudice incurred by the Defendants as a failsafe to the otherwise mandatory notice timelines. *Id.*

¶ 29 Prejudice is also shown when a defendant is deprived of the opportunity to manage a plaintiff's medical care and treatment and provide early and timely intervention, diagnosis, and treatment. Plaintiff's long 471 days after-the-fact claim for compensation and payment to a non-approved heath care providers for non-authorized treatments is clearly not allowed under the statute. N.C. Gen. Stat. § 97-22. The record shows no evidence was admitted to support their finding Defendants were not prejudiced by Plaintiff's 471-day-failure to provide the statutory written notice.

D. Disability Date

¶ 30 The plaintiff carries and retains the burden of proving disability by the greater weight of the evidence. *Clark v. Wal-Mart*, 360 N.C. 41, 44-45, 619 S.E.2d 491, 493 (2005). "[D]isability [is defined as] the impairment of the injured employee's earning capacity rather than physical disablement." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

> "[T]o support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

¶ 31 The Commission erred by concluding Plaintiff was temporarily totally disabled from 28 September 2017 to 21 April 2018. Plaintiff did not consult Dr. McGirt until 27 December 2017. Dr. McGirt's testimony and medical records confirm he was unaware of the 24 September 2016 accident at the time he treated Plaintiff more than a year later. Dr McGirt also testified he knew from Plaintiff's complaints and records that she had a pre-existing history of neck and back pain. Dr. McGirt recommended Plaintiff stop working on 8 January 2018. Plaintiff was only disabled from 10 January 2018 to 21 April 2018.

V. Conclusion

¶ 32 The Full Commission's conclusion that Plaintiff's condition was causally related to her 24 September 2016 injury is unsupported by its findings of fact. Plaintiff failed to show a reasonable excuse for failing to timely notify her employer of her injury and that Defendants were not prejudiced by the 471 days delayed injury report. Defendants were unable to provide timely diagnosis and treatment to Plaintiff in the absence of statutory notice. Undisputed facts show Plaintiff was only disabled from 10 January 2018 to 21 April 2018. The opinion and award of the Commission is reversed and remanded. *It is so ordered.*

REVERSED AND REMANDED.

Judge GORE concurs.

Judge JACKSON dissents with separate opinion.

JACKSON, Judge, dissenting.

¶ 33 Defendants appeal from the Commission's Opinion and Award in favor of Plaintiff. The majority reverses the Commission, holding that the Commission's findings do not support its conclusions. I believe the majority misapplies the standard of review and would affirm the Commission's Opinion and Award. Therefore, I respectfully dissent.

I. Background

¶ 34 Except where noted below, I agree with the facts as described by the majority.

II. Standard of Review

¶ 35 The North Carolina Industrial Commission is the "sole judge" of the weight and credibility of evidence in worker's compensation disputes. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000). *See also* N.C. Gen. Stat. § 97-86 (2021) ("The award of the Industrial Commission . . . shall be conclusive and binding as to all questions of fact[.]"). Therefore, this Court's role on appeal is limited to reviewing "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). This Court does not reweigh evidence on appeal. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) ("The court's duty goes no further than to determine whether the record contains *any* evidence tending to support the finding.") (emphasis added). All evidence is viewed in the light most favorable to the plaintiff, with every inference in her favor. *Deese*, 352 N.C. at. 115, 530 S.E.2d at 553.

¶ 36 In my opinion, for much of its opinion, the majority applies a different standard of review and improperly reweighs the evidence all in favor of Defendants.

III. Analysis

¶ 37 On appeal, Defendants argue that the Commission erred by concluding that (1) Plaintiff's injury was caused by the 24 September 2016 accident, (2) Plaintiff was temporarily totally disabled from 28 September 2017 to 21 April 2018, and (3) Plaintiff had reasonable excuse for her delayed written notice, which did not prejudice Defendant-Employer. I disagree and would affirm the Commission's conclusions.

A. Cause of Plaintiff's Injury

¶ 38 Defendants argue that the Commission erred in finding that Plaintiff's injury was caused by the September 2016 accident, effectively challenging finding 23 and conclusion two. I disagree and would affirm both.

¶ 39 The plaintiff in a worker's compensation case bears the burden of proving a causal relationship between the injury and work-related incident for compensability. *Whitfield v. Lab'y Corp.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003). To establish causation, "the evidence must be such as to take the case out of the realm of conjecture and remote possibility." *Id.* at 350, 581 S.E.2d at 785 (internal quotation and citation omitted). "[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (citation omitted).

¶ 40 Here, in arguing that Plaintiff's injury was not caused by the September 2016 work accident, Defendants point to Plaintiff's long history of back, neck, and limb pain. Defendants theorize that Plaintiff's injury pre-existed the work accident and argue that this theory is supported by Dr. McGirt's testimony and medical records, where he admitted that he was unaware of the September 2016 accident at the time he treated Plaintiff and knew from Plaintiff's records that she had a history of neck and back discomfort. Defendants further contend that "Dr. McGirt's treatment was only related to [Plaintiff's long history of] chronic back and neck pain."

¶ 41 The majority agrees with Defendants and this argument. I believe this argument should be rejected because it improperly asks this Court to reweigh evidence on appeal. As described *supra*, the Commission found that Plaintiff's injury was caused by the 24 September 2016 accident. Because Plaintiff's injury involves complicated medical questions, "only an expert can give competent opinion evidence as to the cause of the injury." *Click*, 300 N.C. at 167, 265 S.E.2d at 391.

¶ 42 In his deposition, Dr. McGirt testified that Plaintiff's spinal cord injury was more likely than not caused by the September 2016 accident. Although Dr. McGirt did not discuss causation with Plaintiff at her appointments, Dr. McGirt based his opinion on the fact that Plaintiff's "spinal cord compression from [] two very large disc herniations[] had to have come from a more sizable injury" and the September 2016 accident

was the most fitting injury in her recent history. Dr. McGirt opined that this type of spinal cord injury, which he deals with frequently, can often take one to two years to become symptomatic. Dr. McGirt was continually asked in his deposition whether Plaintiff's medical history of back, neck, or limb pain impacted his opinion about the underlying cause of Plaintiff's spinal cord injury. Dr. McGirt repeatedly replied that it did not change his opinion on causation because "pain syndrome [is] very different than what [he] was treating which was neurological dysfunction and loss of function." Defendants fail to mention any of this evidence in their brief, despite their contention that Dr. McGirt's testimony supports their argument, and the majority similarly ignores this record evidence, despite concluding that the Commission's causation finding was unsupported.

¶ 43 I would therefore hold that the Commission's finding that Plaintiff's injury was caused by the September 2016 accident was supported by competent evidence in the form of Dr. McGirt's expert medical testimony, and the Commission did not err in concluding that the causation requirement for compensability was satisfied.

B. Length of Plaintiff's Disability

¶ 44 Defendants next argue that the Commission erred in finding that Plaintiff's disability began on 28 September 2017, at the onset of her spinal compression symptoms, and argue instead that Plaintiff's disability began on 10 January 2018, when Dr. McGirt put Plaintiff on work restrictions. Defendants therefore effectively challenge finding 25 and conclusion six.

¶ 45 Under the North Carolina Workers' Compensation Act, disability is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2021). The burden of proving disability is on the plaintiff. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). In order to conclude that a disability existed, the Commission must find

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment,
>
> (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and

> (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Id. (citation omitted).

¶ 46 Here, Defendants argue that the first prong is not satisfied, because Plaintiff was not under work restrictions until her appointment with Dr. McGirt on 10 January 2018, and Nurse Gantt did not put restrictions on Plaintiff's ability to work at her 28 September 2017 appointment. However, Defendants again improperly ask this Court to reweigh evidence and ignore the expert opinion of Dr. McGirt, which was relied upon by the Commission in its findings.

¶ 47 Finding 21, which is uncontested and binding on appeal, establishes that it was Dr. McGirt's expert opinion that Plaintiff was unable to work when she reported numbness and weakness at her 28 September 2017 appointment with Nurse Gantt. In its statement of the facts, the majority omits and ignores a portion of finding 21 which states that "Dr. McGirt also testified Plaintiff would have been unable to work from September 28, 2017, when Plaintiff began experiencing numbness and weakness." In support of this finding, Dr. McGirt testified,

> I mean she should not have been working. Any patient who has that degree of spinal cord compression should not be working and if they are able to do it it's just out of dedication and determination to do it. I mean that's a major problem. So was she physically capable to drive a car? I believe she was physically capable to drive a car but the standard of care in neurosurgery or orthopedic spine surgery is somebody with severe cervical stenosis from disc herniations should not be allowed to drive those cars or professionally go back to work until they're fixed.

Therefore, even though Plaintiff was not formally diagnosed and restricted from working by Dr. McGirt until 10 January 2018, it was Dr. McGirt's opinion that Plaintiff was unable to work at the onset of her symptoms, due to the severity of her injury. This evidence is competent to support the Commission's finding that Plaintiff was unable to work beginning on 28 September 2017, and this finding supports the Commission's conclusion that Plaintiff's temporary disability began on 28 September 2017. I would therefore affirm the Commission's disability conclusion.

¶ 48 The majority appears to adopt Defendants' theory that "Dr. McGirt's treatment was only related to [Plaintiff's long history of] chronic back

and neck pain[,]" stating that "[u]ncontested facts show Plaintiff's chronic medical conditions pre-existed the work accident[,]" and "Dr. McGirt also testified he knew from Plaintiff's records that she had a history of pre-existing neck and back discomfort." However, in reaching this conclusion, I believe the majority mischaracterizes the record and misapplies the standard of review. While it's true that Plaintiff had chronic medical conditions prior to the work accident, the facts are certainly not "undisputed" that her injury at issue pre-existed the work accident. Moreover, even knowing about her pre-existing neck and back pain, Dr. McGirt specifically and repeatedly testified that Plaintiff's spinal cord compression injury "had to have come from a more sizable injury" and the existence of pre-existing pain did not change his opinion that the September accident caused her spinal injury because "pain syndrome [is] very different than what [he] was treating which was neurological dysfunction and loss of function."

C. Written Notice Requirement

¶ 49 Defendants' final argument is that (1) Plaintiff's compensation claim should be barred because she did not provide written notice of her injury to Defendant-Employer within 30 days pursuant to N.C. Gen. Stat. § 97-22, and (2) the Commission erred by finding that Plaintiff had reasonable excuse for her delayed written notice and Defendant-Employer was not prejudiced by the delay. Therefore, Defendants effectively challenge the Commission's conclusions four and five.

¶ 50 An injured employee involved in a work-related accident generally must give written notice of the accident to her employer within 30 days in order to receive compensation for the injury. N.C. Gen. Stat. § 97-22 (2021). The notice requirement can be waived by the Commission if (1) "reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice" and (2) "the Commission is satisfied that the employer has not been prejudiced thereby." *Id.*

¶ 51 "A 'reasonable excuse' has been defined by this Court to include a belief that one's employer is already cognizant of the accident or where the employee does not reasonably know of the nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows." *Yingling v. Bank of Am.*, 225 N.C. App. 820, 828, 741 S.E.2d 395, 401 (2013) (internal quotation and citation omitted). The employee bears the burden of showing a reasonable excuse. *Id.* Either the employer's actual knowledge or the employee's lack of knowledge suffice to show reasonable excuse, but both are not required. *Id.* at 832, 741 S.E.2d at 403.

¶ 52 Even if the employee had a reasonable excuse, if the defendant-employer shows it was prejudiced by delayed notice, the employee's claim is barred. *Id.* at 832, 741 S.E.2d at 403-04. This Court has repeatedly held that "[a] defendant-employer bears the burden of showing that it was prejudiced." *See e.g.*, *id.* at 832, 741 S.E.2d at 403 (internal citation omitted); *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 378, 616 S.E.2d 403, 413 (2005); *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 172-73, 573 S.E.2d 703, 706 (2002); *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 604, 532 S.E.2d 207, 214 (2000). The majority incorrectly states that it is the Plaintiff's burden to prove Defendant-Employer was not prejudiced and that the Commission engaged in impermissible burden shifting.

¶ 53 With regard to prejudice, our Supreme Court has held that the "purpose of the notice-of-injury requirement is two-fold. It allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury." *Booker v. Duke Medical Center*, 297 N.C. 458, 481, 256 S.E.2d 189, 204 (1979). The Commission's conclusion that an employer was not prejudiced can be supported by findings showing that the "purpose[] of the notice requirement [was] vindicated[.]" *Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 762, 688 S.E.2d 431, 439 (2010). The purpose of the notice requirement is vindicated where the defendant-employer "had immediate, actual knowledge of the accident and failed to further investigate the circumstances surrounding the accident at that time." *Yingling*, 225 N.C. App at 834, 741 S.E.2d at 405 (citation omitted).

¶ 54 Here, it is uncontested that Plaintiff filed her disability claim after the 30-day statutory window. Therefore, I would only address conclusions four and five of the Commission, which are directly challenged by Defendants.

¶ 55 In conclusion four, which contains mixed findings of fact and law, the Commission concluded that Plaintiff had reasonable excuse for the delayed notice, finding both that Plaintiff reported the accident to Defendant-Employer on the day of the accident and that "she did not reasonably know of the nature or seriousness of her injury immediately following the accident." The finding that Plaintiff communicated with Defendant-Employer on the day of the accident is not challenged by Defendants on appeal and is therefore binding. The finding regarding Plaintiff's knowledge of her injury is supported by competent evidence, because Dr. McGirt testified that Plaintiff "didn't realize she had a spinal cord issue" at her appointments and Plaintiff told Defendant-Carrier that

she did not believe she was badly hurt immediately following the accident. The majority summarily concludes that "Plaintiff failed to show a reasonable excuse" without discussing the Commission's findings or corresponding evidence regarding Defendant-Employer's actual knowledge of Plaintiff's injury or Plaintiff's lack of knowledge of her injury's seriousness.

¶ 56 Defendants argue that Defendant-Employer should have been notified of Plaintiff's injury at the latest when Plaintiff was referred to Dr. McGirt in December 2017, because by then Plaintiff should have realized the seriousness of her injury. In essence, Defendants ask this Court to find as a fact that Plaintiff knew or should have known of the seriousness of her injury in December 2017, and therefore did not have a reasonable excuse to wait until February 2018 to report the injury. However, the Commission is the "sole judge" of the weight and credibility of witnesses on appeal, and this Court should decline to reweigh the evidence in Defendants' favor. Therefore, I would uphold the Commission's finding of reasonable excuse, because Defendant-Employer had actual notice of the accident and Plaintiff did "not reasonably know of the nature, seriousness, or probable compensable character of [her] injury and delay[ed] notification only until [she] reasonably [knew.]" *Yingling*, 225 N.C. App. at 828, 741 S.E.2d at 401.

¶ 57 In conclusion five, the Commission found that Defendants were not prejudiced by the delayed notice because "Defendant-Employer had actual, immediate notice of Plaintiff's accident on the day of the accident" which "allowed ample opportunity to investigate Plaintiff's condition following the violent truck accident and direct Plaintiff's medical care." Defendants do not contest the Commission's finding of actual notice, and therefore I would hold that it is binding on appeal.

¶ 58 Defendants argue that they were prejudiced in two ways: (1) "by forcing a course of treatment that may not have been required, as [Plaintiff's] cervical stenosis began in 2010," and (2) written notice of injury 471 days after the accident is prejudicial "regardless of the circumstances." I would decline to address the first argument, which is not supported by the Commission's binding factual finding that Plaintiff's injury was caused by the work accident, as discussed extensively above.

¶ 59 Defendant's second argument is unsupported by statute or case law. I would decline to create a *per se* rule of prejudice, which would abrogate the Commission's statutory role in evaluating prejudice on a case-by-case basis. Because I believe the Commission's finding of Defendant-Employer's actual notice is sufficient to vindicate the purpose

of the notice requirement, I would hold that this finding supported the conclusion that Defendants were not prejudiced.

¶ 60 In its recitation of the facts, the majority omits a portion of finding of fact 23, which states

> The Full Commission further finds that Defendant-Employer had actual notice of Plaintiff's September 24, 2016 injury by accident on or about September 24, 2016, when Plaintiff reported the wreck to Defendant-Employer, and that Plaintiff had reasonable excuse for the delay in providing written notice of her accident to Defendant-Employer as she did not reasonably know of the nature or seriousness of her injury immediately following the accident. The Full Commission further finds that Defendants failed to show they were prejudiced by any delay in the notice of Plaintiff's accident.

¶ 61 Thereafter, the majority holds that

> There are no "credibility determinations" for the Commission to make when undisputed facts and evidence are admitted, and the statutory mandates are clear and unambiguous. If the General Assembly had not considered the statutory 30 days written notice to be mandatory and enforced as a matter of public policy, verbal or actual notice to the employer alone under the statute would be sufficient. The statute allows the Plaintiff to show a "reasonable excuse" and no prejudice incurred by the Defendants as a fail-safe to the otherwise mandatory notice timelines.

¶ 62 Not only does the majority omit the Commission's finding of reasonable excuse, it also wholly ignores the law on "actual notice" as provided above, that the purpose of the notice requirement is vindicated where a defendant-employer "had immediate, actual knowledge of the accident and failed to further investigate the circumstances surrounding the accident at that time." *Yingling*, 225 N.C. App at 842, 741 S.E.2d at 405. Defendants never contest that they received actual notice, and the majority glosses over its significance in this case and its opinion.

¶ 63 Additionally, the majority, by improperly shifting the burden of disproving prejudice to Plaintiff, holds that "[t]he record shows no evidence was admitted to support [the Commission's] finding Defendants

were not prejudiced by Plaintiff's 471-day failure to provide the statutory written notice." However, as correctly noted by the Commission, Defendant-Employer is the one who has failed to admit evidence to prove prejudice, not Plaintiff. The Defendants did not offer any testimony to show that Plaintiff's course of treatment would have been different, or that surgery was avoidable, if she had provided written notice within the statutory window and likewise do not point to any record evidence to support their theory that Dr. McGirt "forc[ed] a course of treatment that may not have been required[.]" The majority holds that Defendant-Employer was deprived of the opportunity to manage Plaintiff's injury treatment by impliedly assuming that "early and timely diagnosis and treatment" would have been possible in this case. However, not only does this arguably engage in impermissible fact-finding solely in the province of the Commission, but the Commission specifically found, and competent record evidence supports, that the onset of Plaintiff's severe symptoms and loss of function, which signaled the need for further treatment, did not even begin until over a year after Plaintiff's work injury.

IV. Conclusion

¶ 64 For the foregoing reasons, I would affirm the Commission's conclusions that (1) Plaintiff's injury was caused by the 24 September 2016 accident, (2) Plaintiff was temporarily totally disabled from 28 September 2017 to 21 April 2018, and (3) Plaintiff had reasonable excuse for her delayed written notice, which did not prejudice Defendant-Employer. Accordingly, I respectfully dissent.

STATE EX REL. UTILS. COMM'N v. FRIESIAN HOLDINGS, LLC

[281 N.C. App. 391, 2022-NCCOA-32]

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION, APPELLEES
v.
FRIESIAN HOLDINGS, LLC, PETITIONER; NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION, INTERVENOR; AND NORTH CAROLINA CLEAN ENERGY BUSINESS ALLIANCE, INTERVENOR, APPELLANTS
v.
DUKE ENERGY PROGRESS, LLC AND NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION, INTERVENORS

No. COA20-867

Filed 18 January 2022

1. Utilities—solar energy plant application—denied—merchant plant—no federal preemption

The decision of the Utilities Commission denying an independent energy company's application for a certificate of public convenience and necessity to build and operate a solar energy plant was not preempted by the Federal Power Act (which gives the Federal Energy Regulatory Commission (FERC) exclusive jurisdiction over wholesale rates), where the decision was based, in large part, on the upgrade costs that would be charged to ratepayers pursuant to FERC's crediting policy. Although the energy company sought to operate a merchant plant, which meant that it would sell its output exclusively at wholesale, the Utilities Commission retained sole authority to determine whether and where an energy-generating facility could be constructed.

2. Utilities—solar energy plant application—denied—cost analysis—potential future electricity generation—too speculative

The decision of the Utilities Commission denying an independent energy company's application for a certificate of public convenience and necessity to build and operate a solar energy plant was neither arbitrary and capricious nor unsupported by substantial evidence. Contrary to the energy company's argument on appeal, in its cost analysis the Commission did consider potential future electricity generation created by network upgrades—but it determined that the consideration was too speculative to support approval of the company's application.

3. Utilities—solar energy plant application—denied—need for facility—purchase power agreement—other factors

The decision of the Utilities Commission denying an independent energy company's application for a certificate of public convenience

and necessity to build and operate a solar energy plant was not rendered arbitrary and capricious by the fact that the Commission had never before denied a certificate application where a purchase power agreement (PPA) existed to demonstrate need. The Commission properly considered the existence of the PPA with the N.C. Electric Membership Corporation along with other factors, including the public interest and the economic viability of the project.

Judge MURPHY concurring by separate opinion.

Appeal by Petitioner and Intervenor-Appellants from order entered 11 June 2020 by the North Carolina Utilities Commission. Heard in the Court of Appeals 21 September 2021.

Fox Rothschild LLP, by Karen M. Kemerait, and Kilpatrick, Townsend & Stockton LLP, by Steven J. Levitas, Benjamin L. Snowden, and Adam H. Charnes, for Petitioner-Appellant.

Layla Cummings, Dianna W. Downey, and Robert B. Josey, Jr., for Appellee Public Staff-North Carolina Utilities Commission.

Benjamin W. Smith and Peter H. Ledford for Intervenor-Appellant North Carolina Sustainable Energy Association.

Adam Foodman and John D. Burns for Intervenor-Appellant North Carolina Clean Energy Business Alliance.

Nexsen Pruet PLLC, by David P. Ferrell, and Richard M. Feathers and Michael D. Youth, for Intervenor-Appellee North Carolina Electric Membership Corporation.

Jack E. Jirak for Intervenor Duke Energy Progress, LLC.

INMAN, Judge.

¶ 1 North Carolina has made significant strides in generating and employing alternatives to carbon-emitting fuels. We rank fourth in the nation in solar installations, with solar making up nearly eight percent of our state's electricity.[1] Our legislature has enacted clean energy goals

1. Solar Energy Industries Association (SEIA), *State Solar Spotlight: North Carolina Solar*, (Sept. 24, 2021), https://www.seia.org/sites/default/files/2021-09/North Carolina.pdf.

including a 70 percent reduction in carbon emissions by the year 2030 and carbon neutrality by 2050.[2] The southeastern region of the state, in particular, has attracted several solar energy facilities.[3] But growing production has strained the region's existing electric grid. A dispute over the cost and timing of upgrading the grid gives rise to this appeal.

¶ 2 Unlike other industrial and commercial enterprises, energy generation facilities can operate only as permitted by the North Carolina Utilities Commission ("the Commission"). N.C. Gen. Stat. § 62-110.1(a) (2019). This system of regulation is analogous to state law limiting medical facilities to providers who have obtained a certificate of need from the Department of Health and Human Services. *See* N.C. Gen. Stat. § 131E-175(7) (2019). Energy plants cannot spring up like many restaurants, fitness centers, or dry cleaners, even if consumer demand would support the increased supply. In this way, government regulation influences the energy market.

¶ 3 Petitioner-Appellant Friesian Holdings, LLC ("Friesian"), an independent energy company, seeks to generate additional solar energy in the southeast. Friesian applied to the Commission for a certificate of public convenience and necessity ("CPCN" or "certificate") to build and operate a solar energy plant, which would sell and distribute electricity through an existing electric grid. Citing the cost of upgrading the region's electric grid to accommodate additional transmission, the Commission denied Friesian's application. Friesian appeals, contending that the Commission's decision unfairly favors larger energy utilities and squelches competition, to the detriment of consumers.

¶ 4 Friesian presents three arguments on appeal: (1) federal law aimed at fostering free competition preempts the Commission's decision; (2) the Commission's cost analysis was unsupported by the evidence and was arbitrary and capricious; and (3) the Commission erred in concluding Friesian did not demonstrate a need for its facility. After careful review of the record and our precedent, we affirm the Commission.

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2. *See* An Act to Authorize the Utilities Commission, S.L. 2021-951, § 1, https://www.ncleg.gov/Sessions/2021/Bills/House/PDF/H951v5.pdf.

3. In its order, the North Carolina Utilities Commission concluded, "[N]o party disputes that southeastern North Carolina exhibits many attributes favorable for the development of solar generating facilities and that those attributes have resulted in significant solar development in that region. As a result, however, the transmission infrastructure in that portion of the [Duke] system is approaching a tipping point where additional generation in certain portions of the system will require significant upgrades to the network."

I. FACTS & PROCEDURAL HISTORY

¶ 5 This appeal arises from Friesian's second application to the Commission to build and operate a solar energy plant. As explained below, Friesian's first application was successful, but Friesian amended its energy distribution plan, leading to the application process we now review.

¶ 6 On 9 September 2016, Friesian filed its first application with the Commission seeking a CPCN to construct a 70-MWAC solar photovoltaic electric generation facility ("the facility") in Scotland County. Pursuant to Commission Rule R8-64, Friesian classified itself as a small power producer or "qualifying facility," intending to sell the energy produced by its facility to the public utility Duke Energy Progress ("Duke") which owns and operates the energy grid servicing Scotland County. At the time of its application, Friesian had obtained most of the other federal and state permits required of them and planned to begin construction in early 2023 with commercial operation by December of the same year. The project did not generate any opposition from local residents or other interested parties. On 7 November 2016, the Commission granted Friesian a CPCN.

¶ 7 The Commission's policies for state generator interconnections assign directly to the qualifying facility—also known as the "interconnection customer," here Friesian—the cost of upgrades to the grid necessary to connect to the qualifying facility. *See* Order Approving Revised Interconnection Standard, *In the Matter of Petition for Approval of Revisions to Generator Interconnection Standards*, State of North Carolina Utilities Commission, Docket No. E-100, Sub 101 (May 5, 2015).

¶ 8 On 2 August 2018, Friesian filed a request with the Commission to amend the CPCN previously issued for its facility to file as a different type of energy facility so that it could sell energy to a third-party energy distributor. Friesian's proposed facility would still have to interconnect with the electric grid owned and operated by Duke. Because the amount of electricity already transmitted through the grid is approaching its current maximum capacity, the grid must be upgraded to accommodate Friesian's additional energy supply.

¶ 9 On 15 May 2019, Friesian requested the Commission (1) allow Friesian to withdraw the requested amendment and (2) consider a *new* application for a CPCN as a "merchant plant" pursuant to Commission Rule R8-63 for the same facility. The Commission treated Friesian's filing as a request to *cancel* the previously issued CPCN. The Commission allowed

withdrawal of the requested amendment, cancelled the previously issued CPCN, and closed the docket on 14 June 2019.

¶ 10 On 6 June 2019, Friesian and Duke entered into a large generator interconnection agreement defining the parties' respective obligations for constructing and upgrading existing systems to accommodate the new facility. The necessary upgrade is estimated to require reconstruction of roughly 73 miles of the existing grid at a cost of $223.5 million plus $25 million in interest.[4] The interconnection agreement requires Friesian to bear sole responsibility for $100 million in estimated construction costs and another $4 million to interconnect the old and new facilities. However, a crediting policy provided by the Federal Energy Regulatory Commission ("FERC") to level the playing field between large public utility companies and independent energy producers requires Duke to reimburse Friesian for the upgrade costs, in full, by passing along those costs in higher rates charged to its wholesale and North Carolina retail customers.[5]

¶ 11 On 14 June 2019, eight days after entering into the agreement with Duke, Friesian executed a purchase power agreement ("PPA") with North Carolina Electric Membership Corporation ("NCEMC")[6] providing that Friesian would sell all the power and renewable energy credits generated by its facility to NCEMC. Duke would distribute the energy produced by the facility to NCEMC on a wholesale basis. FERC maintains jurisdiction over generating facilities' wholesale distribution rates. *See Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374, 101 L. Ed. 2d 322, 340 (1988).

¶ 12 Friesian's arrangements with Duke and NCEMC changed the regulatory classification of its facility to a "merchant plant," so Friesian filed a second petition with the Commission for a CPCN as a "merchant plant." A "merchant plant" is "an electric generating facility . . . the output of which will be *sold exclusively at wholesale*[.]" Commission

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4. The Commission described these costs as "far and away [ ] the single costliest transmission project in North Carolina in recent times, perhaps the most expensive ever."

5. These costs were calculated by Duke pursuant to the Open Access Transmission Tariff it filed with FERC.

6. NCEMC is "one of the largest generation and transmission electric cooperatives in the nation, providing reliable, affordable electricity to its 25 member cooperatives. NCEMC owns power generation assets, purchases electricity through contracts, identifies innovative energy projects and coordinates transmission resources for its members." N.C. Electric Cooperatives, *Who We Are: About Us*, (last visited Oct. 28, 2021) https://www.ncelectriccooperatives.com/who-we-are/#about-us.

Rule R8-63(a)(2) (emphasis added). Duke, NCEMC, the North Carolina Sustainable Energy Association ("NCSEA"), and the North Carolina Clean Energy Business Alliance ("NCCEBA") petitioned to intervene in Friesian's certificate application proceeding. The Commission allowed those petitions. The Public Staff of the Commission ("Public Staff"), an independent agency charged with representing the interests of consumers,[7] also participated in the application process.

¶ 13 The Public Staff filed a motion asking the Commission to determine, among other legal questions:

> [w]hether the Commission has authority under state and federal law to consider as part of its review of the CPCN application the costs associated with the approximately $227 million dollars in transmission network upgrades and interconnection facilities necessary to accommodate the FERC-jurisdictional interconnection of the merchant generating facility, and the resulting impact of those network costs on retail rates in North Carolina[.]

Following briefing and arguments, the Commission entered an interlocutory order determining it could consider the upgrade costs pursuant to our General Statutes and its own rules. *See* § 62-110.1; Commission Rule R8-63.

¶ 14 In its second certificate application and before the Commission, Friesian presented evidence of potential benefits that could stem from its facility and the associated grid updates, including: (1) the interconnection of multiple gigawatts of new renewable generation in North Carolina and South Carolina; (2) expansion of the grid capacity so that other solar facilities in Duke's queue could be added in the future without additional upgrades; (3) the public would bear less of the upgrade costs compared to an alterative cost allocation under one of Duke's planned projects; and (4) additional solar energy generation would help bring Duke closer to its target clean energy goals.

¶ 15 The Public Staff challenged that evidence and argued against issuance of a CPCN. Witnesses for the Public Staff testified, and one of Friesian's witnesses conceded, that the facility would do little to

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7. By its own account, the "[Public Staff] is an independent agency not subject to the supervision, direction, or control of [the Commission]. The Public Staff represents the interests of the using and consuming public."

supplement Duke's solar energy supply during the peak winter season,[8] and that Duke had not previously identified the transmission lines in question as needing upgrades due to reliability issues.

¶ 16 On 11 June 2020, the Commission entered an order denying Friesian's application, based on extensive findings. The Commission concluded Friesian's generating facility project was not in the public convenience or need in part because the network upgrade costs, to be passed on to the ratepayers under FERC's crediting policy, were unreasonably high. Before its decision denying Friesian's application, the Commission had never before denied a CPCN to an energy generator that had entered into a PPA. Friesian timely appealed the Commission's order.

II. ANALYSIS

¶ 17 We review Utility Commission decisions to determine:

> if substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made up on unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 62-94(b) (2019). A decision by the Commission is arbitrary and capricious if it "lack[s] fair and careful consideration or fail[s] to display a reasoned judgment." *State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc. of N.C.*, 225 N.C. App. 120, 130, 738 S.E.2d 187, 195 (2013).

¶ 18 On appeal, "any rule, regulation, finding, determination, or order made by the Commission . . . shall be prima facie just and reasonable." § 62-94(e). "[W]here there is substantial evidence supporting the Commission's findings and conclusions, we will not second guess

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8. While Duke's energy resource plans demonstrate a need for additional capacity to meet the grid's winter peak loads, the addition of a solar facility, by its nature, could not provide the type of reliable or controlled additional power generation required during the winter season because of shorter days and less sunlight.

the Commission's determination." *In re Duke Energy Corp.*, 232 N.C. App. 573, 586, 755 S.E.2d 382, 390 (2014). We review the Commission's conclusions of law *de novo*. *State ex rel. Utils. Comm'n v. Stein*, 375 N.C. 870, 900, 851 S.E.2d 237, 256 (2020). When the issue on appeal concerns interpreting a statute,

> the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, [but] those interpretations are not binding. 'The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'

In re N.C. Sav. & Loan League v. N.C. Credit Union Comm'n, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 89 L. Ed. 124, 129 (1944)).

¶ 19 The Commission's CPCN standard "is a relative or elastic theory rather than an abstract or absolute rule. The facts in each case must be separately considered[.]" *State ex rel. N.C. Utils. Comm'n v. Casey*, 245 N.C. 297, 302, 96 S.E.2d 8, 12 (1957) (citations omitted).

A. The Commission's Decision Is Not Preempted by Federal Law

¶ 20 **[1]** Friesian contends the Commission's denial of its CPCN was preempted by federal law because the Commission based its decision, in large part, on the upgrade costs that would be charged to ratepayers as required by FERC's crediting policy. After careful review, we disagree.

¶ 21 Federal law may preempt state law or action in three distinct ways. First, Congress may expressly preempt state action through legislation. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203, 75 L. Ed. 2d. 752, 765 (1983). In the absence of express preemption, "the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 1459 (1947) (citations omitted). Third, state law or action is preempted where it directly conflicts with federal law, such that it makes compliance with both federal and state law impossible, or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pac. Gas & Elec. Co.*, 461 U.S. at 204, 75 L. Ed. 2d at 765 (citations omitted). Friesian asserts that the

Commission's order is preempted because it stands in the way of FERC's policy of preventing discrimination by incumbent energy producers—like Duke—against smaller, independent producers seeking to enter the energy market.

¶ 22 The Federal Power Act ("FPA") assigns FERC exclusive jurisdiction over the transmission of energy in interstate commerce and over the rates for wholesale transactions. 16 U.S.C. § 824(b)(1) (2018); *see also State ex rel. Utils. Comm'n v. Carolina Power & Light Co.*, 161 N.C. App. 199, 203, 588 S.E.2d 77, 80 (2003), *rev'd on other grounds*, 359 N.C. 516, 614 S.E.2d 281 (2005). FERC is responsible for ensuring that the rates charged by utilities within its jurisdiction are "just and reasonable." § 824d(a); *see also Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154, 194 L. Ed. 2d 414, 419 (2016).

¶ 23 On the other hand, the FPA "places beyond FERC's power, and leaves to the States alone, the regulation of 'any other sale'—most notably, any retail sale—of electricity." *Hughes*, 578 U.S. at 154, 194 L. Ed. 2d at 420 (quoting *FERC v. Elec. Power Supply Assn.*, 577 U.S. 260, 265, 193 L.Ed.2d 661, 667 (2016) and § 824(b)). For example, state utilities commissions, rather than FERC, determine the level of consumer need for power and the siting of a necessary facility. *Pac. Gas & Elec. Co.*, 461 U.S. at 205-06, 75 L. Ed. 2d at 766 ("Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States.").

¶ 24 Friesian's wholesale agreements with Duke and NCEMC trigger FERC jurisdiction over the interconnection of the systems. As noted above, the FPA provides: "All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of [FERC], and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable[.]" § 824d(a). FERC must remedy rates, charges, and other practices which are "unduly discriminatory or preferential." § 824e(a).

¶ 25 Pursuant to this authority, FERC issued the "Crediting Policy" in Order No. 2003 to establish standard procedures and pro forma agreements for the interconnection of generating facilities to transmission grids. Standardization of Generator Interconnection Agreements and Procedures, 68 Fed. Reg. 49,846 (Aug. 19, 2003) (codified at 18 C.F.R. 35). Order No. 2003 found that utilities owning or controlling transmission grids have strong incentives to preclude independent generators from accessing the grid and have engaged in discriminatory practices

in the past. *Id.* ¶ 19. The crediting policy was intended to serve the following goals: (1) limit opportunities for transmission providers to favor their own generation; (2) facilitate market entry for generation competitors; (3) encourage "needed investment in generator and transmission infrastructure;" (4) ensure interconnection customers' interconnections are treated comparably to the interconnections that a non-independent transmission provider makes with its own generating facilities; and (5) "enhance competition in bulk power markets by promoting the construction of new generation, particularly in areas where entry barriers due to unduly discriminatory transmission practices may still be significant." *Id.* ¶¶ 12, 694.

¶ 26 Our General Statutes provide:

> [N]o public utility or other person shall begin the construction of any steam, water, or other facility for the generation of electricity to be directly or indirectly used for the furnishing of public utility service . . . without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction.

§ 62-110.1(a). Along with concerns like benefit to the public and the life of the facilities, the Commission may also consider the total costs of construction including those to construct the generating facility, to interconnect facilities, and to upgrade the existing network. § 62-110.1(e); Commission Rule R8-63.

¶ 27 Because the Commission has the sole authority to determine the need for new energy generation in North Carolina pursuant to Section 62-110.1, a power reserved for the states by Congress under the FPA, we hold the Commission's decision to deny Friesian's CPCN is not preempted by federal law. *See State ex rel. Utils. Comm'n v. Carolina Power & Light Co.*, 359 N.C. 516, 529, 614 S.E.2d 281, 289 (2005) (holding the Commission's decision was not preempted because the Commission "[wa]s not claiming . . . the authority to overrule or second-guess an agreement filed with or approved by FERC and subject to FERC's jurisdiction" and it was not "attempting to set rates in a wholesale agreement"). Further, our review of the record reveals that the Commission's decision to deny Friesian's application does not "stand[ ] as an obstacle" to FERC's crediting policy goals. *See Pac. Gas & Elec. Co.*, 461 U.S. at 204, 75 L. Ed. 2d. at 765 (outlining that state law is preempted by federal law when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (citations omitted)).

Friesian has failed to cite, and we cannot find, any precedent precluding a state from considering the cost of required network upgrades in a siting determination.

¶ 28 The United States Supreme Court has made clear that states may not interfere with FERC-regulated interstate wholesale rates. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966, 90 L. Ed. 2d 943, 954 (1986) ("Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority."); *Miss. Power & Light Co.*, 487 U.S. at 374, 101 L. Ed. 2d at 340 ("Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable."). Yet nothing in the FPA precludes states from considering the cost of network upgrades in the preliminary determination of the most cost-effective location for a generating facility or whether energy generation is in the public convenience and need for its residents.

¶ 29 In this case, FERC has not yet allocated costs related to energy to be generated by Friesian's proposed facility. FERC has no authority to order, directly or otherwise, that Friesian's facility be constructed, that it be sited in a particular part of the state, or that its energy be sold to a certain purchaser. The Commission is empowered to make the siting decision of whether and where an energy generating facility can be constructed. FERC then has control over wholesale rates. The Commission's authority to make siting decisions is unaffected by FERC's jurisdiction. Surely, the Commission would be preempted from attempting to alter the cost allocation set by FERC after it approved a site and after parties had incurred costs. But that was not the sequence of events in this case.

¶ 30 We agree with Friesian that if Duke itself generates additional energy in the southeast that requires upgrading the grid, the Commission could not prohibit Duke from passing 100 percent of grid update costs to its ratepayers pursuant to FERC's crediting policy, costing consumers more than if they purchased energy generated by Friesian. *See Nantahala Power & Light Co.*, 476 U.S. at 964-67, 970, 90 L. Ed. 2d at 952-55, 957. However, the Commission's order reflects that it did not deny Friesian's second application merely because upgrade costs would be passed along to the public. Instead, the Commission compared the

unprecedented magnitude of upgrade costs to be borne by ratepayers to accommodate Friesian's proposed facility with the facility's expected output, and concluded they were too burdensome to be in the public convenience. So, we hold that in denying Friesian's application, the Commission did not usurp or alter FERC's crediting policy.

¶ 31 We acknowledge, as Friesian asserts, that the interconnection and upgrade process is ripe for discrimination by incumbents like Duke because of the economic incentive to favor its own generating facilities and disadvantage independent power producers. However, Friesian's generating plant was not the target of FERC's crediting policy in this circumstance and the Commission's denial of Friesian's application does not threaten FERC's comprehensive federal regulatory scheme. *See Pac. Gas & Elec. Co.*, 461 U.S. at 204, 75 L. Ed. 2d. at 765. *Cf. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 964 F.3d 1177, 1188 (D.C. Cir. 2020) ("A State's regulations aimed directly at matters in FERC's jurisdiction cannot be sustained when they threaten the achievement of the comprehensive scheme of federal regulation.") (cleaned up)). That is because Friesian's entry into the energy market did not depend upon FERC's crediting policy.

¶ 32 Friesian was already a participant in the energy market, prepared to pay construction and upgrade costs as a qualifying facility. It then sought to take advantage of the cost allocation required under FERC's crediting policy by contracting with NCEMC. Under this arrangement, Duke would distribute the energy generated by Friesian's facility wholesale to NCEMC. As a result of the wholesale contract, Friesian re-classified itself as a merchant plant with the Commission. Absent this change in classification, Friesian already had a CPCN in hand and was permitted to build and operate its facility. For this reason, we conclude the Commission's denial of Friesian's second application does not frustrate FERC's policy goal to prevent discrimination in competition by an incumbent against a new provider.

¶ 33 We hold federal law does not preempt the Commission's denial of Friesian's application because it did not "interfere with FERC's authority by *disregarding* interstate wholesale rates." *Hughes*, 578 U.S. at 165, 194 L. Ed. 2d at 427 (emphasis added).

B. The Commission's Cost Analysis

¶ 34 **[2]** Second, Friesian argues the Commission's denial of its CPCN was arbitrary and capricious and unsupported by substantial evidence because the Commission did not consider "additional generation resources that the upgrades would facilitate."

¶ 35 As part of its need determination, the Commission adopted the levelized cost of transmission ("LCOT") test to evaluate "the reasonableness of the network upgrade costs associated with interconnecting a new generating facility."[9] The LCOT is "calculated by dividing the annualized cost of the required new transmission assets over the typical transmission asset lifetime by the expected annual generator output in [megawatt hour]."

¶ 36 At the hearing on its application, Friesian introduced evidence that the network upgrades would "facilitate the interconnection of 1,500 megawatts of additional generation in the Carolinas." Duke introduced evidence that the network upgrades would allow for greater interconnection in its southeastern service territory, alleviate any "queue paralysis" and delays in future interconnection, and minimize challenges in its own interconnection study process.

¶ 37 In its cost analysis, the Commission accounted only for the planned output from Friesian's facility, not the potential output from future electricity generation by other facilities that would use the upgraded grid. Based on the narrowed consideration, Friesian's upgrades were assigned an LCOT value of $62.94 per megawatt hour ("MWh") as opposed to between $1.56/MWh and $3.22/MWh for comparable nationwide solar network upgrades. Friesian's LCOT value was significantly higher than the LCOT values for two other generators in the state, both of which have received CPCNs from the Commission, at $0.33/MWh and $0.92/MWh.

¶ 38 Friesian asserts that if the Commission had weighed the potential future electricity generation created by the network upgrades, its upgrade figures would be much more comparable to benchmark LCOT numbers. But the record reflects that the Commission did, in fact, carefully consider and weigh the potential for additional energy generation. Rather than disregard that consideration outright, the Commission determined it was too speculative to support the approval of Friesian's CPCN. The Commission explained that the LCOT analysis provides a benchmark of reasonableness of the upgrades relative to other similar transmission investments, but it is not a determinative test upon which the Commission could solely base its CPCN decision. In its discretion, the Commission concluded that the potential additional generation was subject to many variables and "there is nothing in the record to conclude that any of the proposed generating facilities, much less all of them, will actually be

9. We note that Friesian challenged the propriety of this test before the Commission but "would accept an appropriate LCOT test for the purpose of evaluating the public convenience of the Friesian Facility in light of the Network Upgrade costs."

constructed and placed into service." Friesian cites no authority supporting its argument that the Commission was required to consider potential future generation. Nor does Friesian offer any reason for this Court to deviate from the deferential standard of review applicable to any discretionary decision by the Commission. *See* § 62-94(e) ("[A] rule, regulation, finding, determination, or order made by the Commission . . . shall be prima facie just and reasonable."); *N.C. Sav. & Loan League*, 302 N.C. at 466, 276 S.E.2d at 410 ("[T]he interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts[.]").

¶ 39 Considering the record and the Commission's exercise of its discretion in a fact-specific analysis, we cannot conclude the Commission's cost calculation was arbitrary and capricious, lacked "fair and careful consideration," or "failed to display reasoned judgment." *State ex rel. Utils. Comm'n*, 225 N.C. App. at 130, 738 S.E.2d at 194.

¶ 40 NCSEA and NCCEBA, as intervenors, further contend that the Commission could not implement this LCOT analysis for the first time in its consideration of Friesian's application without conducting rulemaking procedures including public notice and request for public comment. The LCOT analysis is not mandated by statute or Commission Rule for a CPCN application. *See* § 62-110.1; Commission R8-63. However, NCSEA and NCCEBA concede that the Commission is exempt from North Carolina's Administrative Procedures Act, N.C. Gen. Stat. § 150B-1(c)(3) (2019), so formal notice-and-comment rulemaking requirements do not generally apply to Commission policies. These intervenors have not cited, and we have not found, authority prohibiting the Commission from employing the LCOT analysis to the CPCN application process absent a rulemaking procedure.

¶ 41 For these reasons, we hold the Commission did not err by employing the LCOT analysis in its need determination.

C. The Commission Did Not Err in Concluding Friesian Did Not Demonstrate Public Need

¶ 42 **[3]** Friesian contends the Commission's conclusion that Friesian failed to demonstrate a need for the solar electric plant was arbitrary and capricious because Friesian presented evidence of an executed PPA with NCEMC and the Commission has never before denied a certificate application where a PPA existed to demonstrate need. Friesian also asserts that the Commission inappropriately imposed the more stringent need standard for public utilities when it considered Friesian's application as a merchant plant.

¶ 43 There is no indication in the record that the Commission applied the wrong need standard. The Commission considered Friesian's application as a merchant plant pursuant to R8-63, applying the correlating need requirement for that facility classification. *Compare* Commission Rule R8-61(b) (public utilities) *with* Commission Rule R8-63(b)(3) (merchant plants).

¶ 44 In 1992, the Commission established a rule (the "Empire Power Requirement," Docket No. SP-91, Sub 0), requiring a written output contract to demonstrate need for a facility. However, in 2001, the Commission adopted Rule R8-63(b)(3) (No. E-100, Sub 85), requiring that a merchant plant applying for a CPCN provide a "description of the need for the facility in the state and/or region, with supporting documentation." In adopting the current rule, the Commission expressly overruled its "Empire Power Requirement" that an applicant must submit a written contract for purchase of energy. Friesian contends that because it met the original, more stringent requirement to demonstrate need, it necessarily established need for its facility in this case.

¶ 45 We do not agree that the original requirement was necessarily more stringent than the current requirement. Rather, under the Commission's current rule, the presence or absence of an existing contract is simply not dispositive of the need for a facility. Our General Statutes provide that before the Commission can award a CPCN it must consider the "applicant's arrangement with other electric utilities for exchange of power, pooling of plant, purchase of power and other methods for providing reliable, efficient, and economical electric service." § 62-110.1(d). By its own rules, the Commission may consider other factors in its need determination, including compliance with state or federal laws.[10] That the Commission has yet to deny an application supported by an executed

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10. *See* Order Granting Certificate and Accepting Registration of New Renewable Facility, *In the Matter of Application of Atlantic Wind, LLC, for a Certificate of Public Convenience and Necessity to Construct a 300-Megawatt Wind Facility in Pasquotank and Perquimans Counties and Registration as a New Renewable Energy Facility*, State of North Carolina Utilities Commission, Docket No. EMP-49, Sub 0 (May 3, 2011); Order Issuing Certificate of Public Convenience and Necessity with Conditions, *In the Matter of Application of Duke Energy Carolinas, LLC, for a Certificate of Public Convenience and Necessity to Construct a 402-MW Natural Gas-Fired Combustion Turbine Generating Facility in Lincoln County, North Carolina*, State of North Carolina Utilities Commission, Docket No. E-7, Sub 1134 (Dec. 7, 2017); Order Granting Certificate with Conditions, *In the Matter of Application of Duke Energy Progress, LLC, for a Certificate of Public Convenience and Necessity to Construct a Microgrid Solar and Battery Storage Facility in Haywood County, North Carolina*, State of North Carolina Utilities Commission, Docket No. E-2, Sub 1127 (Apr. 6, 2017).

PPA makes this a case of first impression, but it does not establish an outright prohibition.

¶ 46 Here, relying on its past orders, the Commission applied the correct merchant plant need standard, affording "some weight to the existence of the PPA as a demonstration of need." However, it agreed with the Public Staff that while the PPA demonstrates potential financial or economic viability of the project, "it is not in and of itself a sufficient criterion on which to base a recommendation for approval or disapproval of a CPCN."

¶ 47 The record reveals the Commission considered and weighed the benefits of Friesian's contract with NCEMC and Duke. Nonetheless, the Commission concluded the project was not in the public interest: "the cost of the Network Upgrades dwarfs the costs of the generating plant" and "the scale of the costs associated with the Facility relative to the size and projected revenue from the Facility raises concerns regarding economic viability of the project." While reasonable minds may disagree about the Commission's judgment call, the applicable standard of review does not afford this Court the authority to "second guess the Commission's determination" in this regard. *In re Duke Energy Corp.*, 232 N.C. App. at 586, 755 S.E.2d at 390.

¶ 48 NCEMC argues, in the alternative to its request for reversal, that we remand this matter to the Commission with instructions that it consider developments which might have occurred with the passage of time since its denial of Friesian's application or that might occur in the service life of Friesian's facility, such as the completion of Duke's integrated resource plan, proposed queue reform, and additional generating capacity. Our review is limited to whether substantial evidence in the record before us supports the Commission's decision, *see* § 62-94(b)(5), so we cannot consider later occurring developments.

III. CONCLUSION

¶ 49 For the above reasons, we affirm the order of the Commission.

AFFIRMED.

Judge HAMPSON concurs.

Judge MURPHY concurs by separate opinion.

MURPHY, Judge, concurring in result only.

¶ 50 Based merely upon the arguments made by Petitioner-Appellant and Intervenor-Appellant, I agree with the Majority's analysis. While I have surmised potential winning arguments for Appellants, such arguments were not made by them and have not been made a part of this adversarial proceeding. This case does not present an issue of statutory interpretation that would necessitate our deviation from the basic tenet that "it is not the role of this Court to create an appeal for an appellant or to supplement an appellant's brief with legal authority or arguments not contained therein." *Thompson v. Bass*, 261 N.C. App. 285, 292, 819 S.E.2d 621, 627 (2018); *disc. rev. denied*, 822 S.E.2d 617 (2019); *Wells Fargo Bank, N.A. v. Am. Nat'l Bank & Tr. Co.*, 250 N.C. App. 280, 286, 791 S.E.2d 906, 911 (2016) ("When this Court is called upon to interpret a statute, we must examine the text, consult the canons of statutory construction, and consider any relevant legislative history, regardless of whether the parties adequately referenced these sources of statutory construction in their briefs. To do otherwise would permit the parties, through omission in their briefs, to steer our interpretation of the law in violation of the axiomatic rule that while litigants can stipulate to the facts in a case, no party can stipulate to what the law is. That is for the court to decide."). As a result, I would not consider our opinion today to foreclose future litigants from making additional or refined arguments on the issues presented by this case and concur in result only.

STATE v. BRICHIKOV

[281 N.C. App. 408, 2022-NCCOA-33]

STATE OF NORTH CAROLINA
v.
MARK BRICHIKOV, DEFENDANT

No. COA20-660

Filed 18 January 2022

1. Appeal and Error—preservation of issues—request for lesser-included offense—multiple theories—objection to denial of request

In a second-degree murder trial, defendant preserved for review the trial court's refusal to give a pattern involuntary manslaughter instruction to the jury. Although defendant failed to properly request the instruction based on a theory of culpable omission (by not obtaining aid for his wife, who was overdosing)—which, as a deviation from the pattern instruction amounted to a special instruction that needed to be submitted in writing—he also requested the instruction on a theory that he had acted in a criminally negligent manner, which did not deviate from the pattern instruction, and his subsequent objections to the court's refusal to give the pattern instruction was sufficient to preserve the issue.

2. Homicide—second-degree murder—failure to instruct on lesser-included offense—involuntary manslaughter—malice not established—new trial

Where defendant was entitled to a jury instruction on involuntary manslaughter in his trial for second-degree murder and the omission of the instruction constituted prejudicial error, he was granted a new trial. The murder charge arose from the death of defendant's wife, which experts from both sides agreed was caused not only by defendant's assault using his hands but also by the victim's heart condition and having fentanyl in her system. Since the State did not conclusively establish the element of malice necessary for second-degree murder and the evidence could have permitted the jury to infer that defendant's conduct was merely reckless and the result of culpable negligence rather than a specific intent to kill, defendant's request for the lesser-included instruction should have been granted.

Judge CARPENTER dissenting.

STATE v. BRICHIKOV

[281 N.C. App. 408, 2022-NCCOA-33]

Appeal by Defendant from judgment entered 11 December 2019 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 11 May 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc X. Sneed, for the State.

M. Gordon Widenhouse, Jr., for defendant-appellant.

MURPHY, Judge.

¶ 1 A defendant is entitled to a jury instruction on a lesser included offense when the evidence, viewed in the light most favorable to the defendant, could support a jury verdict on that lesser included offense. When there is a reasonable possibility that the jury would have reached a different result had the trial court given the jury instruction on a lesser included offense, a defendant suffers prejudice and is entitled to a new trial.

¶ 2 Here, the evidence, when viewed in the light most favorable to Defendant, entitled him to a jury instruction on the lesser included offense of involuntary manslaughter. There was a reasonable possibility that a different result would have been reached had the involuntary manslaughter instruction been given to the jury, and Defendant is entitled to a new trial.

BACKGROUND

¶ 3 Defendant Mark Brichikov appeals his second-degree murder conviction in the death of his wife, Nadia Brichikov. Defendant and Mrs. Brichikov both were regular drug users. Only two days prior to her death, Mrs. Brichikov suffered a drug overdose, which resulted in a significant wound to the back of her head and required medical personnel to use Narcan to reverse the impact of opioids in her system. Mrs. Brichikov subsequently told Defendant about the overdose and the use of Narcan to revive her.

¶ 4 On 21 April 2018, Defendant and Mrs. Brichikov coordinated their meet up at a motel, and expressed their love for one another and desire to be together multiple times. Defendant had just left a drug rehabilitation facility, and Mrs. Brichikov had recently left jail and suffered the overdose the day before. However, Mrs. Brichikov had been sexually active with at least one individual other than Defendant, and she was also presently working as a confidential police informant. Defendant and

Mrs. Brichikov met at a motel on the evening of 21 April 2018; during that evening and the early morning hours of 22 April 2018, Defendant and Mrs. Brichikov exited their motel room multiple times, and Defendant appeared to have purchased drugs from a truck nearby.

¶ 5 In the early morning hours on 22 April 2018, responding law enforcement personnel found Mrs. Brichikov deceased in her motel room, with blunt force trauma to her face, as well as drug paraphernalia and Narcan in the room. Mrs. Brichikov had cocaine and fentanyl in her system at the time of her death. Responding law enforcement viewed motel surveillance video, which showed Defendant exiting the motel room and Mrs. Brichikov lying on the floor of the room. Law enforcement obtained a warrant and arrested Defendant for murder.

¶ 6 Defendant was indicted for first-degree murder in the death of Mrs. Brichikov. At trial, the State presented evidence Defendant assaulted Mrs. Brichikov in the motel room after they entered the motel room together for the final time in the early morning of 22 April 2018. During the assault and until she was located by police, Defendant and Mrs. Brichikov were the only individuals inside the motel room; while multiple individuals walked by Mrs. Brichikov while she was lying on the ground in the motel room, they did not enter the room. The State introduced motel video surveillance, which showed Defendant left the motel room for the final time in the early morning hours of 22 April 2018, and also showed Mrs. Brichikov assaulted, on the floor, and moving when Defendant left.

¶ 7 At trial, the medical examiner called by the State opined that Mrs. Brichikov's death was a "homicide," due to the presence of blunt force trauma consistent with an assault as at least a partial cause of the death. The medical examiner called by Defendant agreed.

¶ 8 Further, both experts also agreed that Mrs. Brichikov's significant heart condition (due to a narrowing of a coronary artery), as well as fentanyl in her system, contributed to her death, and pointed to all three circumstances–the assault, the heart condition, and the fentanyl–as contributing factors to her death, or comorbidities. The State's expert was not certain whether the removal of any one of these factors would have prevented Mrs. Brichikov's death, while Defendant's expert testified Mrs. Brichikov would not have died of the facial fractures from the assault alone. Defendant's expert also testified that Mrs. Brichikov's movements when Defendant left the room appeared to be consistent with a fentanyl

overdose, rather than the assault to her face, and noted Mrs. Brichikov's airways "were unobstructed."[1]

¶ 9 Defendant did not testify during his case in chief, but he admitted under oath outside the jury's presence during the charge conference that he assaulted Mrs. Brichikov and allowed his attorney to admit the same in closing arguments. After both sides rested, Defendant requested voluntary manslaughter and involuntary manslaughter jury instructions. During the charge conference, Defendant also requested a pattern jury instruction for second-degree murder that included involuntary manslaughter and stated the following:

> [DEFENSE COUNSEL]: . . . . We are also requesting involuntary manslaughter under a different theory. And the theory is that if the jury determines that [Defendant] is not guilty of first-, second- and voluntary, if submitted, on the theory that he did not proximately cause her death, then we would submit that an involuntary manslaughter is appropriate under the theory that, based on the video, he -- and text messages and circumstantial evidence, that he would've had knowledge of her drug use and did not adequately get her any medical assistance, and as a result of no medical assistance, [Mrs. Brichikov] expired.

In addition to that request, the trial court and Defense Counsel had the following exchanges during the charge conference:

> THE COURT: . . . . I believe you mentioned earlier that you're requesting involuntary manslaughter.
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> . . . .

---

1. We note the experts' disagreement does not negate Defendant's criminal responsibility. *See State v. Bethea*, 167 N.C. App. 215, 222, 605 S.E.2d 173, 179 (2004) (marks and citations omitted) ("To escape responsibility based on an intervening or superseding cause, the defendant must show that the intervening or superseding act was the sole cause of death. An intervening or superseding cause is a cause that so entirely intervenes in or supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury."), *cert. denied*, 362 N.C. 88 (2007); *see also State v. Quesinberry*, 319 N.C. 228, 233, 354 S.E.2d 446, 449 (1987) ("A person is criminally responsible for a homicide if his act caused or directly contributed to the death of the victim."). Here, Defendant could still be criminally responsible for Mrs. Brichikov's death because his assaultive behavior directly contributed to her death.

> THE COURT: . . . . -- assuming the Court gives involuntary manslaughter, or not, either way, do you intend to argue that [Defendant] is guilty of . . .
>
> [DEFENSE COUNSEL]: Yes, Judge. If the Court is inclined to give the involuntary instruction, then yes, I would be inclined to argue [Defendant] is guilty. We have had that discussion, Judge.
>
> . . . .
>
> THE COURT: All right. So this one does include at the end of the second-degree, "If you do not find [Defendant] guilty of second-degree murder, you must determine whether [Defendant] is guilty of involuntary manslaughter," and . . . "First that [Defendant] acted in a criminally negligent way" is what you're requesting?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.

¶ 10 The North Carolina pattern jury instruction for "Second Degree Murder Where a Deadly Weapon Is Used, Not Including Self-Defense, Covering All Lesser Included Homicide Offenses" reads, *inter alia*, as follows regarding the lesser included offense of involuntary manslaughter:

> For you to find the defendant guilty of involuntary manslaughter, the State must prove two things beyond a reasonable doubt:
>
> First, that the defendant acted a) [unlawfully] (or) b) [in a criminally negligent way]. a) [The defendant's act was unlawful if *(define crime e.g. defendant recklessly discharged a gun, killing the victim*).] b) [Criminal negligence is more than mere carelessness. The defendant's act was criminally negligent, if, judging by reasonable foresight, it was done with such gross recklessness or carelessness as to amount to a heedless indifference to the safety and rights of others.]
>
> And Second, the defendant's [unlawful] (or) [criminally negligent] act proximately caused the victim's death.

N.C.P.I.–Crim. 206.30A (2019). The involuntary manslaughter pattern jury instruction does not include language specifically discussing a culpable omission. *See id.*

¶ 11 The trial court rejected Defendant's requests for pattern voluntary and involuntary manslaughter instructions. Defendant objected at the charge conference to the trial court's refusal to submit those instructions, and renewed his objection after the trial court instructed the jury. The trial court instructed the jury as to first-degree murder and second-degree murder.

¶ 12 On the element of malice, and the use of Defendant's hands as a deadly weapon, the trial court instructed as follows:

> Malice means not only hatred, ill will or spite, as it is ordinarily understood -- to be sure, that is malice -- but it also means that condition of mind that 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 her death, without just cause, excuse or justification.
>
> If the State proves beyond a reasonable doubt that [Defendant] intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused the person's death, you *may infer* first that the killing was unlawful and, second, that it was *done with malice*, *but you are not compelled to do so*.
>
> . . . .
>
> If the State proves beyond a reasonable doubt that [Defendant] intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused the victim's death, you *may infer*, first, that the killing was unlawful and, second, that it was *done with malice*, *but you are not compelled to do so*.

(Emphases added). The trial court's instructions closely track the pattern jury instructions regarding malice in the "Second Degree Murder Where a Deadly Weapon Is Used, Not Including Self-Defense, Covering All Lesser Included Homicide Offenses" jury instruction. *See* N.C.P.I.–Crim. 206.30A (2019). In its closing argument, specifically regarding malice, the State referred to Mrs. Brichikov's facial wounds from Defendant's assault in arguing "[t]hat's malice. That's ill will. That's hatred. That's anger."

¶ 13 The jury convicted Defendant of second-degree murder. On appeal, Defendant argues the trial court's failure to instruct the jury on involuntary manslaughter was reversible error, as the jury could have found Defendant assaulted Mrs. Brichikov in a culpably negligent manner and failed to render aid in a culpably negligent omission, and accordingly could have convicted him of involuntary manslaughter.

¶ 14 The State argues a presumption of malice arose due to Defendant's use of his hands in his assault of Mrs. Brichikov. Specifically, the State argues it "has *established* malice in the instant case." (Emphasis added). Of note, in its brief, the State does not attempt to distinguish one of the most important cases relied on by Defendant, *State v. Debiase*, 211 N.C. App. 497, 711 S.E.2d 436, *disc. rev. denied*, 365 N.C. 335, 717 S.E.2d 399 (2011).

ANALYSIS

A. Preservation

¶ 15 **[1]** "Where a defendant has properly preserved [a] challenge to jury instructions, an appellate court reviews the trial court's decisions regarding jury instructions de novo." *State v. Richardson*, 270 N.C. App. 149, 152, 838 S.E.2d 470, 473 (2020); *see also State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) ("Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court.").

¶ 16 We examine two preservation issues regarding the involuntary manslaughter instruction. First, we analyze whether Defendant's requests for an involuntary manslaughter instruction, with subsequent argument regarding the theory of culpable omission, were sufficient requests for a pattern jury instruction for involuntary manslaughter. Second, we examine whether Defendant preserved the involuntary manslaughter instruction via objection.

¶ 17 While Defendant requested a pattern jury instruction for involuntary manslaughter, the focus of the request turned to a theory of Defendant's culpable omission to obtain aid for his wife when he knew she was overdosing. A request for a culpable omission instruction would be a deviation from the pattern jury instruction, qualify as a special instruction, and would have needed to be submitted to the trial court in writing. *See State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997) (citation omitted) ("We note initially that [the] defendant's proposed instructions [to modify the pattern jury instructions] were tantamount to a request for special instructions. . . . This Court has held that a trial

court's ruling denying requested [special] instructions is not error where the defendant fails to submit his request for instructions in writing. [The] [d]efendant here did not submit either of his proposed modifications in writing, and therefore it was not error for the trial court to fail to charge as requested."), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998).

¶ 18 However, upon a thorough review of the Record, Defendant requested involuntary manslaughter under multiple theories and was not limited to the culpable omission theory. While Defendant requested a special instruction regarding culpable omission that deviated from the pattern jury instructions, he also requested the pattern jury instruction for involuntary manslaughter by responding affirmatively to the trial court's question regarding whether Defendant was requesting the following instruction: "First that the defendant acted in a criminally negligent way[.]" The trial court's language in that question derives from the pattern jury instruction for involuntary manslaughter, and Defendant orally requested the pattern jury instruction for involuntary manslaughter. *See* N.C.P.I.–Crim. 206.30A (2019) (marks omitted) ("For you to find the defendant guilty of involuntary manslaughter, the State must prove . . . that the defendant acted . . . in a criminally negligent way.").

¶ 19 Further, Defendant's objections to the trial court's refusal to give the involuntary manslaughter instruction preserved the issue for appeal. *See State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999) ("We note that [the] defendant waived this [improper jury instructions] argument by failing to properly object during the charge conference."), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d. 321 (2000); *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988); N.C. R. App. P. 10(a)(2) (2021) ("A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury."). Defendant objected during the charge conference and after the trial court instructed the jury, and properly preserved his challenge to the trial court's refusal to give a pattern involuntary manslaughter instruction to the jury.

B. Refusal to Give Pattern Involuntary Manslaughter Instruction

¶ 20 **[2]** "When determining whether the evidence is sufficient to entitle a defendant to jury instructions, courts must consider the evidence in the

light most favorable to the defendant." *State v. Clegg*, 142 N.C. App. 35, 46, 542 S.E.2d 269, 277 (marks omitted), *disc. rev. denied*, 353 N.C. 453, 548 S.E.2d 529 (2001).

¶ 21 "[A] judge presiding over a jury trial *must instruct* the jury as to a lesser included offense of the crime charged where there is evidence from which the jury could reasonably conclude that the defendant committed the lesser included offense." *State v. McConnaughey*, 66 N.C. App. 92, 95, 311 S.E.2d 26, 28 (1984) (emphasis added); *see also State v. Collins*, 334 N.C. 54, 58, 431 S.E.2d 188, 190-91 (1993) ("If the evidence before the trial court in the defendant's non-capital trial . . . tended to show that the defendant might be guilty of lesser-included offenses, the trial court was required . . . to instruct the jury as to those lesser-included crimes.").

> A trial judge is required to instruct the jury on the law arising from evidence presented at trial. The necessity of instructing the jury as to lesser included offenses arises only where there is evidence from which the jury could find that a lesser included offense had been committed. Further, the trial judge is not required to submit lesser included offenses for a jury's consideration when the State's evidence is *positive as to each and every elemen*t of the crime charged and there is *no conflicting evidence* related to any element of the crime charged.

State v. Washington, 142 N.C. App. 657, 659-60, 544 S.E.2d 249, 251 (2001) (emphases added) (citation omitted), *disc. rev. denied*, 353 N.C. 532, 550 S.E.2d 165 (2001); *see also State v. Drumgold*, 297 N.C. 267, 271, 254 S.E.2d 531, 533 (1979) (citation and marks omitted) ("It is well settled that a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts. On the other hand, the trial court need not submit lesser degrees of a crime to the jury when the State's evidence is positive as to each and every element of the crime charged *and there is no conflicting evidence relating to any element of the charged crime*.").

¶ 22 We review whether the State's evidence was sufficient to fully satisfy its burden of proving each element of the crime–second-degree murder. *See State v. Johnson*, 317 N.C. 193, 205, 344 S.E.2d 775, 783 (1986). Where other evidence negates those elements, when viewed in the light most favorable to Defendant, Defendant is entitled to an instruction regarding the lesser included offense of involuntary manslaughter. *Id.* ("Since the State's evidence was sufficient to fully satisfy its burden of proving

each element of first-degree murder and there was no other evidence to negate these elements other than the defendant's denial that he committed the offense, the defendant was not entitled to an instruction on the lesser-included offense of involuntary manslaughter."). Defendant's argument that the trial court should have given an involuntary manslaughter jury instruction posits that the evidence negated the element of malice and supported a jury verdict of involuntary manslaughter due to his criminally negligent actions.

¶ 23 Additionally,

> [o]n appeal, a defendant is required not only to show that a challenged jury instruction was erroneous, but also that such error prejudiced the defendant. "A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."

Richardson, 270 N.C. App. at 152, 838 S.E.2d at 473 (citation omitted) (quoting N.C.G.S. § 15A-1443(a) (2019)).

1. Second-Degree Murder and Malice Presumption

¶ 24 Before our analysis of the lesser included offense of involuntary manslaughter, we note the elements of the more serious crime of second-degree murder, and analyze its element of malice. "Second-degree murder . . . is defined as an unlawful killing of a human being *with malice* but without premeditation and deliberation." *State v. Thomas*, 325 N.C. 583, 567, 386 S.E.2d 555, 603-04 (1989). The pattern jury instructions require the State to prove three things beyond a reasonable doubt in order to obtain a second-degree murder conviction: "the defendant wounded the victim with a deadly weapon"; "the defendant acted intentionally and with malice"; and "the defendant's act was a proximate cause of the victim's death." N.C.P.I.–Crim. 206.30A (2019).

¶ 25 Malice is defined as follows:

> [M]alice, as it is ordinarily understood, means not only hatred, ill will, or spite, but also that condition of mind which prompts a person to take the life of another intentionally, without just cause, excuse, or justification, or to wantonly act in such a manner as to manifest depravity of mind, a heart devoid of a sense of social duty, and a callous disregard for human life.

State v. Crawford, 329 N.C. 466, 481, 406 S.E.2d 579, 587 (1991).

¶ 26 "It is well settled that an instruction to the jury that the law implies malice and unlawfulness from the intentional use of a deadly weapon proximately resulting in death is not a conclusive irrebuttable presumption." *State v. Holder*, 331 N.C. 462, 487, 418 S.E.2d 197, 211 (1992) (citing *State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982)); *see also State v. Forrest*, 321 N.C. 186, 191-92, 362 S.E.2d 252, 255 (1987) ("The trial court properly instructed the jury that it should consider this permissive inference [of malice] along with all the other facts and circumstances . . . ."). Defendant and the State disagree regarding whether the evidence established the second-degree murder element of malice, which would preclude a lesser included offense instruction in this case. After analyzing caselaw below, we do not agree with the State's contention that each element of second-degree murder, specifically malice, was conclusively established when the evidence is viewed in the light most favorable to Defendant.

2. Involuntary Manslaughter–Criminal Negligence

¶ 27 "Involuntary manslaughter, which is a lesser included offense of second degree murder, is the unlawful killing of a human being *without malice*, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury." *Debiase*, 211 N.C. App. at 505, 711 S.E.2d at 441 (emphasis added) (citation and marks omitted).

¶ 28 "Involuntary manslaughter may also be defined as the unintentional killing of a human being *without malice*, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Powell*, 336 N.C. 762, 767, 446 S.E.2d 26, 29 (1994) (emphasis added).

> [W]hile involuntary manslaughter imports an unintentional killing, i.e., the absence of a specific intent to kill, it is . . . accomplished by means of some intentional act. [W]ithout some intentional act in the chain of causation leading to death there can be no criminal responsibility. Death under such circumstances would be the result of accident or misadventure.

State v. Wilkerson, 295 N.C. 559, 582, 247 S.E.2d 905, 918 (1978).

¶ 29 Defendant was entitled to an involuntary manslaughter jury instruction, specifically in light of our opinion in *Debiase*. In *Debiase*, the defendant and the victim argued, and the defendant attacked the victim with a beer bottle and hit the victim multiple times in the head. *Debiase*, 211 N.C. App. at 500, 711 S.E.2d at 438. During the course of the attack, the

beer bottle broke, the defendant "jabbed [the victim] multiple times with the bottle[,]" and the victim died. *Id.* at 498, 500, 711 S.E.2d at 437, 438 (marks omitted). The defendant was convicted of second-degree murder, but argued the trial court erred in failing to instruct the jury on the lesser included offense of involuntary manslaughter because the evidence supported the charge. *Id.* at 503, 711 S.E.2d at 440. We agreed, stating the evidence, when viewed in the light most favorable to the defendant, indicated "[the] [d]efendant did not know and had no reason to believe that the bottle would break or that the breaking of the bottle would inflict a fatal wound to [the victim's] neck." *Id.* at 506, 711 S.E.2d at 442.

¶ 30 Moreover, in *Debiase*, we rejected the State's argument that the defendant's use of a deadly weapon required a "conclusive, irrebuttable presumption" that the defendant acted with malice, which would have rendered the trial court's refusal to instruct the jury regarding involuntary manslaughter valid. *Id.* at 509, 711 S.E.2d at 444. The State makes a similar argument here regarding a required and established presumption of malice. This argument is similarly unpersuasive and is now in direct contradiction to our caselaw. The trial court's instruction regarding malice, which told the jury it was permitted, but not required, to infer malice from Defendant's use of his hands in the assault, comported with our holding in *Debiase*, which treated malice as a "permissible inference," and not a "mandatory presumption," when "the defendant adduces evidence or relies on a portion of the State's evidence raising an issue on the existence of malice[.]" *Debiase*, 211 N.C. App. at 509-10, 711 S.E.2d at 444-45 (marks omitted).

¶ 31 Viewing the evidence in the light most favorable to Defendant, the evidence was not "positive" as to the element of malice for second-degree murder. The jury could reasonably have found Defendant did not act with malice, but rather committed a reckless act without the intent to kill or seriously injure[2]–he spent the day declaring his love for Mrs. Brichikov,

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2. We have held:

> Had the jury been permitted to consider the issue of Defendant's guilt of involuntary manslaughter, there is a reasonable possibility that it might have concluded that he acted 'without intention to kill or inflict serious bodily injury, and without either express or implied malice,' making him guilty of involuntary manslaughter rather than second degree murder.

Debiase, 211 N.C. App. at 510, 711 S.E.2d at 445 (quoting *State v. Foust*, 258 N.C. 453, 459, 128 S.E.2d 889, 893 (1963)). " 'In this setting, and with credibility a matter for the jury, the court should have submitted involuntary manslaughter with appropriate instructions' to the jury." *Id.* (quoting *State v. Wrenn*, 279 N.C. 676, 683, 185 S.E.2d 129, 133 (1971)).

Further, we note Defendant acted intentionally in assaulting Mrs. Brichikov, which does not negate the possibility of him acting with criminal negligence to support an

they used drugs together, something occurred to trigger a confrontation after they spent hours together the day of the killing, and her body was in a weakened state from a recent overdose, heart blockage, and fentanyl overdose. Further, according to Defendant's expert, the assault did not cause the death on its own. Defendant also arguably used a less deadly weapon than the bottle used in *Debiase*, his hands, and "the evidence contained in the present [R]ecord is susceptible to the interpretation that, at the time that [Defendant] struck [Mrs. Brichikov]," he did so recklessly and with culpable negligence, permitting an involuntary manslaughter conviction. *Debiase*, 211 N.C. App. at 506, 711 S.E.2d at 442.

¶ 32 The State relies on *State v. Smith*, *inter alia*, to advance an argument that malice is presumed due to the use of a deadly weapon. *See State v. Smith*, 351 N.C. 251, 266-67, 524 S.E.2d 28, 40, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000); *see also State v. Bush*, 289 N.C 159, 170, 221 S.E.2d 333, 340, *judgment vacated in part and remanded on other grounds*, *Bush v. North Carolina*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976). Specifically, the State argues it "has *established* malice in the instant case." (Emphasis added). Our Supreme Court's holding in *Smith*, where malice was not required to be shown in a first-degree murder conviction where the defendant used *poison* as a weapon, is clearly distinguishable from this case, where Defendant's *hands* were his deadly weapon, which do not support an irrebuttable presumption of malice. *See Smith*, 351 N.C. at 267, 524 S.E.2d at 40 (marks omitted) ("This Court has already stated that murder by torture, which is in the same class as murder by poison, is a dangerous activity of such reckless disregard for human life that, like felony murder, malice is implied by the law. The commission of torture implies the requisite malice, and a

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involuntary manslaughter conviction. "[W]hile involuntary manslaughter imports an unintentional killing, i.e., the absence of a specific intent to kill, it is . . . accomplished by means of some intentional act. Indeed without some intentional act in the chain of causation leading to death there can be no criminal responsibility." *Wilkerson*, 295 N.C. at 582, 247 S.E.2d at 918; *see also State v. Drew*, 162 N.C. App. 682, 686-87, 592 S.E.2d 27, 30 (holding that, where the defendant stabbed an individual he did not expect to be in his home, "the jury could have . . . concluded that [the] defendant . . . intended to strike at [the intruder] to keep him away, but did not intend to kill or seriously injure him," which merited an involuntary manslaughter instruction), *disc. rev. denied*, *appeal dismissed*, 358 N.C. 735, 601 S.E.2d 867 (2004); *Debiase*, 211 N.C. App. at 508-10, 711 S.E.2d at 443-45 (noting that, despite the defendant's admission that he intentionally hit the deceased on the head with a beer bottle, the "evidence tending to show the occurrence of a killing caused by the negligent or reckless use of a deadly weapon without any intent to inflict death or serious injury [was] sufficient to support an involuntary manslaughter conviction" and merited an involuntary manslaughter instruction). Here, the evidence tending to show Mrs. Brichikov's death was caused by Defendant's negligent or reckless use of his hands without intent to kill or seriously injure Mrs. Brichikov was sufficient to support an involuntary manslaughter conviction.

separate showing of malice is not necessary."). We find *Smith* inapplicable to this case. Further, such an established, conclusive presumption of malice would be at odds with the trial court's permissible inference instruction in this case. Finally, such a mandatory presumption of malice would be contrary to our Supreme Court's precedent. *See Holder*, 331 N.C. at 487, 418 S.E.2d at 211 (holding a jury instruction regarding the implication of "malice and unlawfulness from the intentional use of a deadly weapon proximately resulting in death is not a conclusive irrebuttable presumption").

¶ 33 In light of *Debiase*, a defendant wielding a deadly weapon that is not a tool deemed *per se* malicious, such as poison, merits an involuntary manslaughter instruction when the evidence, viewed in the light most favorable to the defendant, supports that the defendant acted intentionally and recklessly or carelessly, rather than intentionally and maliciously, and also acted without a specific intent to kill. *See State v. Brewer*, 325 N.C. 550, 575-76, 386 S.E.2d 569, 583 (1989), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990); *State v. Fleming*, 296 N.C. 559, 564, 251 S.E.2d 430, 433 (1979); *Wilkerson*, 295 N.C. at 582, 247 S.E.2d at 918. The evidence, viewed in the light most favorable to Defendant, merited an involuntary manslaughter instruction, as the evidence supported a finding Defendant acted with criminal negligence. The trial court erred in denying Defendant's request for an involuntary manslaughter instruction.

3. Prejudice

¶ 34

> The trial court must give a requested instruction, at least in substance, if a defendant requests it and the instruction is correct in law and supported by the evidence. In determining whether the evidence supports an instruction requested by a defendant, the evidence must be interpreted in the light most favorable to [the defendant]. The trial judge making the decision must focus on the sufficiency of the evidence, not the credibility of the evidence. Failure to give the requested instruction where required is a reversible error.

State v. Reynolds, 160 N.C. App. 579, 581, 586 S.E.2d 798, 800 (2003) (citations omitted), *disc. rev. denied*, 358 N.C. 548, 599 S.E.2d 916 (2004); *see also State v. Tidwell*, 112 N.C. App. 770, 775-77, 436 S.E.2d 922, 926-27 (1993) (ordering a new trial where the trial court refused the defendant's request for an involuntary manslaughter jury instruction and the defendant's testimony supported a finding of culpably negligent action).

> Error in failing to submit the question of a defendant's guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged because, in such case, it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly presented in the charge.

State v. Thacker, 281 N.C. 447, 456, 189 S.E.2d 145, 151 (1972), *disapproved on other grounds in North Carolina v. Butler*, 441 U.S. 369, 372, 60 L. Ed. 2d 286, 291 (1979).

¶ 35 Upon our review of the Record, "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached[,]" as the jury could have found Defendant did not act with malice, but rather with culpable negligence, but we cannot know with certainty. *See Richardson*, 270 N.C. App. at 152, 838 S.E.2d at 473 (marks omitted) ("A defendant is prejudiced when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."). Defendant suffered prejudice due to the trial court's failure to instruct the jury regarding involuntary manslaughter and is entitled to a new trial.

4. Involuntary Manslaughter-Culpable Omission

¶ 36 Our holding that the evidence, when viewed in the light most favorable to Defendant, supported a finding Defendant acted with criminal negligence and entitled him to a jury instruction regarding involuntary manslaughter renders Defendant's second argument–the evidence supported a finding Defendant's actions were a culpable omission meriting an involuntary manslaughter instruction–moot. *See State v. Angram*, 270 N.C. App. 82, 88, 839 S.E.2d 865, 869 (2020) ("Because we must reverse the judgment, we need not address [the] defendant's other issue on appeal."). We decline to address the substance of Defendant's second and unpreserved argument. The mootness of Defendant's second argument is no indictment on the validity or invalidity of the argument.

CONCLUSION

¶ 37 Defendant was entitled to a jury instruction on involuntary manslaughter, as the evidence could have supported a guilty verdict for involuntary manslaughter under a theory of culpable negligence. Further, Defendant suffered prejudicial error, as there was a reasonable possibility that a different result would have been reached had the involuntary manslaughter instruction been given to the jury.

NEW TRIAL.

Judge GORE concurs.

Judge CARPENTER dissents by separate opinion.

CARPENTER, Judge, dissenting.

¶ 38 In this matter, I concur with the majority that an instruction on involuntary manslaughter based upon a theory of culpable omission would require a special instruction be given to the jury, and Defendant failed to properly preserve this issue for appeal by failing to present his proposed special instruction in writing to permit review by this Court.

¶ 39 I write to respectfully dissent regarding the issue of whether the trial court's refusal to grant Defendant's request for a lesser included instruction on involuntary manslaughter contained in the pattern jury instructions was error. Based upon the jury finding beyond a reasonable doubt that this offense was especially heinous, atrocious, or cruel as an aggravating factor, it appears clear the verdict would not have been different had the trial judge given the lesser included involuntary manslaughter instruction.

¶ 40 "Involuntary manslaughter, which is a lesser included offense of second degree murder, is the unlawful killing of a human being without malice, without premeditation and deliberation, *and without intention to* kill or *inflict serious bodily injury*." *State v. Debiase*, 211 N.C. App. 497, 505, 711 S.E.2d 436, 441, *disc. rev. denied*, 365 N.C. 335, 717 S.E.2d 399 (2011) (emphasis added) (citation and marks omitted). "Involuntary manslaughter may also be defined as the unintentional killing of a human being without malice, proximately caused by (1) an *unlawful act not amounting to a felony* nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Powell*, 336 N.C. 762, 767, 446 S.E.2d 26, 29 (1994) (emphasis added).

¶ 41 My colleagues rely heavily on the application of *Debiase*, 211 N.C. App. 497, 711 S.E.2d 436. However, *Debiase* is distinguishable from this case. In *Debiase*, factual accounts varied as to the occurrences resulting in the victim's fatal wound, and the jury had to determine whether the defendant acted intentionally in inflicting the wound. *See Debiase*, 211 N.C. App. at 499, 711 S.E.2d at 438 (testimony presented to the effect the defendant did not make a stabbing motion at the victim using a broken beer bottle).

¶ 42 In the case at bar, there was no dispute Defendant intentionally and feloniously assaulted the victim, causing facial fractures. At all times, expert testimony was consistent in the conclusion the death was a homicide. Further, there was substantial evidence of malice in this case. The jury was asked to consider aggravating factors and found beyond a reasonable doubt the presence of the aggravating factor: the offense was "especially heinous, atrocious, or cruel." We have special insight into the jury's treatment and consideration of the malice element of second degree murder, based upon its findings of aggravating factors: insight that we would not ordinarily have. In finding this offense was especially heinous, atrocious, or cruel beyond a reasonable doubt, it is clear the jury gave substantially the same consideration to the evidence that it would have given in the determination of the presence of malice. Therefore, the verdict would not have been different had the lesser included instruction on involuntary manslaughter been given. The majority correctly writes that in *Debiase*, we decided, when viewing the evidence in the light most favorable to the defendant, "[the] [d]efendant did not know and had no reason to believe that the bottle would break or that the breaking of the bottle would inflict a fatal wound to [the victim's] neck." *Id.* at 506, 711 S.E.2d at 442. I cannot similarly agree that in the case at bar, where Defendant beat his wife so badly that she suffered multiple facial fractures, the Defendant did not know or did not have reason to believe he would cause serious bodily injury or inflict a fatal wound.

¶ 43 Given that the jury found this crime to be especially heinous, atrocious, or cruel, the evidence is undisputed that Defendant committed an unlawful act amounting to a felony intended to inflict serious bodily injury. Even in the light most favorable to Defendant, no evidence existed to contravene the fact that Defendant assaulted his wife, nor did evidence exist to contravene the fact that Defendant acted with the intention to inflict serious bodily injury, or the knowledge or reason to know his actions could do so. Therefore, Defendant was not entitled to an involuntary manslaughter instruction.

¶ 44 I would find no error in the trial court's decision to decline to deliver an instruction to the jury on involuntary manslaughter because the jury's verdict would not have been different had the instruction been given. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
FRANK CATALDO

No. COA20-740

Filed 18 January 2022

Discovery—post-conviction—instructions on remand—scope of in camera review—failure to comply with mandate

In a sexual offense case in which the appellate court instructed the trial court on remand to conduct an in camera review of child protective services records for materiality—requested in defendant's motion for post-conviction discovery seeking information regarding prior unfounded claims of sexual abuse made by the victim—the trial court impermissibly narrowed the scope of its review to records involving specific time periods and accusations against specific people. Therefore, its order denying defendant's motion for post-conviction discovery was vacated and the matter remanded for further review.

Judge ARROWOOD dissenting.

Appeal by Defendant from order entered 17 June 2019 by Judge Edwin G. Wilson, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 8 September 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State-Appellee.

North Carolina Prisoner Legal Services, Inc., by Christopher J. Heaney, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals an order wherein the trial court concluded that certain sealed child protective services records obtained by the trial court and reviewed in camera during post-conviction discovery were immaterial to Defendant's defense and denied Defendant's request for access to those records and a new trial. Because the trial court impermissibly narrowed the scope of its post-conviction discovery orders, the trial court failed to comply with this Court's mandate in *State v. Cataldo*,

261 N.C. App. 538, 818 S.E.2d 203, WL 4441414 (2018) (unpublished) ("*Cataldo II*"). We reverse the trial court's order and remand for post-conviction discovery orders and an in camera review of the records at issue, in accordance with *Cataldo II*.

I. Procedural Background

¶ 2 On 8 May 2013, following a trial, a jury found Defendant guilty of two counts of statutory sex offense and one count of statutory rape of T.B., a minor.[1] The trial court consolidated the two statutory sex offense convictions and entered judgment, sentencing Defendant to consecutive prison terms of 240 to 297 months for statutory sex offense and 240 to 297 months for statutory rape. Defendant appealed. By opinion filed 3 June 2014, this Court found no error in the proceeding below. *State v. Cataldo*, 234 N.C. App. 329, 762 S.E.2d 2, WL 2507788 (2014) (unpublished) ("*Cataldo I*").

¶ 3 On 7 July 2015, Defendant filed in the trial court a motion for appropriate relief ("MAR") and a motion for post-conviction discovery. In his MAR, Defendant alleged that he had received ineffective assistance of counsel because his "trial counsel did not request an *in camera* review of DSS records about the complainant's prior allegations of sexual abuse," and "[a]s a result, trial counsel failed to discover exculpatory and impeachment evidence that would have greatly aided [Defendant's] defense."

¶ 4 Defendant relied on *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), to support his argument. In *Ritchie*, the defendant was charged with various sex offenses against a minor and sought disclosure of the victim's child protective services records in order to raise a defense. In a plurality decision, the United States Supreme Court stated, "It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Id.* at 57 (citations omitted). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* (citation omitted). The Court concluded that the defendant was "entitled to know whether the [child protective services] file contains information that may have changed the outcome of his trial had it been disclosed[,]" and remanded for an in camera review of the file. *Id.* at 61.

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1. The transcript indicates that the jury found Defendant not guilty of one other count of statutory rape.

¶ 5 Defendant alleged in his MAR that before accusing Defendant, "T.B. made multiple allegations of sexual abuse against family members that were investigated by DSS and determined to be unfounded," including: "a previous DSS investigation when T.B. was four years old regarding T.B. being sexually abused by her biological father and by a neighbor"; accusations made in 2008 against her biological father for sexually abusing her; and accusations made in 2009 against her uncle for sexually abusing her. Defendant argued that T.B.'s "history of making false allegations of sexual abuse" was "directly relevant to the credibility of her claims against [Defendant]." Defendant requested the trial court "order post-conviction discovery from the State so he may review the materials, continue post-conviction investigation, and amend his [MAR]."

¶ 6 In his motion for post-conviction discovery, Defendant requested that the trial court order Rockingham Department of Health and Human Services ("Rockingham DHHS") and Guilford County Department of Social Services ("Guilford DSS") "to turn over all records, including medical and mental health records, concerning [T.B.] . . . to the Court for *in camera* review" and order Kim Madden, a psychiatrist who interviewed T.B. in January 2011, "to turn over all notes and/or reports concerning her treatment of T.B. for an *in camera* review," pursuant to *Ritchie*.

¶ 7 The State filed an answer to Defendant's MAR, arguing that it should be denied. Defendant moved to stay a decision on his MAR until he received and had an opportunity to review post-conviction discovery materials. The trial court entered an order on 5 October 2016 denying Defendant's motion to stay a decision on his MAR, his MAR, and his motion for post-conviction discovery.

¶ 8 Defendant filed a petition for writ of certiorari with this Court, seeking review of the 5 October 2016 order. This Court granted certiorari. By opinion filed 18 September 2018, this Court reversed the denials of Defendant's MAR and motion for post-conviction discovery stating,

> Our precedent, as well as that of *Ritchie*, is clear. The DSS records sought by defendant, if in fact they exist, may have permitted him to confront and impeach T.B. Defendant could not be expected to present a showing of this evidence prior to it being released. Its materiality, however, is questionable. Do the records exist? Do they show what defendant contends? These are matters best suited to an *in camera* review. . . .
>
> [W]e hold that [D]efendant made the requisite showing to support his motion for post-conviction

> discovery, and that the trial court erred in denying it. We therefore reverse the trial court's order, and remand for an *in camera* review of the DSS records at issue. Should the trial court determine that these records are in fact material, and would have changed the outcome of defendant's trial, [D]efendant should be granted a new trial.

Cataldo II, WL 4441414 at *11-12 (citations omitted).

¶ 9 Upon remand, the State, through Rockingham DHHS, provided the trial court "with the complete files of Rockingham DHHS, as they pertain to this matter." The trial court held a hearing on the matter and entered an Order Post-Conviction Discovery on 18 December 2018 ("Rockingham Order"), in which it found, in relevant part:

> 9. This Court has reviewed the records provided by the State through Rockingham DHHS and finds that the file does not contain any records "at issue" as requested by [D]efendant in his post-conviction motion for discovery and as described by the Court of Appeals. The records at issue are records regarding T.B.'s allegations of prior abuse by her father from 2000-2001, and again in 2008, and by her uncle in 2009.
>
> 10. This Court does find that the records provided contain references to the records at issue, but they do not provide the substance of those records and this Court is unable to complete its *in camera review* as Ordered by the Court of Appeals until it receives the appropriate records.

¶ 10 Upon its findings, the trial court concluded and ordered that Rockingham DHHS "shall make available to this Court the DSS records at issue, specifically records regarding T.B.'s allegations of prior abuse by her father from 2000-2001, and again in 2008, and by her uncle in 2009."

¶ 11 Subsequently, the trial court and the parties exchanged emails regarding the scope of the Rockingham Order. Specifically, Defendant contended that the Rockingham Order's time ranges were too narrow, and that it failed to request both the files related to allegations made by T.B. against Defendant himself or unknown others, and the documents from Kim Madden regarding her treatment of T.B. The trial court declined to modify the Rockingham Order in response to Defendant's contentions, explaining that "the Court of Appeals was clear the remand was for a review of DSS records."

¶ 12 In response to the Rockingham Order, Rockingham DHHS sent a letter to the trial court, indicating that it "did not respond to any abuse, neglect or dependency reports regarding the victim child in 2000-2001, 2008, or 2009." However, the letter advised that the Central Registry "indicate[d] that the Guilford . . . [DSS] responded to abuse and/or neglect reports on the victim child on or around these time periods." The letter also indicated that Rockingham DHHS investigated a situation regarding T.B. in 2004, during which Guilford DSS had provided it with records from its involvement with the family in 2001 and 2002. Copies of the Guilford DSS records from 2001 and 2002 were attached to the letter.

¶ 13 The trial court entered an Order Post-Conviction Discovery Guilford DSS on 18 February 2019 ("Guilford Order"), finding in part:

> This Court has reviewed the Guilford County DSS records provided by [Rockingham] DHHS and finds they do not contain any records described by the Court of Appeals regarding T.B.'s allegations of prior abuse in 2008 or 2009. This Court is unable to complete its *in camera review* as Ordered by the Court of Appeals until it receives the appropriate records.

¶ 14 The trial court thus ordered Guilford DSS to "make available to this [c]ourt the DSS records at issue, specifically records regarding T.B.'s allegations of prior abuse from 2000-2001, 2008, and 2009."

¶ 15 The trial court entered an Order on Remand Defendant's Motion for Post-Conviction Discovery ("Order on Remand") on 17 June 2019. The trial court found, in pertinent part, that it had "conducted an *in camera* review of the records provided by [Guilford] DSS as directed by the Court of Appeals and observed that the records contained documentation related to allegations of prior abuse occurring on or around the dates noted in the Opinion of the Court of Appeals."

¶ 16 The trial court concluded, in relevant part:

> 23. Having conducted an *in camera* review of the records provided by [Guilford DSS], this Court concludes that, in the context of the entire record, there is not a reasonable probability that the outcome of defendant's trial would have been different had he been able to access these records. As such, the records of T.B.'s prior allegations of abuse are not material to the defense.

> 24. Defendant, therefore, is not entitled to have access to the records of T.B.'s prior allegations of abuse and is not entitled to a new trial.

¶ 17 The trial court denied Defendant's Motion for Post-Conviction Discovery and ordered the records reviewed be sealed and placed in the record for appellate review, in accordance with *State v. Hardy*, 293 N.C. 105, 128, 235 S.E.2d 828, 842 (1977).

¶ 18 Defendant filed a petition for writ of certiorari with this Court on 29 May 2020. This Court allowed the petition "for purposes of reviewing Judge Edwin G. Wilson, Jr.'s, 17 June 2019 order denying [Defendant's] motion for post-conviction discovery upon the *in camera* review ordered by this Court in [*Cataldo II*]."

II. Discussion

A. Scope of post-conviction discovery orders

¶ 19 Defendant argues that the trial court erred on remand by impermissibly narrowing the scope of its post-conviction discovery orders to Rockingham DHHS and Guilford DSS, such that the trial court failed to conduct a sufficient in camera review of relevant records, as mandated by this Court in *Cataldo II*. We agree.

¶ 20 "The general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure." *Condellone v. Condellone*, 137 N.C. App. 547, 551, 528 S.E.2d 639, 642 (2000) (quoting *Metts v. Piver*, 102 N.C. App. 98, 100, 401 S.E.2d 407, 408 (1991)); *see, e.g.*, *Creech v. Melnik*, 147 N.C. App. 471, 473-74, 556 S.E.2d 587, 589 (2001) ("Under the law of the case doctrine, an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.").

¶ 21 In the Factual and Procedural Background of *Cataldo II*, this Court explained that Defendant had filed an MAR on 7 July 2015 in which

> Defendant alleged that T.B.'s father had been accused of sexually abusing her from 2000 to 2001, and again in 2008, and that she had accused her uncle of sexually abusing her in 2009. He argued that he received ineffective assistance of counsel at trial, due to (1) counsel's failure to subpoena T.B.'s DSS records regarding prior claims of abuse; (2) counsel's failure

> to cross-examine T.B.'s therapist regarding prior claims of abuse; and (3) counsel's failure to impeach T.B. regarding her prior claims of abuse. That same day, [D]efendant filed a motion for post-conviction discovery, seeking an *in camera* review of T.B.'s DSS records regarding prior claims of abuse.

Cataldo II, WL 4441414 at *2. This Court then addressed the trial court's denial of Defendant's MAR as follows:

> [D]efendant contends that the trial court erred in denying his MAR because he made a plausible showing that material, favorable DSS records exist. We agree.
>
> . . . .
>
> Our precedent in [*State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990), and *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977)], as well as that of *Ritchie*, is clear. The DSS records sought by [D]efendant, if in fact they exist, may have permitted him to confront and impeach T.B. Defendant could not be expected to present a showing of this evidence prior to it being released. Its materiality, however, is questionable. Do the records exist? Do they show what defendant contends? These are matters best suited to an *in camera* review. *See Ritchie*, 480 U.S. at 61, 94 L. Ed. 2d at 60 (concluding that *in camera* review by the trial court would serve the defendant's interest while also protecting the confidentiality of individuals involved in child-abuse investigations).
>
> In accordance with all of this precedent, we hold that [D]efendant made the requisite showing to support his motion for post-conviction discovery, and that the trial court erred in denying it. We therefore reverse the trial court's order, and remand for an *in camera* review of the DSS records at issue. Should the trial court determine that these records are in fact material, and would have changed the outcome of [D]efendant's trial, [D]efendant should be granted a new trial.

Cataldo II, WL 4441414 at *3-4.

¶ 22 At issue is the proper scope of "the DSS records at issue" in this Court's directive to the trial court. *Id.* at *5.

¶ 23 Defendant argues that his original request was for Rockingham DHHS and Guilford DSS to produce "all records, including medical and mental health records, concerning [T.B.] . . . for *in camera* review[,]" and this request "defined the requisite scope of the DSS records at issue on remand." Thus, Defendant argues, the trial court erred in limiting the scope of review to the specified time periods and excluding any records of Rockingham DHHS's investigation in 2004, any allegations by T.B. against Defendant in 2006 or 2007, and any other relevant social services records.

¶ 24 In its Rockingham Order, the trial court found and concluded that "[t]he records at issue are records regarding T.B.'s allegations of prior abuse by her father from 2000-2001, and again in 2008, and by her uncle in 2009." Similarly, in its Guilford Order, the trial court concluded "the DSS records at issue" are "records regarding T.B.'s allegations of prior abuse from 2000-2001, 2008, and 2009." In its Order on Remand, the trial court noted the limited scope of its review, finding that "[i]n response to the Order of the Court of Appeals, this [c]ourt ordered [Rockingham] DHHS to provide the [c]ourt with the records described by the Court of Appeals, specifically regarding T.B.'s allegations of prior abuse in 2000-2001, 2008, and 2009." The trial court also found that it "ordered [Guilford] DSS to make available to [the court] the DSS records at issue, specifically those related to T.B.'s allegations of prior abuse from 2000-2001, 2008, and 2009[.]"

¶ 25 In *Cataldo II*, as quoted above, this Court mentioned these specific time periods in the Factual and Procedural Background of the opinion, describing specific allegations of abuse asserted in Defendant's MAR as grounds for Defendant's ineffective assistance of counsel claims. This Court, with a general reference to T.B.'s prior allegations of sexual abuse investigated by social services, then summarized Defendant's argument on appeal as "he was entitled to an *in camera* review and the disclosure of these DSS documents proving that T.B. has falsely accused others of sexual abuse." *Cataldo II*, WL 4441414 at *2-3. However, in describing Defendant's motion for post-conviction discovery – the main issue ultimately decided in *Cataldo II* – this Court described the motion as "seeking an *in camera* review of T.B.'s DSS records regarding prior claims of abuse." *Id.* at *2.

¶ 26 In his motion for post-conviction discovery, while Defendant referenced allegations from the specific time periods, Defendant's request for discovery of DSS records was not limited to those time periods.

Defendant argued that he "should be granted an *in camera* review of all DSS records concerning T.B." and requested the trial court order Rockingham DHHS and Guilford DSS "to turn over all records, including medical and mental health records, concerning [T.B.] to the [c]ourt for *in camera* review[.]"

¶ 27 In support of its holding that "[D]efendant made the requisite showing to support his motion for post-conviction discovery, and that the trial court erred in denying it[,]" this Court reasoned that "[t]he DSS records sought by [D]efendant, if in fact they exist, may have permitted him to confront and impeach T.B. Defendant could not be expected to present a showing of this evidence prior to it being released." *Id.* at *4-5. This reasoning applies to all DSS records sought by Defendant in his motion for post-conviction discovery regarding T.B.'s prior allegations of sexual abuse, not just those specific instances identified by Defendant without access to the records. The in camera review is designed to safeguard Defendant's due process right to evidence favorable and material to his guilt or punishment. *Ritchie*, 480 U.S. at 57.

¶ 28 Based on Defendant's motion for post-conviction discovery seeking all Rockingham DHHS and Guilford County DSS records regarding T.B. and this Court's language in *Cataldo II* ordering in camera review of the DSS records at issue, the trial court erred by impermissibly narrowing the scope of its post-conviction discovery orders to Rockingham DHHS and Guilford DSS, such that the trial court failed to conduct a sufficient in camera review of relevant records, as mandated by this Court in *Cataldo II*.

¶ 29 Accordingly, we reverse the trial court's order and remand for post-conviction discovery orders of proper scope and in camera review of "T.B.'s DSS records regarding prior claims of abuse." *Cataldo II*, WL 4441414 at *2.

B. In camera review on appeal

¶ 30 Defendant also asks this Court to review the social services records already reviewed by the trial court to determine whether they contain exculpatory information that would be favorable and material to his defense. We decline to review the records until all of the relevant records have been requested and reviewed in camera by the trial court. In light of our holding, we need not reach any remaining arguments.[2]

2. Defendant also argues that he is entitled to post-conviction discovery under N.C. Gen. Stat. § 15A-1415(f) and that the trial court erred when it failed to order production of such discovery by the State. We are uncertain what discovery Defendant believes he is entitled to beyond the scope of the issues decided in this opinion.

III. Conclusion

¶ 31 The trial court erred when it impermissibly narrowed the scope of its orders to Rockingham DHHS and Guilford DSS to include only records regarding allegations of events during certain time periods and against certain persons. Accordingly, we reverse the trial court's order and remand to the trial court with instructions to order Rockingham DHHS and Guilford DSS to produce T.B.'s social services records "regarding prior claims of abuse." *Id.*

¶ 32 Upon receipt and in camera review of the records, should the trial court determine that the records are in fact material, Defendant should be granted a new trial. *See id.* at *5.

REVERSED AND REMANDED.

Judge JACKSON concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

¶ 33 I respectfully dissent from the majority's holding that the trial court failed to comply with this Court's mandate as set out in *State v. Cataldo*, 261 N.C. App. 538, 818 S.E.2d 203 (2018) (unpublished) ("*Cataldo II*"). I sat on the panel that decided *Cataldo II* and concurred in that opinion, and I believe the trial court complied with *Cataldo II*. I vote to affirm the trial court's order, and respectfully dissent.

¶ 34 In defendant's motion for post-conviction discovery, defendant alleged the following:

> A review of the State's discovery materials contained in the file indicates that there are Department of Social Services records regarding T.B.'s past allegations of sexual abuse against other people that were determined to be unfounded by DSS. Additionally, there are records concerning T.B.'s work with counselor Kim Madden that are likely to contain information helpful for the defense.

Defendant's factual allegations included three subsections, describing T.B.'s allegations of sexual abuse against her father in 2000-2001, again in 2008, and against her uncle in 2009. After highlighting the allegations

made during these relevant periods, defendant argued that he "should be granted an in camera review of all DSS records concerning T.B."

¶ 35 In *Cataldo II*, this Court addressed defendant's contention "that he was entitled to an *in camera* review and the disclosure of *these DSS documents proving that T.B. had falsely accused others of sexual abuse*." 261 N.C. App. 538, 818 S.E.2d 203 at *8 (emphasis added). After concluding that the trial court erred in denying defendant's motion for post-conviction discovery, we directed the trial court to conduct "an *in camera* review of the DSS records at issue[,]" and if the trial court "determine[d] that these records [were] in fact material, and would have changed the outcome of defendant's trial," the trial court should grant defendant a new trial. *Id.* at *12.

¶ 36 On 18 December 2018, the trial court entered an order for post-conviction discovery with respect to Rockingham County DSS records. In the order, the trial court made the following relevant findings:

> 9. This Court has reviewed the records provided by the State through Rockingham DHHS and finds that the file does not contain any records regarding the DSS records "at issue" as requested by defendant in his post-conviction motion for discovery and as described by the Court of Appeals. The records at issue are records regarding T.B.'s allegations of prior abuse by her father from 2000-2001, and again in 2008, and by her uncle in 2009. The allegations of prior abuse are alleged to have occurred in North Carolina.
>
> 10. This Court does find that the records provided contain references to the records at issue, but they do not provide the substance of those records and this Court is unable to complete its *in camera review* as Ordered by the Court of Appeals until it receives the appropriate records.

On 18 February 2019, the trial court entered a similar order with respect to Guilford County DSS records, ordering the State to furnish complete records for the aforementioned time periods.

¶ 37 The issue on appeal is whether the trial court properly determined the scope of "the DSS records at issue" as directed by this Court in *Cataldo II*. In *Cataldo II*, we answered the question of whether defendant was entitled to an *in camera* review and disclosure of DSS

documents "proving that T.B. had falsely accused others of sexual abuse." *Id.* at *8. Although defendant's MAR did request "an *in camera* review of all DSS records concerning T.B.[,]" *Cataldo II* did not grant an *in camera* review of all DSS records concerning T.B., instead limiting the review to documents related to T.B.'s allegations against others. *Id.* This scope aligns with defendant's MAR, which specifically described three sets of allegations in 2000-2001, 2008, and 2009. I believe that the scope of "the DSS records at issue" is limited by the argument presented in defendant's MAR and encompasses DSS records pertaining to T.B.'s allegations against others in 2000-2001, 2008, and 2009.

¶ 38 Notably, the trial court entered two orders requiring the State to furnish additional records prior to completing the *in camera* review. The trial court recognized that the *in camera* review, as mandated by *Cataldo II*, required the production of specific records, but that the *in camera* review was limited in scope. After obtaining the relevant records at issue, the trial court conducted its *in camera* review and properly determined that the records of T.B.'s prior allegations of abuse were not material to the defense. The trial court complied with *Cataldo II* by conducting an *in camera* review of DSS records from these relevant time periods.

¶ 39 I believe the majority has misapprehended the holding and mandate set out in *Cataldo II*, and I vote to affirm the trial court's order. I respectfully dissent.

STATE v. CREW

[281 N.C. App. 437, 2022-NCCOA-35]

STATE OF NORTH CAROLINA
v.
DANIEL ISIAH CREW, JR.

No. COA20-721

Filed 18 January 2022

1. Animals—dogfighting—sufficiency of evidence

The State presented substantial evidence to send to the jury multiple charges of dogfighting where, on a property at which defendant ran a kennel business, investigators seized numerous dogs that had injuries and scarring consistent with trained, organized dogfighting and discovered equipment designed to condition dogs to increase their strength and endurance, medication commonly used in dogfighting operations, an area that appeared to be a dogfighting pit or training area, and publications and notes related to dogfighting.

2. Evidence—expert testimony—dogfighting case—leading question on direct exam

In a dogfighting and animal cruelty case, the trial court exercised appropriate discretion when it allowed the State to ask a leading question of the forensic veterinary medicine expert on direct examination as a follow-up to an earlier, non-leading question that elicited the expert's opinion that the dogs were being kept for the purpose of organized dogfighting.

3. Damages and Remedies—restitution—criminal case—evidentiary support—ability to pay

In a dogfighting and animal cruelty case in which thirty dogs were seized and placed in the care of a county animal shelter, the trial court's seven orders requiring defendant to pay a total of $70,000 in restitution for the dogs' care and housing was supported by sufficient evidence. The appellate court rejected defendant's argument that, where he was convicted of crimes relating to only seventeen out of thirty dogs seized, he could not be required to pay the costs associated with all thirty animals, since restitution may be imposed for any injuries or damages directly and proximately caused by criminal offenses pursuant to N.C.G.S. § 15A-1340.34(c), and in this case, all the dogs needed to be removed due to defendant's criminal activities. Further, the trial court was not required to make specific findings and conclusions of law to support its determination that defendant had the ability to pay the amount of restitution where there was sufficient supporting evidence.

4. Judgments—criminal case—awards of restitution—immediate conversion to civil judgments improper

In a dogfighting and animal cruelty case in which defendant was ordered to pay a total of $70,000 in restitution for the care and housing of thirty dogs that were seized, the trial court erred by immediately converting the restitution orders to civil judgments. Where the offenses at issue were not subject to the Crime Victim's Rights Act (and thus not subject to a specific statutory procedure allowing a restitution award to be converted into a civil judgment), and there was no other, separate statutory authority for the court's action, the civil judgments were vacated.

Appeal by defendant from judgments entered 25 September 2019 by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 6 October 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brenda Menard, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for defendant.

DIETZ, Judge.

¶ 1 Defendant Daniel Crew appeals his convictions for dogfighting, felony cruelty to animals, misdemeanor cruelty to animals, and restraining dogs in a cruel manner. Crew also challenges the trial court's restitution orders totaling $70,000, which the trial court immediately converted to civil judgments.

¶ 2 As explained below, the State presented sufficient evidence to support the dogfighting charges, and Crew's unpreserved challenge to a leading question posed by the prosecutor at trial is meritless. We therefore find no error in Crew's criminal convictions. We also find no error in the trial court's restitution orders, which were supported by sufficient evidence at trial. But we hold that the trial court lacked the authority to immediately convert those restitution orders into civil judgments. We therefore vacate those civil judgments.

Facts and Procedural History

¶ 3 Defendant Daniel Crew ran Crew Kennels on property owned by his parents in Rougemont. Most of the dogs he kept in his kennel

were pit bulls, which he bred and sold primarily for hunting and pulling competitions.

¶ 4 In 2018, law enforcement officers arrived at the property and found 30 pit bulls. The officers contacted Orange County Animal Services, who arrived and took over the investigation. Animal Control Manager Irene Phipps went to the property during the search. She found some of the dogs chained and others in "above ground box housing." Phipps was concerned because some of the dogs had injuries, which were "similar to injuries a dog would sustain through dogfighting." Some of the dogs had what appeared to be topical medication applied to the skin to attempt to heal the wounds. Phipps testified that she saw twenty dogs with no water and ten dogs with inadequate water. Phipps also testified that some of the animals appeared unhealthy and underweight.

¶ 5 Officers also found dogfighting publications and "keep notes" for preparing a dog for a fight at the property. Officers took five dogs that appeared to need immediate care to a veterinary facility and the rest to the Orange County Animal Services shelter.

¶ 6 The equipment found at the site included a device called a "Jenny," to which a dog is harnessed, a spring pole, two flirt poles, heavy chains, and a treadmill with two weighted dog collars. These items are used for exercise and conditioning to build up a dog's strength. The site also contained areas that appeared to be staging and dogfighting pit areas and weight scales used in organized dogfighting operations to weigh dogs before a fight.

¶ 7 Many of the dogs had injuries or significant scarring from past wounds. A number of dogs ultimately were euthanized.

¶ 8 The State charged Crew with fifteen counts of engaging in dogfighting, one count of allowing property to be used for dogfighting, five counts of felony cruelty to animals, twenty-five counts of misdemeanor cruelty to animals, and sixteen counts of restraining dogs in a cruel manner.

¶ 9 Dr. Clarissa Noureddine conducted two forensic examinations of the dogs. Dr. Noureddine is the chief veterinarian at the Guilford County Animal Shelter. She was admitted as an expert in forensic veterinary medicine. Dr. Noureddine reviewed photos and evidence found on site, exam findings from the emergency veterinary hospital and its veterinarian, and results of testing performed on the dogs.

¶ 10 At trial, Dr. Noureddine described the secluded environment in which the dogs were kept, and the items located at the site, as consistent with those found at dogfighting operations. Dr. Noureddine also testified

that the injuries the dogs sustained indicated that the animals were engaged in trained, organized fighting, not spontaneous fighting.

¶ 11 Andi Morgan, Assistant Director of Orange County Animal Services, testified that the agency incurred $92,500 in costs to house the seized dogs and provide necessary medical care and other services. According to Morgan, the cost to house the dogs alone was "a little over 80,000."

¶ 12 Crew moved to dismiss the dogfighting charges. The trial court granted the motion to dismiss the charge of allowing property to be used for dogfighting. The trial court denied the motion to dismiss as to the other dogfighting charges.

¶ 13 The jury found Crew guilty of eleven counts of dogfighting, three counts of felony cruelty to animals, fourteen counts of misdemeanor cruelty to animals, and two counts of restraining dogs in a cruel manner. The trial court imposed six consecutive active sentences of 10 to 21 months each along with several suspended sentences. The trial court also ordered Crew to pay Orange County Animal Services $10,000 in seven separate restitution orders that were then entered as civil judgments, totaling $70,000 in restitution.

¶ 14 Crew timely appealed the criminal judgments. He later petitioned for a writ of certiorari seeking review of the restitution awards entered as civil judgments. Because, as explained below, Crew's challenge to those civil judgments has merit, in our discretion, we allow the petition and issue of a writ of certiorari to review that issue. N.C. R. App. P. 21.

Analysis

I. Denial of motion to dismiss

¶ 15 **[1]** Crew first argues the trial court erred by denying his motion to dismiss the dogfighting charges. He contends that the State's evidence was insufficient to show that he intended to use the dogs for fighting purposes.

¶ 16 "This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). When a criminal defendant moves to dismiss, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65–66, 296 S.E.2d 649, 651 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164,

169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

¶ 17 The crime of possession of a dog for the purpose of dogfighting is a specific intent crime; it applies to a person "who owns, possesses, or trains a dog with the intent that the dog be used in an exhibition featuring the baiting of that dog or the fighting of that dog with another dog or with another animal." N.C. Gen. Stat. § 14-362.2(b). Crew argues that the State did not present sufficient evidence of his intent to commit that crime.

¶ 18 We reject this argument. The State presented evidence that the property at which they found the dogs contained equipment designed to increase the dogs' strength and endurance. They also recovered medication commonly used in dogfighting operations that could be used for wound care without involving a veterinarian. The property also contained an area that appeared to be a dogfighting pit or training area. Finally, the officers recovered dogfighting publications and "keep notes" for preparing a dog to fight.

¶ 19 In addition, the State presented expert testimony that many of the dogs had scarring and parasite infections consistent with dogs who were trained and used for dogfighting.

¶ 20 This evidence was sufficient for a reasonable juror to find that Crew intended to engage in dogfighting. Accordingly, the trial court did not err by denying the motion to dismiss.

II. The State's leading question during direct examination

¶ 21 **[2]** Crew next argues that the trial court plainly erred by allowing the prosecutor to ask a leading question to Dr. Noureddine, the expert who testified about the use of the dogs for fighting purposes.

¶ 22 As an initial matter, Crew acknowledges that the trial court's decision to permit this leading question was a discretionary one and that our Supreme Court and this Court repeatedly have held that plain error review does not apply to discretionary decisions. *See, e.g.*, *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000) ("[T]his Court has not applied the plain error rule to issues which fall within the realm of the trial court's discretion, and we decline to do so now."); *State v. Smith*, 194 N.C. App. 120, 126–27, 669 S.E.2d 8, 13 (2008) ("Our Supreme Court

has held, however, that discretionary decisions by the trial court are not subject to plain error review."). Crew thus asks this Court to invoke Rule 2 of the Rules of Appellate Procedure to excuse his failure to preserve this issue for appellate review. We reject this request. We can invoke Rule 2 only "in exceptional circumstances" that present a manifest injustice or issues of importance in the public interest. *State v. Ricks*, 378 N.C. 737, 2021-NCSC-116, ¶ 5. This case does not remotely approach that high bar.

¶ 23 Indeed, even if we were to apply the plain error standard—which, itself, is an exceedingly high standard of review—we could not find any error, much less any plain error. Leading questions generally are not permitted during direct examination. N.C. Gen. Stat. § 8C-1, Rule 611(c). But trial courts have discretion to permit a leading question that elicits "testimony already received into evidence without objection." *State v. Stafford*, 150 N.C. App. 566, 569, 564 S.E.2d 60, 62 (2002). Here, the prosecutor posed the following non-leading questions to Dr. Noureddine concerning the use of the dogs for dogfighting:

> Q. Dr. Noureddine, based on your observations and examinations in this case, did you form an opinion as to whether these dogs had been or were intended to be used in organized dogfighting?
>
> A. Yes.
>
> Q. And what was that opinion?
>
> A. It's my opinion that the 30 dogs in this case that we have described either have been, are, or are intended to be used in organized dogfighting.

After Dr. Noureddine further described the basis for her opinion, the prosecutor then asked the leading question that Crew challenges on appeal:

> Q. But it – it's your opinion that all of them were, in your opinion, being kept for that purpose?
>
> A. Yes.

¶ 24 The trial court's decision to permit this question was well within its sound discretion and not error, certainly not plain error, and not even remotely close to the sort of exceptional circumstances that would justify the use of Rule 2. We therefore reject Crew's argument.

III. Restitution

¶ 25 **[3]** Finally, Crew challenges the trial court's seven restitution orders, which the court converted into seven civil judgments. Those restitution orders require Crew to pay Orange County Animal Services a total of $70,000 in restitution.

¶ 26 This Court reviews "*de novo* whether the restitution order was supported by evidence at trial or sentencing." *State v. Hardy*, 242 N.C. App. 146, 159, 774 S.E.2d 410, 419 (2015).

¶ 27 Crew first argues that, although the State charged him with offenses related to thirty dogs, he was convicted only of offenses related to seventeen of those dogs. Thus, he argues, the trial court's restitution orders impermissibly impose restitution based on offenses for which he was not convicted, because they were based on evidence of costs associated with all thirty of the seized animals.

¶ 28 We reject this argument. The trial court may impose restitution for "any injuries or damages arising directly and proximately out of the offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34(c). Crew's acts of engaging in dogfighting, cruelty to animals, and restraining dogs in a cruel manner led directly to the need to remove all thirty dogs from his possession and place them with animal services. Employees of Orange County Animal Services testified that the shelter spent $92,500 on care and housing of those dogs, including $80,000 solely for housing of the animals. This evidence was sufficient to support the trial court's seven separate restitution orders, amounting to $70,000 in total restitution.

¶ 29 Crew next argues that the trial court failed to adequately consider his ability to pay the restitution judgments. Again, we disagree. "Whether the trial court properly considered a defendant's ability to pay when awarding restitution is reviewed by this Court for abuse of discretion." *State v. Hillard*, 258 N.C. App. 94, 98, 811 S.E.2d 702, 705 (2018). "An abuse of discretion results when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 809 (2015).

¶ 30 Under N.C. Gen. Stat. § 15A-1340.36(a), a trial court determining the amount of restitution must consider factors pertaining "to the defendant's ability to make restitution." These factors include, but are not limited to, the defendant's resources "including all real and personal property owned by the defendant and the income derived from the

property" and "the defendant's ability to earn." *Id.* The trial court need not make "findings of fact or conclusions of law on these matters." *Id.*

¶ 31 Here, there was evidence concerning Crew's ability to pay, including evidence that the kennel Crew operated "generate[s] good money"; that a "good puppy" could sell for a thousand dollars; and that the kennel generated $15,927 of income in 2017. There also was evidence that, although Crew has four minor dependents, he lives with his fiancée who has a job outside the kennel. Based on this evidence, the trial court's determination that Crew had the ability to pay the restitution award was within the court's sound discretion and certainly not manifestly arbitrary or outside the realm of reason.

¶ 32 Crew responds that, although this evidence *might* support the trial court's discretionary decision concerning ability to pay, the court never expressly stated that it considered this evidence. But the law does not require the court to expressly make this sort of statement. To be sure, if there was evidence indicating that the court did *not* consider this evidence of ability to pay, or misapprehended the requirement to consider it, we could find an abuse of discretion. But absent that indication, we presume that the trial court knew the law and followed it. *See Hillard*, 258 N.C. App. at 98, 811 S.E.2d at 705; *State v. Tate*, 187 N.C. App. 593, 597–99, 653 S.E.2d 892, 896–97 (2007) (holding that restitution orders will be overturned only when the trial court "did not consider *any* evidence of defendant's financial condition") (emphasis in original). We thus reject Crew's argument.

¶ 33 **[4]** Finally, Crew argues that the trial court erred by immediately converting the restitution awards into civil judgments. The restitution statutes distinguish between two categories of offenses: (1) those for which the victim is entitled to restitution under the Crime Victims' Rights Act (VRA), and (2) those not covered by the VRA. N.C. Gen. Stat. § 15A-1340.34(b), (c). For VRA offenses falling in the first category, the restitution statutes provide a procedure through which a trial court may convert the restitution award into a civil judgment and a corresponding procedure to enforce that civil judgment. N.C. Gen. Stat. § 15A-1340.38. The restitution statutes do not expressly address whether a restitution award for an offense in the second category—offenses not covered by the VRA—can be converted into a civil judgment.

¶ 34 In a series of unpublished cases, this Court reasoned that restitution awards for some offenses in this second category can be converted to civil judgments based on other, separate statutory authority. For example, in *State v. Batchelor*, the Court held that although "the offense

for which [the defendant] was convicted, larceny, is not one to which the VRA applies," a separate statute, "N.C. Gen. Stat. § 15-8 grants the trial court authority to award restitution where a defendant is convicted of stealing goods, and to 'make all such orders and issue such writs of restitution or otherwise as may be necessary for that purpose.' " 267 N.C. App. 691, 833 S.E.2d 255, 2019 WL 4803703, at *2 (2019) (unpublished). The Court then held that "given the trial court's broad authorization under N.C. Gen. Stat. § 15-8 to 'make all such orders and issue such writs of restitution or otherwise as may be necessary,' it had the authority to enforce, *ab initio*, restitution by civil judgment." *Id.*

¶ 35 We are persuaded by the reasoning of *Batchelor*, but unable to extend it to justify the civil judgments in this case. Unlike *Batchelor*, a larceny case subject to N.C. Gen. Stat § 15-8, there is no corresponding statute authorizing the trial court to "make all such orders and issue such writs" as are necessary to enforce the restitution awards in this case—which provide restitution to an animal services agency in a criminal case involving charges of dogfighting and animal cruelty.

¶ 36 The State contends that the trial court does not need any separate statutory authority because courts have the "inherent authority" to convert any restitution award to a civil judgment. But we agree with Crew that, if this were so, it would render the language in N.C. Gen. Stat. § 15A-1340.38 superfluous, counter to long-standing principles of statutory construction. *State v. Morgan*, 372 N.C. 609, 614, 831 S.E.2d 254, 258 (2019). Moreover, the General Statutes contain a separate provision that can compel a defendant charged with the offenses at issue in this case to pay the reasonable expenses of the animal shelter that took custody of the dogs. N.C. Gen. Stat. § 19A-70. There is no indication in the record that the animal services agency availed itself of this statutory provision. Because there is no statutory provision authorizing the immediate entry of civil judgments for the restitution in this case, we vacate those civil judgments.

Conclusion

¶ 37 For the reasons explained above, we find no error in the trial court's criminal judgments but vacate the civil judgments concerning the awards of restitution.

NO ERROR IN PART; VACATED IN PART.

Judges ARROWOOD and HAMPSON concur.

STATE v. GUINN

[281 N.C. App. 446, 2022-NCCOA-36]

STATE OF NORTH CAROLINA
v.
LUMARRIS GUINN

No. COA21-153

Filed 18 January 2022

Probation and Parole—right to counsel—violated—void order—subject matter jurisdiction in later proceeding

Defendant's right to counsel was violated in a probation violation hearing where the hearing transcript did not show a "thorough inquiry" into defendant's waiver of counsel (the trial court merely asked defendant "Who is your attorney?") and the standard "Waiver of Counsel" form was incomplete (it was signed by defendant and the trial court, defendant checked the box regarding the extent of his waiver, but the trial court did not check the corresponding box in the "Certificate of Judicial Official" section). Therefore, the resulting order extending his probationary term by twelve months was void, and when the State filed a new probation violation report after the expiration of defendant's original probationary period (but during the extended period), the trial court lacked subject matter jurisdiction to revoke defendant's probation.

Judge TYSON dissenting.

Appeal by defendant from judgment entered 28 October 2020 by Judge Jesse B. Caldwell, III, in Gaston County Superior Court. Heard in the Court of Appeals 3 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Heather Haney, for the State.

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

ZACHARY, Judge.

¶ 1 Defendant Lumarris Guinn appeals from the trial court's judgment revoking his probation and activating his suspended sentence for two counts of uttering a forged instrument. After careful review, we vacate the judgment.

I. Background

¶ 2 On 11 July 2014, Defendant entered an *Alford* plea[1] to two counts of uttering a forged instrument in exchange for the State's dismissal of two counts of obtaining property by false pretenses. The trial court accepted Defendant's plea and that same day entered a judgment sentencing Defendant to 6 to 17 months in the custody of the North Carolina Division of Adult Correction, suspending the sentence, placing Defendant on supervised probation for 30 months, and ordering Defendant to pay restitution along with court costs and fees.

¶ 3 On 18 July 2016, Defendant's probation officer filed a probation violation report alleging that Defendant had violated the conditions of his probation by failing to make required monetary payments. The trial court held a probation violation hearing, at which Defendant was not represented by counsel, on 31 August 2016. On 13 September 2016, the trial court entered an order ("the 2016 Order") finding the probation violations alleged by the State and modifying the terms of Defendant's probation. The trial court extended Defendant's term of probation by 12 months and ordered Defendant to complete 40 hours of community service within six months, for which Defendant would receive $20 credit per hour worked against the balance of the restitution that he was originally ordered to pay as a condition of his probation. The trial court further ordered that Defendant be placed on unsupervised probation upon completion of his community service.

¶ 4 On 29 September 2017, Defendant's probation officer filed a second probation violation report, this time alleging that Defendant did not comply with the conditions of his probation, in that (1) he twice tested positive for marijuana; (2) he left the jurisdiction of the court without the permission of his probation officer; (3) he failed to report for scheduled office appointments; and (4) he failed to make required monetary payments. The probation officer also alleged that Defendant had a new criminal charge pending against him. On 3 October 2017, the probation officer filed the 29 September report again, together with an addendum alleging that Defendant had absconded.

¶ 5 On 28 October 2020, the trial court held another probation violation hearing, at which Defendant was represented by counsel. By judgment

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1. An *Alford* plea is a guilty plea in which the defendant does not admit to any criminal act, but admits that there is sufficient evidence to convince the judge or jury of the defendant's guilt. *See North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970); *State v. Baskins*, 260 N.C. App. 589, 592 n.1, 818 S.E.2d 381, 387 n.1 (2018), *disc. review denied*, 372 N.C. 102, 824 S.E.2d 409 (2019).

entered that same day, ("the 2020 Judgment") the trial court found that Defendant had willfully violated the terms and conditions of his probation, revoked Defendant's probation, and activated Defendant's original sentence. The trial court also reduced the balance owed by Defendant to a civil judgment. Defendant timely filed his notice of appeal.

II. Discussion

¶ 6 Defendant argues on appeal that the trial court lacked subject-matter jurisdiction to revoke his probation because his right to counsel was violated at the 2016 probation violation hearing, rendering void the 2016 Order extending his probation; thus, the 2017 probation violation reports were filed after the expiration of Defendant's probation. Alternatively, Defendant argues that the trial court lacked subject-matter jurisdiction to revoke his probation for absconding because he was on unsupervised probation, and thus no longer subject to the conditions of supervised probation, when the probation officer filed the 2017 violation reports.

¶ 7 Defendant further argues that the trial court (1) erred by finding that he had committed a new criminal offense because the State presented insufficient evidence to support that finding, (2) abused its discretion by revoking his probation because the State presented insufficient evidence that he had absconded, and (3) erred by failing to make a finding of "good cause" before denying him the opportunity to confront and cross-examine his probation officer.

¶ 8 After careful review, we conclude that the trial court lacked subject-matter jurisdiction to revoke Defendant's probation because the 2016 Order was void, and thus we must vacate the 2020 Judgment. Accordingly, we need not reach Defendant's remaining arguments.

A. Collateral Attack

¶ 9 As an initial matter, the State argues that Defendant's subject-matter jurisdiction argument "amounts to an impermissible collateral attack" on the 2016 Order. We disagree.

¶ 10 Our Supreme Court has repeatedly held that "a direct appeal from the original judgment lies only when the sentence is originally entered." *State v. Pennell*, 367 N.C. 466, 470, 758 S.E.2d 383, 386 (2014) (citation omitted). Accordingly, "a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order revoking his probation and activating his sentence." *Id.* at 472, 758 S.E.2d at 387.

¶ 11 In its brief, the State relies on *State v. Rush*, in which this Court dismissed an appeal from a judgment entered pursuant to a plea agreement

where the defendant "failed to file a motion to withdraw her guilty plea, failed to give oral or written notice of appeal within ten days after the judgment was entered, and failed to petition for writ of certiorari[.]" 158 N.C. App. 738, 741, 582 S.E.2d 37, 39 (2003) (italics omitted). We held that "[b]y failing to exercise any of [these] options, [the] defendant waived her right to challenge the judgment[,]" and her "appeal amount[ed] to an impermissible collateral attack on the initial judgment." *Id.*

¶ 12 However, the State's attempt to paint the instant appeal as "an impermissible collateral attack" is misguided. Indeed, we rejected a similar argument in *State v. Hoskins*, where the defendant was "not challenging the trial court's jurisdiction over her original convictions; rather she contend[ed] that the . . . trial court lacked statutory authority to extend her probation." 242 N.C. App. 168, 170, 775 S.E.2d 15, 17 (2015). Although the State relied on both *Rush* and *Pennell* to argue that the appeal in *Hoskins* was an impermissible collateral attack, *id.* at 167, 775 S.E.2d at 17, we distinguished those cases because "[u]nlike an original conviction, a probation extension order is not immediately appealable. . . . N.C. Gen. Stat. § 15A-1347 provides the only avenues for appeal from a probation order[,]" *id.* at 170, 775 S.E.2d at 17. Under that statute, a "defendant may only appeal a probation order that either activates his sentence or places the defendant on 'special probation.' " *Id.*; *see* N.C. Gen. Stat. § 15A-1347(a) (2019). Accordingly, because the *Hoskins* defendant "had no mechanism to appeal her probation extension orders[,]" we held that she had not waived her right to challenge those orders on appeal from the trial court's subsequent order terminating her probation. *Hoskins*, 242 N.C. App. at 170, 775 S.E.2d at 17.

¶ 13 In the present case, Defendant is not challenging his original conviction; rather, he challenges the validity of the 2016 Order extending his probation. Here, as in *Hoskins*, the 2016 Order neither activated Defendant's sentence nor placed him on special probation. Thus, Defendant "had no mechanism to appeal" the 2016 Order, and under *Hoskins* he "has not waived [his] right to challenge" the 2016 Order on appeal from the 2020 Judgment activating his sentence. *Id.*

¶ 14 Nonetheless, after the State challenged the permissibility of Defendant's appeal, out of an abundance of caution, Defendant filed with this Court a petition for writ of certiorari requesting review of the 2016 Order, if the issue was not preserved by law. However, we conclude that Defendant's argument concerning his right to counsel at the 2016 probation violation hearing is properly before us on appeal from the 2020 Judgment revoking his probation and activating his suspended

sentence. Accordingly, we dismiss as moot Defendant's petition for writ of certiorari and proceed to the merits of his appeal.

B. Standard of Review

¶ 15 This Court reviews de novo "the issue of whether a trial court had subject[-]matter jurisdiction to revoke a defendant's probation." *State v. Moore*, 240 N.C. App. 461, 462, 771 S.E.2d 766, 767 (2015). We similarly review de novo issues concerning a defendant's waiver of the right to counsel under N.C. Gen. Stat. § 15A-1242. *State v. Lindsey*, 271 N.C. App. 118, 124, 843 S.E.2d 322, 327 (2020). When conducting de novo review, "this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation omitted).

C. Analysis

¶ 16 Defendant argues that the trial court lacked subject-matter jurisdiction to revoke his probation. Defendant's argument hinges on whether the trial court erred by extending his probation in the 2016 Order where the hearing was allegedly conducted in violation of his right to counsel under N.C. Gen. Stat. § 15A-1345(e) and the procedural requirements of § 15A-1242. Because an order modifying probation that is entered without statutory authority is "void and of no effect," *State v. Gorman*, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) (citation omitted), Defendant contends that his probationary term expired on 11 January 2017, as originally scheduled. After careful review, we agree.

1. Subject-Matter Jurisdiction

¶ 17 "[O]ther than as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term." *Moore*, 240 N.C. App. at 463, 771 S.E.2d at 767. Section 15A-1344(f) provides that a trial court may only

> extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.

> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.
>
> (4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under G.S. 15A-1342(a).

N.C. Gen. Stat. § 15A-1344(f).

¶ 18 In the case at bar, if Defendant is correct that the 2016 Order was void and as a result, his probation was not properly extended, then the State did not file either the 3 October 2017 probation report or its addendum "[b]efore the expiration of the period of probation" on 11 January 2017. *Id.* Thus, the trial court "lack[ed] jurisdiction to revoke [D]efendant's probation[.]" *Moore*, 240 N.C. App. at 463, 771 S.E.2d at 767.

¶ 19 Accordingly, Defendant's subject-matter jurisdiction argument rises and falls on the validity of the 2016 Order extending his probation.

2. Defendant's Right to Counsel at the 2016 Hearing

¶ 20 "[A]n accused is entitled to the assistance of counsel at every critical stage of the criminal process as constitutionally required under the Sixth and Fourteenth Amendments to the United States Constitution." *State v. Jacobs*, 233 N.C. App. 701, 702, 757 S.E.2d 366, 368 (2014) (citation omitted). Our General Statutes specifically provide that "a defendant is entitled to be represented by counsel at a probation revocation hearing and, if indigent, to have counsel appointed for him." *Id.* at 703, 757 S.E.2d at 368; *see* N.C. Gen. Stat. § 15A-1345(e).

¶ 21 The trial court must ensure that "constitutional and statutory standards are satisfied" before allowing a defendant to waive the right to counsel. *Jacobs*, 233 N.C. App. at 703, 757 S.E.2d at 368 (citation omitted). "To satisfy the trial court, a defendant must first clearly and unequivocally waive his right to counsel and instead elect to proceed *pro se*. Second, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily waived his right to in-court representation by counsel." *Id.* (citation and internal quotation marks omitted). "A signed written waiver is presumptive evidence that a defendant wishes to act as his or her own attorney. However, the trial court must still comply with N.C. Gen. Stat. § 15A-1242." *Id.* (citation omitted).

¶ 22 Section 15A-1242 establishes that prior to accepting a defendant's waiver of the right to counsel, the trial court must make a "thorough inquiry" and be satisfied that the defendant:

> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242.

¶ 23 Defendant argues that the trial court did not conduct the statutorily required "thorough inquiry" into his purported waiver of his right to counsel prior to entering the 2016 Order. Indeed, the transcript of the 2016 hearing contains only one fleeting reference to Defendant's representation, which occurred at the commencement of the hearing:

> (Court proceedings were called to order Wednesday, August 31st, 2016)
>
> [THE STATE]: Lumarris Guinn.
>
> Who is your attorney, Mr. Guinn?
>
> [DEFENDANT]: Officer Samuals.[2]
>
> [THE STATE]: Samuals?
>
> [DEFENDANT]: Yes.
>
> Well, that's my probation officer. He was here.
>
> (Officer Samuals entered the courtroom)
>
> PROBATION OFFICER SAMUALS: I apologize, Your Honor.
>
> THE COURT: Yes, sir. Thank you.

The transcript of the 2016 hearing does not otherwise reflect any inquiry into Defendant's waiver of his right to counsel. Accordingly, the transcript of this hearing indicates that the trial court did not satisfy N.C. Gen. Stat. § 15A-1242's requirements for a knowing, intelligent, and voluntary waiver of the right to counsel.

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2. The record on appeal suggests that the probation officer's last name is actually "Samuels."

¶ 24 However, the record contains the standard "Waiver of Counsel" form, AOC-CR-227, which is signed by Defendant and the trial court, and dated 31 August 2016, the day of the hearing. That form contains the following "Acknowledgment of Rights and Waiver," which is to be executed by a defendant seeking to waive his or her right to counsel:

> As the undersigned party in this action, I freely and voluntarily declare that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.

¶ 25 Beneath this acknowledgment are two check blocks with instructions to the defendant to "check only one," thereby indicating the extent of the defendant's waiver of counsel:

> I freely, voluntarily and knowingly declare that:
>
> . . . .
>
> ☐ 1. I waive my right to assigned counsel and that I, hereby, expressly waive that right.
>
> ☐ 2. I waive my right to all assistance of counsel which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do.

¶ 26 Here, in addition to signing the waiver form, Defendant checked block #2, thereby indicating that he waived his right to all assistance of counsel.

¶ 27 On appeal, the State argues that this signed form "establishes that Defendant's waiver was knowing, intelligent, and voluntary." However, the trial court did not check any block in the "Certificate of Judicial Official" section. That section, which follows the defendant's portion of the form, contains the following language:

> I certify that the above named defendant has been fully informed of the charges against him/her, the nature of and the statutory punishment for each charge, and the nature of the proceeding against the defendant and his/her right to have counsel assigned by the court and his/her right to have the assistance of counsel to represent him/her in this action; that the defendant comprehends the nature of the charges and proceedings and the range of punishments; that he/she understands and appreciates the consequences of his/her decision and that the defendant has voluntarily, knowingly and intelligently elected in open court to be tried in this action[.]

¶ 28 As in the defendant's section of the form, this language is followed by two numbered blocks—again, with instructions to "check only one"—for the trial court to specify whether the defendant elected to proceed:

> ☐ 1. without the assignment of counsel.
>
> ☐ 2. without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel.

¶ 29 Below these two check blocks, appearing prominently in its own thick-framed box and bold typeface, the following note emphasizes:

> **NOTE: For a waiver of assigned counsel only, both blocks numbered "1" must be checked. For a waiver of all assistance of counsel, both blocks numbered "2" must be checked.**

¶ 30 Despite this clear instruction, here, the trial court did not check either block on the waiver form.

¶ 31 The State contends that the trial court's failure to check one of the blocks is merely a clerical error, claiming that the omission "is inconsequential and does not result in an unclear or incorrect record." Furthermore, the State maintains that because "Defendant himself checked the appropriate [block] on the form indicating that he would be proceeding without counsel and on his own behalf[,]" the trial court's failure to check the appropriate block "does not render the form unclear or erroneous, and Defendant is presumed to have knowingly, intelligently and voluntarily waived his right to counsel." This argument lacks merit.

¶ 32 This Court has defined a clerical error as "an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Allen*, 249 N.C. App. 376, 380, 790 S.E.2d 588, 591 (2016) (citation omitted). However, "[w]e have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error." *State v. Harwood*, 243 N.C. App. 425, 429, 777 S.E.2d 116, 119 (2015) (citation omitted).

¶ 33 The *Harwood* defendant was charged in 2009 with 79 offenses and pleaded no contest to each. *Id.* at 426, 777 S.E.2d at 117. The trial court consolidated his convictions into seven judgments and ordered that he serve the seven sentences consecutively, suspended five of the seven judgments, and placed the defendant on 48 months of supervised probation. *Id.* at 426–27, 777 S.E.2d at 117–18. In 2010, the defendant was released from incarceration, and in 2014, a probation officer filed probation violation reports. *Id.* at 427, 777 S.E.2d at 118. The defendant admitted to willfully violating the terms of his probation without lawful justification and the trial court activated all five of the defendant's suspended sentences. *Id.*

¶ 34 On appeal, the defendant argued that the trial court lacked jurisdiction to revoke his probation in 2014 because in each of the 2009 judgments suspending his sentences, the trial court had "failed to either check the box to order that the probation would begin upon [the] defendant's release from incarceration or check the box to order that the period of probation would begin at the expiration of another sentence." *Id.* at 430, 777 S.E.2d at 120. Accordingly, the defendant argued that his 48-month probation term had actually begun in 2009 when the trial court entered its judgments, and thus expired "several months before the probation officer filed violation reports" in 2014. *Id.* at 428, 777 S.E.2d at 119.

¶ 35 In response, the State acknowledged the trial court's failure to check the boxes on the judgments but argued that the trial court's omissions were mere clerical errors. *Id.* at 428–29, 777 S.E.2d at 119. Yet assuming, *arguendo*, that the trial court's failure to check these boxes was a mistake, we held that "this mistake would be a substantive error, rather than a clerical one. Changing this provision would retroactively extend [the] defendant's period of probation by more than one year and would grant the trial court subject[-]matter jurisdiction to activate five consecutive sentences of 6 to 8 months' imprisonment." *Id.* at 430, 777 S.E.2d at 120. Because we determined that the relevant provision was "substantive," we rejected the State's request to remand the case to permit the

trial court to correct what the State contended was merely a "clerical" error. *Id.*

¶ 36 Similarly, if we accept the State's argument here that the trial court made a mistake by failing to check the block certifying that Defendant's waiver of his right to the assistance of counsel was knowing, intelligent, and voluntary, such error would be substantive, rather than clerical. As in *Harwood*, correcting the asserted "mistake" here "would retroactively extend [D]efendant's period of probation . . . and would grant the trial court subject[-]matter jurisdiction to activate" his sentence of imprisonment. *Id.* Thus, this does not constitute a clerical error.

¶ 37 Moreover, even if the error were merely clerical, this would not change the outcome of this case. "When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, *unless the rest of the record indicates otherwise*." *State v. Sorrow*, 213 N.C. App. 571, 574, 713 S.E.2d 180, 182 (2011) (citation omitted). Although "[a] signed written waiver is presumptive evidence that a defendant wishes to act as his or her own attorney[,] . . . the trial court must still comply with N.C. Gen. Stat. § 15A-1242." *Jacobs*, 233 N.C. App. at 703, 757 S.E.2d at 368 (citation omitted).

¶ 38 In *Jacobs*, this Court reversed a judgment revoking probation—even though the defendant had signed a waiver—where the transcript of the revocation hearing "reveal[ed] that the trial judge made no inquiry as to whether [the] defendant understood the 'range of permissible punishments' pursuant to N.C. Gen. Stat. § 15A-1242(3)." *Id.* at 705, 757 S.E.2d at 369. "Although we recognize[d] that [the] defendant signed a written waiver of his right to assistance of counsel, the trial court was not abrogated of its responsibility to ensure the requirements of N.C. Gen. Stat. § 15A-1242 were fulfilled." *Id.*

¶ 39 We reach a similar conclusion in the instant case. As explained above, the waiver form was incomplete, in that the trial court failed to check either of the two blocks presented for the purpose of indicating the extent of Defendant's waiver of counsel. The instructions on the AOC-CR-227 "Waiver of Counsel" form very plainly require that the trial court must "check only one" of two numbered blocks, and that the court's selection—either #1 or #2—must match the defendant's: "For a waiver of assigned counsel only, *both blocks numbered '1' must be checked*. For a waiver of all assistance of counsel, *both blocks numbered '2' must be checked*." (Emphases added).

¶ 40 In the instant case, although signed by both parties, the form includes only one party's response to the critical question regarding the extent of Defendant's waiver of counsel. While Defendant checked block #2, the trial court made no selection at all. We are not persuaded by the State's characterization of this omission as "a missing duplicative check mark . . . [that] does not render the form unclear or erroneous[.]" This assertion contradicts the explicit instructions set out—quite emphatically—on the face of the waiver form itself.

¶ 41 Accordingly, although a signed written waiver is generally "*presumptive* evidence that a defendant wishes to act as his or her own attorney[,]" *id.* at 703, 757 S.E.2d at 368 (emphasis added) (citation omitted), we conclude that the written waiver in the instant case is insufficient—notwithstanding the presence of both parties' signatures—to pass constitutional and statutory muster.

¶ 42 Moreover, even assuming, *arguendo*, that the waiver form in this case presented no concerns, "the trial court must still comply with N.C. Gen. Stat. § 15A-1242." *Id.* (citation omitted). "The execution of a written waiver is no substitute for compliance by the trial court with the statute. A written waiver is something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not an alternative to it." *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (citations and internal quotation marks omitted). "Failure to conduct the mandatory inquiry under N.C. Gen. Stat. § 15A-1242 is prejudicial error." *Sorrow*, 213 N.C. App. at 577, 713 S.E.2d at 184.

¶ 43 In the instant case, the 2016 hearing transcript is silent on the subject of Defendant's waiver of counsel. Indeed, in response to the prosecutor's question, "Who is your attorney, Mr. Guinn?", Defendant identified *his probation officer*, Officer Samuels, who was present at the hearing to testify as a witness for the State. This limited exchange—initiated by the prosecutor, not the trial court—constitutes the sole inquiry into Defendant's legal representation that occurred during the 2016 hearing.

¶ 44 Perhaps, as the State contends, it may be that "[t]his exchange was not indicative of any confusion on the part of Defendant"; as the State accurately observes, Defendant subsequently "corrected himself unprompted to clarify that he meant that Officer Samuels was his probation officer, not his attorney." (Original emphasis omitted). But regardless of whether Defendant was confused by the prosecutor's question or whether he merely misspoke, our analysis remains the same.

¶ 45 Simply put, the 11-page hearing transcript fails to establish that Defendant "clearly and unequivocally waive[d] his right to counsel and

instead elect[ed] to proceed *pro se*." *Jacobs*, 233 N.C. App. at 703, 757 S.E.2d at 368 (citation and internal quotation marks omitted). Although Defendant apparently signed the AOC-CR-227 waiver form on 31 August 2016, the date of the violations hearing, we cannot agree with our dissenting colleague that this fact, alone, "establishes that Defendant's waiver was knowing, intelligent, and voluntary[,]" nor that it was "*made and entered in open court*." *Dissent* at ¶ 65 (emphasis added) (internal quotation marks omitted). To the contrary, the brief hearing transcript contains no mention of Defendant's waiver of counsel, or of the trial court's statutory responsibilities pursuant to N.C. Gen. Stat. § 15A-1242. Except for the incomplete AOC-CR-227 waiver form, the record is devoid of evidence establishing that the trial court took appropriate steps to ensure that "constitutional and statutory standards [we]re satisfied" before accepting Defendant's purported waiver of counsel. *Jacob*s, 233 N.C. App. at 703, 757 S.E.2d at 368 (citation omitted).

¶ 46 Accordingly, as in *Jacobs*, the record in this case fails to demonstrate that Defendant "clearly and unequivocally waive[d] his right to counsel and instead elect[ed] to proceed *pro se*[,]" or that the trial court made the requisite inquiry to "determine whether [D]efendant knowingly, intelligently, and voluntarily waived his right to in-court representation by counsel." *Id.* (citation and internal quotation marks omitted); *see also State v. Doisey*, 277 N.C. App. 270, 2021-NCCOA-181, ¶ 9 ("Absent a more searching inquiry, we conclude that the colloquy between [the d]efendant and the trial court did not comply with the requirements of a valid waiver under N.C. Gen. Stat. § 15A-1242."). We thus conclude that the 2016 Order was entered in violation of Defendant's statutory right to counsel and was therefore "void and of no effect." *Gorman*, 221 N.C. App. at 333, 727 S.E.2d at 733.

¶ 47 As the 2016 Order was void on account of the violation of Defendant's right to counsel, Defendant's probation was not properly extended, and the State did not file either the 3 October 2017 probation violation report or its addendum before Defendant's period of probation expired on 11 January 2017. Therefore, the trial court lacked subject-matter jurisdiction to conduct a probation revocation hearing "after the expiration of the probationary term." *Moore*, 240 N.C. App. at 463, 771 S.E.2d at 767. Accordingly, the trial court's 2020 Judgment revoking Defendant's probation and activating his sentence of imprisonment "must be vacated." *Id.* at 464, 771 S.E.2d at 768.

III. Conclusion

¶ 48 The 2016 Order extending Defendant's probation was entered in violation of Defendant's statutory and constitutional right to counsel and

was, therefore, void. Consequently, the trial court lacked subject-matter jurisdiction to revoke Defendant's probation in 2020, and the 2020 Judgment must be vacated.

VACATED.

Judge ARROWOOD concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

¶ 49 Our Supreme Court and this Court have repeatedly recognized that probation hearings are summary in nature and the full panoply of protections available at trial or upon entry of a guilty plea do not attach to a defendant, who has already been convicted and is under judgment and sentence. "The trial court has authority to alter or revoke a defendant's probation pursuant to N.C. Gen. Stat. § 15A-1344(a)." *State v. Johnson*, 246 N.C. App. 132, 136, 782 S.E.2d 549, 552 (2016). Suspension of a sentence is given to one convicted of a crime "as an act of grace." *State v. Boggs*, 16 N.C. App. 403, 405, 192 S.E.2d 29, 31 (1972).

¶ 50 A proceeding to revoke probation is informal or summary, and "the court is not bound by strict rules of evidence." *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000). An alleged violation by a defendant/probationer of "a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt." *Id.* (citation omitted).

¶ 51 All that is required is for the State's evidence to reasonably satisfy the court in "the exercise of [its] sound discretion that the defendant has violated a valid condition upon which the sentence was suspended." *Id.* (citation omitted). Defendant does not challenge the findings of the court not being supported by competent evidence. His judgment based thereon is not reviewable on appeal in the absence of showing a manifest abuse of discretion. *Id.*

¶ 52 Defendant does not challenge the findings and conclusion of violations or show any abuse of discretion here. Nothing divested the superior court of subject matter jurisdiction over a felony probation extension or revocation hearing. The trial court's order is properly affirmed. I vote to affirm the trial court's order and respectfully dissent.

I. Background

¶ 53 On 11 July 2014, Defendant was in open court and offered and accepted a plea bargain and entered an *Alford* plea to two counts of uttering

a forged instrument in exchange for the State's dismissal of two counts of obtaining property by false pretenses. Defendant was sentenced to 6 to 17 months in the custody of the North Carolina Division of Adult Correction, which was suspended, and he was placed upon supervised probation for 30 months and ordered to pay restitution along with court costs and fees. Defendant was represented by counsel at this hearing and sentencing.

¶ 54 While unquestionably still under probation supervision, Defendant was served and ordered back into court in 2016 to answer for his alleged repeated probation violations. Defendant appeared in court, voluntarily waived counsel, signed and checked the waiver in the record, which was also signed by the judge, and did not object to nor challenge the extension of his probation to allow him to remain out of prison. He alternatively faced revocation and activation of his suspended sentence. Presuming any error, he cannot now demonstrate any prejudice.

¶ 55 The record clearly demonstrates Defendant has repeatedly and grossly violated the terms and conditions of his probation and suspended sentence on multiple occasions and has shown no regard for the grace of not being actively incarcerated for his crimes. The State correctly argues Defendant's lack of subject matter jurisdiction assertion amounts to an impermissible collateral attack on the 2016 Order where he was present in open court and executed a valid waiver of counsel.

¶ 56 Our Supreme Court has repeatedly held "a direct appeal from the original judgment lies only when the sentence is originally entered." *State v. Pennell*, 367 N.C. 466, 470, 758 S.E.2d 383, 386 (2014) (citation omitted). "[A] defendant *may not challenge the jurisdiction over the original conviction* in an appeal from the order revoking his probation and activating his sentence." *Id.* at 472, 758 S.E.2d at 387 (emphasis supplied).

¶ 57 Even if Defendant had no direct appeal of right from the Order extending his probation, if any asserted error or prejudice occurred, Defendant could have sought discretionary appellate review at that time, failed to do so, and has waived any claim. *See* N.C. R. App. P. 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right to appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. §15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.").

¶ 58 N.C. Gen. Stat. § 15A-1344(f) provides a trial court may:

> extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.
>
> (4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under G.S. 15A-1342(a).

N.C. Gen. Stat. § 15A-1344(f) (2021).

¶ 59 Defendant does not challenge that the trial court or the probation officer failed to comply with all provisions of the above statute or that he failed to receive all protections accorded therein at his 2016 hearing. *Id.* Recognizing now, as then, the lack of appellate jurisdiction to seek review, Defendant filed a petition for writ of certiorari requesting review of the 2016 Order. I agree with the majority's opinion that Defendant's petition should be dismissed. This panel should dismiss Defendant's petition for writ of certiorari for lack of prejudice, but we should also dismiss his purported appeal and affirm the 2020 judgment.

II. Waiver of Counsel

¶ 60 "It is well-settled that a criminal defendant can waive his right to be represented by counsel so long as he voluntarily and understandingly does so." *State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999). This Court has held "to obtain relief from a waiver of [the] right to counsel, a criminal defendant must move the court for withdrawal of the waiver." *Id.* at 702, 513 S.E.2d at 94 (citation omitted).

¶ 61 A defendant waives any right to appeal the issue of his prior probation revocation where "[t]he record does not contain any suggestion

that defendant ever objected to this determination prior to this appeal, but rather reveals that she accepted both the terms and the benefits of the modified order." *State v. Rush*, 158 N.C. App. 738, 741, 582 S.E.2d 37, 39 (2003). In *Rush*, this Court dismissed an appeal from a judgment entered pursuant to a plea agreement where the defendant "failed to file a motion to withdraw her guilty plea, failed to give oral or written notice of appeal within ten days after the judgment was entered, and failed to petition for writ of certiorari[.]" *Id.* (alteration omitted). This Court held "[b]y failing to exercise any of [these] options, [the] defendant waived her right to challenge the judgment[,]" and her "appeal amount[ed] to an impermissible collateral attack on the initial judgment." *Id.*

¶ 62 Defendant fails to show either during the initial entry of his plea or at the multiple probation violations hearing thereafter, he was not accorded every right and protection due to him. The State correctly asserts Defendant himself checked the appropriate block on the form indicating that he would be proceeding without counsel and on his own behalf, and Defendant is presumed to have knowingly, intelligently and voluntarily waived his right to counsel.

¶ 63 The record contains the standard "Waiver of Counsel" form, AOC-CR-227, signed by Defendant and the trial court, and is dated 31 August 2016, the day of the hearing. That form contains the following "Acknowledgment of Rights and Waiver," which is executed by a defendant seeking to waive his or her right to counsel:

> As the undersigned party in this action, I freely and voluntarily declare that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.

¶ 64 Beneath this acknowledgment are two check blocks with instructions to the defendant to "check only one," thereby indicating the extent of the defendant's waiver of counsel:

> I freely, voluntarily and knowingly declare that:
>
> . . . .

> ☐ 1. I waive my right to assigned counsel and that I, hereby, expressly waive that right.
>
> ☐ 2. I waive my right to all assistance of counsel which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do.

¶ 65 Defendant was present in court, signed the waiver form, and also checked block #2, clearly indicating he waived his right to all assistance of counsel. The State correctly argues this signed form "establishes that Defendant's waiver was knowing, intelligent, and voluntary" made and entered in open court. Defendant's term of probation was extended for merely 12 months, and he was ordered to complete 40 hours of community service within six months. Defendant would receive $20 credit per hour worked against the balance of the restitution he was ordered to pay as a condition of his probation. Defendant was to be placed on unsupervised probation *upon completion of* his community service. Defendant failed to complete this condition of his probation, along with later absconding supervision and committing new crimes.

III. Subject Matter Jurisdiction

¶ 66 Defendant next argues the trial court lacked subject matter jurisdiction in 2020 because he was on unsupervised probation during the relevant time period. The State bears the burden of "demonstrating beyond a reasonable doubt that a trial court has subject matter jurisdiction." *State v. Williams*, 230 N.C. App. 590, 595, 754 S.E.2d 826, 829 (2013) (citation omitted).

¶ 67 Defendant bases this notion on a series of implications, which are not supported by the evidence in the record. The record contains no evidence Defendant had completed the ordered hours of community service and was transferred from supervised to unsupervised probation.

¶ 68 Defendant does not contest the trial court's jurisdiction at the entry of his plea, sentence, and imposition of his probation. "Once the jurisdiction of a court or administrative agency attaches, the general rule is that it will not be ousted by subsequent events." *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 880, 911 (1978); *see State v. Armstrong*, 248 N.C. App. 65, 67, 786 S.E.2d 830, 832 (2016). "Jurisdiction is not a light bulb which can be turned off or on during the course of the trial." *Armstrong*, 248 N.C. App. at 67, 786 S.E.2d at 832 (citations omitted).

¶ 69 Despite the additional grace for violations and opportunities provided by the extension, Defendant continued to disregard and violate the terms and conditions of his probation and commit new crimes. On 29 September 2017, Defendant's probation officer filed a second probation violation report and alleged Defendant had again failed to comply with the conditions of his probation: (1) he twice tested positive for marijuana; (2) he left the jurisdiction of the court without the permission of his probation officer; (3) he failed to report for scheduled office appointments; (4) he failed to make the required monetary payments; and, (5) he had a new criminal charge pending against him.

¶ 70 On 3 October 2017, the probation officer filed the 29 September report again, together with an addendum alleging Defendant had absconded with a warrant issued for his arrest. After being arrested, the trial court held another probation violation hearing, at which Defendant was represented by counsel on 28 October 2020. The trial court found Defendant had willfully violated the terms and conditions of his probation, revoked Defendant's probation, and activated Defendant's original sentence. The trial court also reduced the balance owed by Defendant to a civil judgment.

¶ 71 Defendant's probation was revoked for committing a new criminal offense and for absconding. Regardless of whether Defendant's probation was supervised or not at the time of the violations, the violations rose to the level to warrant revocation pursuant to N.C. Gen. Stat. § 15A-1344(a). The State has carried its burden beyond a reasonable doubt, Defendant's arguments are without merit. *See Williams*, 230 N.C. App. at 595, 754 S.E.2d at 829.

IV. Conclusion

¶ 72 The trial court acquired and maintained subject matter jurisdiction to revoke Defendant's probation in 2020. Defendant waived counsel, has not sought to withdraw that waiver, and did not challenge nor seek review of the 2016 Order extending Defendant's probation. The 2020 Judgment is properly affirmed. I respectfully dissent.

STATE v. HEATH

[281 N.C. App. 465, 2022-NCCOA-37]

STATE OF NORTH CAROLINA
v.
REBECCA MICHELLE HEATH, DEFENDANT

No. COA20-715

Filed 18 January 2022

Search and Seizure—motion to suppress—traffic stop—reasonable articulable suspicion—conflicting evidence—insufficient findings

In a drug prosecution arising from a traffic stop in which defendant initially denied the officer's request to search the car, the officer called for a K-9 officer, and defendant subsequently admitted to having drugs in the car, the trial court improperly denied defendant's motion to suppress where its findings did not resolve material conflicts in the evidence regarding the interaction between defendant and the officer and the timing of certain events in relation to the canine sniff. Defendant's judgment was vacated and the matter remanded for additional findings and conclusions.

Appeal by defendant from judgment entered on or about 6 September 2019 by Judge Daniel A. Kuehnert in Superior Court, Cleveland County. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H Stein, by Special Deputy Attorney General Alexander G. Walton, for the State.

Shawn R. Evans, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant appeals the denial of her motion to suppress. Because the trial court failed to make sufficient findings of fact resolving conflicting evidence of material facts, we must vacate and remand for further findings of fact and the requisite conclusions of law.

I. Procedural Background

¶ 2 On 27 August 2018, defendant was indicted for possession of methamphetamine. On 1 August 2019, defendant filed a motion to suppress "any statements made by the Defendant as well as any controlled substances seized after an unconstitutional stop and delay pursuant to a search without a search warrant on or about June 4, 2018." Defendant

argued, "there was no reasonable articulable suspicion or traffic violation warranting a stop of the vehicle, that the Defendant was asked to leave her vehicle without justification and that she was further detained without reasonable articulable suspicion that criminal activity was afoot[.]" Defendant filed an affidavit in support of her motion to suppress.

¶ 3 After a hearing on the motion to suppress on 1 August 2019, the trial court entered an order denying defendant's motion. The trial court found:

> 1. That on June 4, 2018, the defendant Rebecca Heath was stopped by Deputy Nathan Hester for driving left of center and driving without an active license.
>
> 2. That Deputy Hester had a connection with this individual from prior drug activity and recognized the vehicle she was driving as one owned by someone involved in drug activity.
>
> 3. That upon conducting [sic] the vehicle, he began to perform those standard vehicle checks involved with a traffic stop which included checking car registration, VIN, and license status of Heath.
>
> 4. That, as Deputy Hester was in an unmarked car and thus did not have the ability to run the defendant's information himself, the information had to be called in and run through dispatch.
>
> 5. That while that information was being run, *Deputy Hester asked the defendant for consent to search the vehicle which the defendant did not give.*
>
> 6. That Deputy Hester then asked the defendant to get out of the vehicle and called for a canine officer to come to the scene.
>
> 7. That the call to the canine officer for a sniff came approximately four minutes after the defendant's vehicle was stopped by Deputy Hester.
>
> 8. That within four minutes of being called to the scene, Canine Officer Chris Graham with the Kings Mountain Police Department arrived on scene.

> 9. That prior to the canine officer's arrival, the defendant advised Deputy Hester that she possessed illegal narcotics in the vehicle.
>
> 10. That upon the canine officer's arrival following the admission, a canine sniff was done and confirmed the presence of narcotics in the vehicle.
>
> 11. That a subsequent search of the vehicle uncovered in what [sic] was believed to be methamphetamine in the defendant's purse along with marijuana and a glass pipe.
>
> 12. That during the entire period of the vehicle stop, prior to the defendant's admission to the presence of narcotics and the arrival of the canine officer, Deputy Hester was waiting on dispatch to run all the information on the defendant and the vehicle with regards to the original basis of the stop for left of center and driving without an active license.
>
> 13. At no time did Deputy Hester prolong the stop involved in this case.

(Emphasis added.)

The trial court concluded:

> 1. Deputy Hester had reasonable, articulable suspicion and justification to stop the vehicle based on the violation of driving left of center and knowledge the defendant was driving without an active license.
>
> 2. The Court also concludes as a matter of law that Deputy Hester did not violate the defendant's Fourth Amendment *rights in that the consent to search was given within the context of the stop* and the stop was not extended.
>
> 3. The Court also concludes as a matter of law that Deputy Hester *received consent from the defendant to search the vehicle* and, upon searching, found what he believed to be methamphetamine in the defendant's vehicle, thus establishing probable cause.

(Emphasis added.) Thereafter, defendant entered a plea arrangement to plead guilty to possession of methamphetamine while reserving her

right to appeal the denial of her motion to suppress. On 6 September 2019, the trial court entered judgment for possession of methamphetamine, and defendant appeals.

II. Defendant's Appeal

¶ 4 Defendant contends the trial court erred in denying her motion to suppress.

A. Standard of Review

> The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. The trial court's findings are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. Conclusions of law are reviewed de novo and are subject to full review. Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Royster, 224 N.C. App. 374, 375–76, 737 S.E.2d 400, 402–03 (2012) (citations and quotation marks omitted).

B. Findings of Fact

¶ 5 Defendant primarily challenges many of the findings of fact based on arguments regarding the exact sequence of events. *Both* Deputy Hester and defendant's testimonies establish that defendant was stopped; Deputy Hester asked for consent to search the vehicle; defendant denied the request for consent; Deputy Hester called in the K-9 officer; and after this call, defendant admitted she had drugs in the vehicle.

¶ 6 But there was also conflicting evidence as to the details of the interactions between Deputy Hester and defendant and the timing of the relevant events, and the findings of fact do not resolve these conflicts. *See generally State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) ("At the suppression hearing in this case, disagreement between two expert witnesses created a material conflict in the evidence. Although defendant did not dispute the officer's testimony about what happened during the field sobriety tests, defendant's expert sharply disagreed with the officer's opinion on whether defendant's performance indicated impairment. Expert opinion testimony is evidence, and the two expert opinions in this case differed from one another on a fact that

is essential to the probable cause determination—defendant's apparent degree of impairment. Thus, a finding of fact, whether written or oral, was required to resolve this conflict. Here, Judge Jones made no such finding. Although he did attempt to explain his rationale for granting the motion, we cannot construe any of his statements as a definitive finding of fact that resolved the material conflict in the evidence. Without such a finding, there can be no meaningful appellate review of the trial judge's decision. *See Salinas*, 366 N.C. at 124, 729 S.E.2d at 66. Accordingly, the oral ruling by Judge Jones did not comply with N.C.G.S. §§ 15A–974 and 15A–977.")

¶ 7 Defendant's testimony raised an issue regarding the timing of when Deputy Hester seized the drugs in relation to the canine sniff. Defendant claims Deputy Hester removed the drugs from the vehicle before the K-9 officer's arrival, and then he put the drugs back into the car and allowed the sniff for training purposes. Deputy Hester testified that defendant confessed; the K-9 officer arrived; the dog sniffed the vehicle; then he searched the vehicle to seize the drugs. The order does not include any findings resolving the conflicting evidence as to the potential timing issue or the relevance of the K-9 officer's search. Finding of fact 10 notes that the canine sniff "confirmed the presence of narcotics in the vehicle" but does not state whether the narcotics were found based upon defendant's admission before the K-9 officer arrived, as defendant testified.

¶ 8 But the trial court did not base its ruling regarding the search upon Defendant's "admission" or the canine sniff for the narcotics. The trial court concluded:

> 2. The Court also concludes as a matter of law that Deputy Hester did not violate the defendant's Fourth Amendment rights in that *the consent to search* was given within the context of the stop and the stop was not extended.
>
> 3. The Court also concludes as a matter of law that Deputy Hester *received consent* from the defendant to search the vehicle and, upon searching, found what he believed to be methamphetamine in the defendant's vehicle, thus establishing probable cause.

(Emphasis added.) Thus, the specific basis for the trial court's denial of defendant's motion to suppress is her "consent to search[.]"

¶ 9 The State argues the consent mentioned in conclusions of law 2 and 3 is based upon defendant's consent for the canine to sniff and the

officer to search the vehicle after her confession. The State summarizes the evidence as follows:

> Upon the arrival of the K-9 officer however, she did give consent to a search of her vehicle. According to Defendant, upon arriving the K-9 officer asked her, "Do you mind since I'm here, for dog training purposes, to go ahead and search your car?" (T p 63) Defendant responded, "No, I don't care. Go ahead." (*Id.*) She continued, "He already had the drugs in his car, Hester. He had to go back, put it back where it was in my car so the canine could do its training thing – I consented to that – and then take the drugs back out."

¶ 10 The trial court is the finder of fact, and we cannot assume facts from the unusual evidence of this alleged transaction where defendant claimed the drugs were removed from the vehicle before the canine arrived and then put back into the vehicle. We note that even according to the State's summary of the evidence, Deputy Hester had seized the drugs *before* defendant "consented" for the canine to sniff, and thus it does not make sense for the trial court to base its determination of defendant's "consent" on a "consent" which occurred *after* the drugs were seized. Further, the trial court's findings of fact do not discuss most of the evidence the State relies upon in its argument on appeal regarding consent, as the trial court's written findings of fact mention *only* the request for consent to search before the call for the canine, and the trial court found defendant did not consent at that point.

¶ 11 The State also contends this Court should note the trial court's oral findings of fact. At the hearing, while the trial court briefly explained why it denied the motion, it did not render oral findings of fact and conclusions of law which were then memorialized in a written order as the State contends. The trial court's rendition in open court does not clarify the basis for denial of the motion to suppress. Because the findings of fact are not sufficient to allow proper appellate review, we must remand for further findings of fact, particularly regarding whether and when defendant consented to a search and the timing of the search and seizure in relation to the consent and the call for, arrival, and sniff of the canine officer. *See Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674 ("In determining whether evidence should be suppressed, the trial court 'shall make findings of fact and conclusions of law which shall be included in the record.' N.C.G.S. § 15A–974(b) (2013); *see also id.* § 15A–977(f) (2013) ('The judge must set forth in the record his findings of facts and

conclusions of law.'). A written determination setting forth the findings and conclusions is not necessary, but it is the better practice. *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012). Although the statute's directive is in the imperative form, only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling. *State v. Salinas*, 366 N.C. 119, 123–24, 729 S.E.2d 63, 66 (2012); *State v. Ladd*, 308 N.C. 272, 278, 302 S.E.2d 164, 168 (1983). When there is no conflict in the evidence, the trial court's findings can be inferred from its decision. *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996). Thus, our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing."). Without such a finding, there can be no meaningful appellate review of the trial judge's decision. *See generally id.*

¶ 12 Ultimately, the trial court's findings of fact are not sufficient to allow meaningful appellate review.

III. Conclusion

¶ 13 Because the trial court failed to make sufficient findings of fact resolving conflicting evidence of material facts, we must vacate and remand for further findings of fact and the requisite conclusions of law.

VACATED and REMANDED.

Judges COLLINS and WOOD concur.

STATE v. STEELE

[281 N.C. App. 472, 2022-NCCOA-39]

STATE OF NORTH CAROLINA
v.
THOMAS WAYNE STEELE

No. COA20-894

Filed 18 January 2022

1. Embezzlement—fiduciary relationship—joint bank accounts—intent—elder abuse

The State presented sufficient evidence to survive defendant's motion to dismiss an embezzlement charge where defendant was in a fiduciary relationship with the victim (whom he called "Mom" and convinced to grant him access to all of her financial accounts after her husband died so that he could "help her") and he wrongfully converted the victim's money to his own use (being a joint holder of the victim's bank accounts did not entitle him to use her money). Further, there was sufficient evidence that he embezzled more than $100,000—elevating the offense to a Class C felony—because the circumstances allowed the inference that he intended for overdrafts on his personal account to be paid from the joint account funded with the victim's money.

2. Embezzlement—jury instructions—special instruction requested—bank protection law—confusion of jury

In an embezzlement prosecution arising from defendant's financial exploitation of an elderly woman whose husband had just died, the trial court properly declined to give defendant's requested special jury instruction—that if defendant was lawfully named on the joint bank accounts with the victim, then he was entitled to use the funds in the accounts. The requested instruction, which summarized a statute for the protection of banks (N.C.G.S. § 54C-165) and was not dispositive as to the ownership of funds, would have confused the jury.

Appeal by defendant from judgments entered 31 January 2020 by Judge John E. Nobles, Jr., in Pamlico County Superior Court. Heard in the Court of Appeals 19 October 2021.

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

Tin Fulton Walker & Owen, PLLC, by Noell P. Tin, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Thomas Wayne Steele appeals from judgments entered upon a jury's verdicts finding him guilty of one count of embezzlement and four counts of exploitation of an older adult. On appeal, Defendant contends that the trial court erred by (1) denying his motion to dismiss the embezzlement charge for insufficient evidence, and (2) declining to give Defendant's proposed special jury instruction. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error.

Background

¶ 2 Defendant first met Lillie Monk and her late husband, Pastor Mike Monk, Jr., in 1985. They became very close, eventually considering themselves family; Defendant called Mrs. Monk and Pastor Monk "Mom" and "Dad," and the Monks referred to Defendant as their "son." On 28 March 2015, Pastor Monk passed away unexpectedly. Defendant, who was also a pastor, delivered the eulogy at Pastor Monk's funeral.

¶ 3 Mrs. Monk struggled to return to her daily life. She testified that her husband's death "almost took [her] out[,]" and she felt like she "couldn't make it without him[.]" Mrs. Monk's family was concerned about her because she was so "grief-stricken" and "distraught."

¶ 4 Following the funeral, Mrs. Monk visited Defendant and his wife for a week in their home in Concord, North Carolina, against her family's advice. Over the next few months, she stayed with Defendant and his wife periodically. Defendant told Mrs. Monk that "he was there to help" her. Mrs. Monk testified at trial that she "thought [Defendant] was a man of God" who "loved [her]" and was "going to take care of [her.]" Mrs. Monk had little experience managing the household finances, as that had been her husband's responsibility throughout their marriage. Because she trusted Defendant and thought of him as family, Mrs. Monk "just turned everything"—including the keys to her home and post office box—over to Defendant after Pastor Monk's death.

¶ 5 On 16 April 2015, less than a month after her husband's death, Mrs. Monk added Defendant as joint holder on her State Employees' Credit Union (SECU) savings and money-market accounts. She also redeemed over $146,000 in savings bonds and deposited that money into the joint money-market account. That same day, Mrs. Monk added Defendant as a joint holder on her First Citizens Bank accounts as well. In addition, at some point, Defendant linked his personal SECU accounts to Mrs. Monk's SECU accounts, with the effect that any overdrafts on

Defendant's personal SECU account would be paid from the joint SECU accounts funded with Mrs. Monk's money.

¶ 6 Shortly thereafter, on 12 June 2015, Defendant drove Mrs. Monk to an attorney's office. Mrs. Monk testified that at Defendant's behest, she executed a power of attorney naming Defendant as her attorney-in-fact. She also executed a will, naming Defendant to serve as her executor and leaving the majority of her estate to him.

¶ 7 A few months later, on 4 September 2015, funds were withdrawn from the joint First Citizens accounts and used to fund two bank accounts at Wells Fargo Bank. Mrs. Monk and Defendant were named as joint holders of the new Wells Fargo accounts. There was conflicting evidence as to who opened the Wells Fargo accounts. Defendant testified that Mrs. Monk agreed to open these joint accounts. Mrs. Monk testified that the signatures on the applications for the two Wells Fargo accounts did not look like her handwriting; that she did not give Defendant permission to open the Wells Fargo accounts; and that she "didn't know what was going on" with the Wells Fargo accounts because Defendant "took over."

¶ 8 Concerned that Defendant was committing financial crimes against Mrs. Monk, her brother contacted the Pamlico County Sheriff's Office, which transferred the case to Agent Kevin Snead at the State Bureau of Investigation. On 22 April 2019, a Pamlico County grand jury returned indictments charging Defendant with four counts of exploitation of an older adult and one count of embezzlement of $100,000 or more. On 21 October 2019, a Pamlico County grand jury returned a superseding indictment amending the range of dates alleged for one of the charges of exploitation of an older adult.

¶ 9 On 28 January 2020, this matter was called for trial in Pamlico County Superior Court, the Honorable John E. Nobles, Jr., presiding. At trial, SBI Agent Snead testified that Defendant obtained a total of $123,367.09 from the accounts that he held with Mrs. Monk.

¶ 10 Agent Snead explained that, because Defendant linked his personal SECU checking account to Mrs. Monk's now jointly held SECU accounts, SECU transferred $21,350 from the joint money-market account to Defendant's personal checking account to cover his overdrafts between 11 August 2015 and 11 May 2016. He also testified that Defendant used $102,017 of Mrs. Monk's money from the jointly-held SECU, Wells Fargo, and First Citizens accounts for his benefit, including $15,000 for a down payment on a Ford truck titled to Defendant; $6,000

in contributions to his IRA; $4,850 for repairs to his Mercedes; $8,000 in payments on his credit card account; and $25,250 in cash withdrawals.

¶ 11 Defendant testified that the money in the joint accounts belonged to Mrs. Monk, stating, "it was her money—her accounts, her money. I was there to help her. It wasn't about me." He maintained that he had "no idea" that SECU was transferring money from the SECU accounts that he held with Mrs. Monk to cover overdrafts from his personal checking account, because he had not reviewed the SECU statements and instead "just stuck them in a drawer." Defendant also testified that Mrs. Monk asked him to recruit a new pastor for Pastor Monk's church and agreed to fund that project, and that he withdrew money from the accounts as she requested. However, Defendant conceded that he suffered from financial difficulties. Although his annual salary was $80,000, he had to pay the IRS "a bunch of money back" at one time and had struggled with his finances and bookkeeping.

¶ 12 Mrs. Monk testified that, although she "just turned everything over" to Defendant after her husband's death, she never authorized Defendant to link his personal SECU checking account to any joint account in order to cover his overdrafts, never gave Defendant permission to withdraw money from the joint accounts for his personal use, and never requested that Defendant find a new pastor for the church. She also stated that she never gave Defendant permission to use her money to purchase a new truck or to fix his Mercedes.

¶ 13 At the close of the State's evidence, Defendant moved to dismiss the embezzlement charge due to insufficient evidence, and he renewed the motion at the close of all evidence. The trial court denied the motion both times.

¶ 14 At the charge conference, Defendant submitted a written request for the following special jury instruction with regard to the embezzlement charge:

> Pursuant to NC law, NCGS [§] 54C-165, Any two or more persons may open or hold a withdrawable account or accounts. The withdrawable account and any balance of the account is held by them as joint tenants. You should consider this as well as all other evidence as you evaluate whether the State has proven its case beyond a reasonable doubt.

¶ 15 Defense counsel argued that the proposed special instruction was necessary because "if the jury finds that [Defendant] was lawfully on the

joint accounts, meaning that there was no deception involved, then he would have been entitled to use those funds regardless." The trial court denied Defendant's request on the grounds that the special instruction was likely to confuse the jury.

¶ 16 On 31 January 2020, the jury returned its verdicts finding Defendant guilty of all charges. The trial court sentenced Defendant to 6-17 months for three of the four counts of exploitation of an older adult and an additional 13-25 months for the fourth count, with the sentences to run consecutively in the custody of the North Carolina Division of Adult Correction. The court also sentenced Defendant to 73-100 months for the embezzlement conviction, to run concurrently with Defendant's other sentences. In addition, the court ordered Defendant to pay $123,367.09 in restitution to Mrs. Monk. Defendant entered oral notice of appeal in open court.

Discussion

¶ 17 On appeal, Defendant argues that the trial court erred by (1) denying his motion to dismiss the embezzlement charge, and (2) declining to deliver his requested special jury instruction. We disagree.

I. Motion to Dismiss

¶ 18 **[1]** Defendant contends that the trial court erred in denying his motion to dismiss because the State presented insufficient evidence that (1) he had a fiduciary relationship with Mrs. Monk when he converted the funds to his use; (2) he wrongfully converted Mrs. Monk's money to his own use, when he was entitled to the funds in the bank accounts as a joint holder; and (3) Defendant embezzled at least $100,000.

A. Standard of Review

¶ 19 We review the denial of a motion to dismiss based on an insufficiency of evidence de novo. *State v. Parker*, 233 N.C. App. 577, 579, 756 S.E.2d 122, 124 (2014).

¶ 20 "A motion to dismiss is properly denied where there is substantial evidence of each element of the offense charged and of [the] defendant being the perpetrator of that offense." *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation and internal quotation marks omitted). The evidence "should be viewed in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. Where the State offers substantial evidence of each essential element of the crime charged, [the] defendant's motion to dismiss must be denied." *Id.* (citation omitted).

B. Embezzlement

¶ 21 The felony offense of embezzlement applies to any person "[w]ho is a guardian, administrator, executor, trustee, or any receiver, or any other fiduciary[.]" N.C. Gen. Stat. § 14-90(a)(3) (2019). Our embezzlement statute also provides that:

> (b) Any [fiduciary] who shall:
>
> (1) Embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or
>
> (2) Take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use,
>
> any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever that . . . belongs to any other person or corporation, unincorporated association or organization . . . , which shall have come into his possession or under his care, shall be guilty of a felony.

Id. § 14-90(b). In short, "to constitute embezzlement, the property in question initially must be acquired lawfully, pursuant to a trust relationship, and then wrongfully converted." *State v. Speckman*, 326 N.C. 576, 578, 391 S.E.2d 165, 166 (1990). If the value of the property embezzled is $100,000 or more, the offense constitutes a Class C felony. N.C. Gen. Stat. § 14-90(c).

C. Fiduciary Relationship

¶ 22 Defendant first argues that the trial court erred in denying his motion to dismiss because the State presented insufficient evidence that a fiduciary relationship existed between himself and Mrs. Monk. Specifically, Defendant contends that "[n]o such relationship existed . . . until the power of attorney was executed on June 12, 2015, approximately two months after [Defendant] came into possession of the funds in Mrs. Monk's bank accounts[.]" We disagree.

¶ 23 It is axiomatic that "[t]he relationship created by a power of attorney between the principal and the attorney-in-fact is fiduciary in nature[.]" *Albert v. Cowart*, 219 N.C. App. 546, 554, 727 S.E.2d 564, 570

(2012). However, a fiduciary relationship may arise "under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *State v. Seay*, 44 N.C. App. 301, 307, 260 S.E.2d 786, 789 (1979) (citation omitted), *appeal dismissed and disc. rev. denied*, 299 N.C. 333, 265 S.E.2d 401, *cert. denied*, 449 U.S. 826, 66 L. Ed. 2d 29 (1980). Indeed, as this Court explained in *State v. Newell*:

> In determining whether an agency or fiduciary relationship exists, it is the terms of the relationship that are important and not how the relationship is designated. The question which determines the nature of the relationship between the defendant and the alleged victim is the ownership of the money at the time it came into the hands of the defendant.

189 N.C. App. 138, 141, 657 S.E.2d 400, 403 (2008) (citation and internal quotation marks omitted).

¶ 24 Here, Defendant concedes that he acted as Mrs. Monk's fiduciary *after* she executed the power of attorney naming Defendant as her attorney-in-fact. Nevertheless, the evidence sufficiently established that a fiduciary relationship existed between Defendant and Mrs. Monk prior to that point, when he "came into possession of the funds in Mrs. Monk's bank accounts[.]" The parties' relationship was certainly one of special confidence and trust: Defendant called Mrs. Monk "Mom," and she called him "son." Mrs. Monk "thought he was a man of God" who "loved" and was "going to take care of" her. Defendant told Mrs. Monk that "he was there to help" her. Only a few weeks after her husband's funeral, Mrs. Monk granted Defendant access to her accounts in reliance on Defendant's promise to "take care of" her. She "turned everything over" to Defendant—including the keys to her home and post office box.

¶ 25 Mrs. Monk clearly granted Defendant access to the funds in her bank accounts "pursuant to a trust relationship[.]" *Speckman*, 326 N.C. at 578, 391 S.E.2d at 166. Because Defendant and Mrs. Monk had a relationship of trust, and because "it is the terms of the relationship that are important and not how the relationship is designated[,]" *Newell*, 189 N.C. App. at 141, 657 S.E.2d at 403 (citation omitted), we conclude that there was sufficient evidence that Defendant was acting as Mrs. Monk's fiduciary when he gained access to her money.

D. Joint Ownership of Bank Accounts

¶ 26 Defendant next argues that the trial court erred in denying his motion to dismiss because there was insufficient evidence that Defendant wrongfully converted Mrs. Monk's money to his own use, in that "[a]s a holder of the [joint] accounts, [he] was entitled to the balance of the [joint] accounts" that he held with Mrs. Monk. Again, we disagree.

¶ 27 In support of his theory of the case, Defendant relies on N.C. Gen. Stat. § 54C-165(a), which provides, *inter alia*:

> Any two or more persons may open or hold a withdrawable account or accounts. The withdrawable account and any balance of the account is held by them as joint tenants, with or without right of survivorship, as the contract shall provide. . . . Unless the persons establishing the account have agreed with the savings bank that withdrawals require more than one signature, payment by the savings bank to, or on the order of, any persons holding an account authorized by this section is a total discharge of the savings bank's obligation as to the amount so paid.

N.C. Gen. Stat. § 54C-165(a).

¶ 28 Defendant interprets this statute as granting joint ownership of the funds deposited into the accounts by virtue of his being named a joint holder. Consequently, Defendant maintains that as a joint holder of the accounts, he was an owner of the funds, and thus, he could not be prosecuted for unlawful withdrawal and use of the funds. This contention is without merit.

¶ 29 Although § 54C-165 governs savings banks, it is essentially the same as § 53C-6-6 (formerly § 53-146, governing banks) and § 54-109.58 (governing credit unions). *See id.* §§ 53C-6-6(f); 54-109.58(f); 54C-165(a). These statutes simply provide, in sum, that the financial institution "may safely pay either of the two persons." *O'Brien v. Reece*, 45 N.C. App. 610, 617, 263 S.E.2d 817, 821 (1980). It is well established that these statutes are "for the protection of the [financial institution] only, and absent any other evidence, [are] not dispositive as to the ownership of funds." *Id.*

¶ 30 It is true that "[t]he ownership of funds in a bank account is presumed to belong to or be owned by the person(s) named on the account." *Mut. Cmty. Sav. Bank, S.S.B. v. Boyd*, 125 N.C. App. 118, 122, 479 S.E.2d 491, 493 (1997). Nevertheless, where ownership is disputed,

the presumption may be rebutted with evidence of the "facts surrounding the creation and history of the account, the source of the funds, the intent of the depositor[,] the nature of the bank's transactions with the parties, and whether the owner of the monies . . . intended to make a gift to the person named[.]" *Id.* at 122, 479 S.E.2d at 494 (citations omitted). "The depositor is . . . deemed to be the owner of the funds." *Myers v. Myers*, 68 N.C. App. 177, 181, 314 S.E.2d 809, 812 (1984) (concluding that husband's unauthorized removal and use of funds deposited by wife in a joint checking account supported a claim of conversion). "[A] deposit by one party into an account in the names of both, standing alone, does not constitute a gift to the other. In order for the exchange of property to constitute a gift, there must be donative intent coupled with loss of dominion over the property." *Hutchins v. Dowell*, 138 N.C. App. 673, 678, 531 S.E.2d 900, 903 (2000). The intent of the parties controls when ownership is disputed. *McAulliffe v. Wilson*, 41 N.C. App. 117, 120, 254 S.E.2d 547, 549 (1979).

¶ 31 In the instant case, it is undisputed that Mrs. Monk, alone, funded the joint accounts. Indeed, Defendant testified that all of the money in the accounts "was [Mrs. Monk's] money." Thus, Mrs. Monk, as the depositor, was "still deemed to be the owner of the funds." *Myers*, 68 N.C. App. at 181, 314 S.E.2d at 812.

¶ 32 Moreover, there was ample evidence that Mrs. Monk did not intend to make a gift to Defendant of $123,367.09, the total amount of funds that Defendant was eventually convicted of embezzling from her. Mrs. Monk testified that she did not give Defendant permission to use the funds for his personal expenses, nor did she gift him the money. Although there was contrary evidence presented at trial—Defendant testified that Mrs. Monk did, in fact, authorize his particular use of the funds—in reviewing the denial of a motion to dismiss, we nonetheless must "view [the evidence] in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *Parker*, 233 N.C. App. at 579, 756 S.E.2d at 124.

¶ 33 We conclude that there was sufficient evidence that the funds taken were the property of Mrs. Monk, and that she did not have the requisite "donative intent" to grant Defendant the money to withdraw and use for his personal benefit. *Hutchins*, 138 N.C. App. at 678, 531 S.E.2d at 903. Thus, Defendant was not entitled to convert the money to his use without her permission.

E. Amount Embezzled

¶ 34 Defendant also contends that the State presented insufficient evidence that the amount of money he embezzled was $100,000 or more—thus elevating the offense to a Class C felony—because: (1) less than $100,000 was taken while Defendant acted as a fiduciary to Mrs. Monk; and (2) Defendant did not have the requisite intent to embezzle the overdraft fees, and therefore, the amount of money embezzled was less than $100,000. We disagree with both contentions.

¶ 35 Defendant first argues that the trial court erred in denying his motion to dismiss the Class C embezzlement charge, because there was insufficient evidence that Defendant was acting as a fiduciary when he converted $100,000 or more of Mrs. Monk's funds to his personal use. As explained above, there was sufficient evidence that Defendant was acting as Mrs. Monk's fiduciary prior to his appointment as her attorney-in-fact. The wrongful conversion of $123,367.09 occurred while Defendant acted as a fiduciary. Accordingly, this argument fails.

¶ 36 Second, Defendant maintains that there was insufficient evidence that he had the requisite intent to wrongfully convert $21,350 in transfers from a joint account in order to cover overdraft fees in his personal checking account. Defendant asserts that "[t]here was no evidence that [he] initiated or knowingly allowed those transfers, nor was there evidence that [he] was aware of those transfers when they occurred" or that "he knowingly linked the joint account to his personal account" with the intent of instituting the overdraft transfers.

¶ 37 "The fraudulent intent required [for the offense of embezzlement] is the intent to willfully or corruptly use or misapply the property of another for purposes other than those for which the agent or fiduciary received it[.]" *State v. Rupe*, 109 N.C. App. 601, 609, 428 S.E.2d 480, 486 (1993). "When a defendant receives money under an agency relationship and does not transmit it to the party to whom it is due, this is circumstantial evidence of intent. Evidence that the defendant was experiencing personal financial problems is also circumstantial evidence of intent." *Newell*, 189 N.C. App. at 142–43, 657 S.E.2d at 404 (citations omitted).

¶ 38 Here, there was sufficient evidence of Defendant's fraudulent intent to embezzle $21,350 in overdraft fees from Mrs. Monk. Although Defendant denied linking the accounts or knowing that his personal checking account overdrafts were being covered with funds from a joint account, the $21,350 in overdraft fees constituted more than a quarter of his approximately $80,000 annual salary, and Defendant admitted

receiving SECU statements for that account. Moreover, transfers from the joint account covered Defendant's personal overdrafts for many months, from August 2015 to May 2016, with each month's statements providing Defendant with additional notice of the transfers. Defendant also testified that he was experiencing money problems, as he struggled with his finances and bookkeeping, and had to pay the IRS "a bunch of money back" at one time.

¶ 39 The evidence was sufficient to support that Defendant embezzled $100,000 or more from Mrs. Monk. Accordingly, the trial court did not err in denying Defendant's motion to dismiss the charge of embezzlement.

II. Special Jury Instruction

¶ 40 **[2]** Finally, Defendant argues on appeal that the trial court erred in declining to give his requested special jury instruction that "if the jury found that he was lawfully named on the joint bank accounts with [Mrs.] Monk, then he would be entitled to use the funds in the accounts[.]" A review of the record, however, reveals that Defendant's requested special instruction was in fact a brief summary of N.C. Gen. Stat. § 54C-165; counsel had intended to use this statute to argue that Defendant was not guilty of the embezzlement charge. We conclude that the trial court did not err in denying Defendant's request for this special instruction.

A. Standard of Review

¶ 41 A trial court should give a specific jury instruction when "(1) the requested instruction [i]s a correct statement of law and (2) [i]s supported by the evidence, and . . . (3) the [pattern jury] instruction . . . , considered in its entirety, fail[s] to encompass the substance of the law requested and (4) such failure likely misle[ads] the jury." *State v. Oxendine*, 242 N.C. App. 216, 219, 775 S.E.2d 19, 21–22 (2015) (citation omitted). "Where the request for a specific instruction raises a question of law," this Court reviews de novo "the trial court's decisions regarding jury instructions[.]" *State v. Palmer*, 273 N.C. App. 169, 171, 847 S.E.2d 449, 451 (2020). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *State v. Guerrero*, 2021-NCCOA-457, ¶ 9 (citation omitted).

B. Discussion

¶ 42 During the charge conference, Defendant requested that the trial court instruct the jury that:

> Pursuant to NC law, NCGS [§] 54C-165, Any two or more persons may open or hold a withdrawable

> account or accounts. The withdrawable account and any balance of the account is held by them as joint tenants. You should consider this as well as all other evidence as you evaluate whether the State has proven its case beyond a reasonable doubt.

Defendant requested this special instruction in the hopes of arguing to the jurors that if they found that Defendant "was lawfully on the joint accounts, meaning that there was no deception involved," then they should also find that "he would have been entitled to use those funds regardless."

¶ 43 Defendant's requested special instruction is a correct statement of law insofar as "[a]ny two or more persons may open or hold a withdrawable account or accounts. The withdrawable account and any balance of the account is held by them as joint tenants[.]" N.C. Gen. Stat. § 54C-165(a). It does not, however, accurately negate any element of the offense of embezzlement; Defendant was not entitled to spend the funds because he was a joint holder of the accounts. Consequently, the trial court correctly concluded that such an instruction would have been confusing to the jury.

¶ 44 As we addressed above, N.C. Gen. Stat. § 54C-165 and its related statutes, §§ 53C-6-6 and 54-109.58, are "for the protection of the *bank* only, and absent any other evidence, [are] *not dispositive as to the ownership of funds*." *O'Brien*, 45 N.C. App. at 617, 263 S.E.2d at 821 (emphases added). Furthermore, Defendant admitted at trial that all of the money in the joint accounts belonged to Mrs. Monk: "[I]t was her money—her accounts, her money. I was there to help her. It wasn't about me." Mrs. Monk testified that she granted Defendant joint access so that he could "take care of [her]."

¶ 45 Additionally, Defendant can show no prejudice from the trial court's refusal to give the requested special instruction. Indeed, the requested instruction actually *supports* an element of the offense of embezzlement—that Defendant had lawful access to the funds. *See* N.C. Gen. Stat. § 14-90; *Speckman*, 326 N.C. at 578, 391 S.E.2d at 166. Thus, there is no reasonable possibility that, had the trial court given the requested special instruction, the jury would have reached a different result at trial. Moreover, it is evident upon review that the trial court appropriately instructed the jury.

¶ 46 Because the requested special instruction could have misled the jury and was likely to create an inference unsupported by the law and the record—that Defendant's lawful access to the funds in the joint

accounts entitled him to freely spend the money therein—the trial court properly declined to deliver Defendant's requested special jury instruction. *See Guerrero*, 2021-NCCOA-457 at ¶ 9.

Conclusion

¶ 47 For the foregoing reasons, we conclude that the trial court did not err in denying Defendant's motion to dismiss the embezzlement charge, nor in refusing to deliver Defendant's requested special jury instruction.

NO ERROR.

Judges MURPHY and COLLINS concur.

STATE OF NORTH CAROLINA
v.
JOHNATHAN WENDELL WARD

No. COA21-303

Filed 18 January 2022

1. Constitutional Law—right to counsel—trial strategy—absolute impasse

The trial court did not err in a statutory rape trial by denying defendant's request to remove his counsel and represent himself, or in not more fully informing defendant of his constitutional rights, where the record did not clearly disclose there was an absolute impasse between defendant and his attorney on trial strategy. Although defendant expressed that he did not believe his attorney had his best interest at heart and made vague claims of misconduct, the trial court gave defendant an opportunity to raise his concerns and adequately addressed them.

2. Evidence—statutory rape trial—expert testimony—use of words "victim" and "disclosure"—credibility vouching

There was no plain error in a statutory rape trial by the expert witness using the words "victim" and "disclosure" during her testimony to describe the child prosecuting witness and the allegations made against defendant. The jury also heard testimony about defendant's assaults directly from the prosecuting witness as well as testimony from family members, a counselor, and others. Given the overwhelming evidence of guilt presented, defendant's alternative

argument that his counsel was ineffective for failing to object to the expert's language was also without merit.

Appeal by defendant from judgment entered 9 December 2020 by Judge Jeffery B. Foster in Pasquotank County Superior Court. Heard in the Court of Appeals 14 December 2021.

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

Mark Montgomery for defendant-appellant.

TYSON, Judge.

¶ 1 Johnathan Ward ("Defendant") appeals a jury's verdict finding him guilty of statutory rape and abduction of a child. We find no prejudicial error.

I. Background

¶ 2 Katy was 14 years old when she attended a gathering at her grandmother's home on 25 December 2016. *See* N.C. R. App. P. 42(b) (pseudonym used to protect the identity of the juvenile). Defendant attended the same gathering because he was dating Katy's aunt, Naquana.

¶ 3 On 26 December 2016, Katy's sister, Ada Doe, awoke to find Katy was no longer inside the bedroom with her. Ada looked for her sister and awoke her mother and stepfather. The family looked for Katy and eventually they spotted Defendant's car in the apartment complex parking lot beside their house. Ada and her stepfather approached Defendant's car and saw Defendant in the front seat and Katy in the backseat. Ada and her stepfather tried to open the car doors and rapped upon the windows. Defendant started the car and drove away with Katy still in the backseat. Naquana called the police.

¶ 4 Katy was found and taken to Children's Hospital of the King's Daughters by her biological father, Kenneth Doe. Katy's mother, Denita Doe, testified at trial that Katy was missing for eight to ten hours. Denita testified Katy was "distant, upset, scared" upon being reunited at the hospital. Denita arranged an interview for Katy at Kid's First Child Advocacy Center ("Kid's First").

¶ 5 Ida Rodgers, a licensed clinical social worker, conducted Katy's interview at Kid's First. Rodgers testified when she met Katy on 28 December 2016 Katy was "very withdrawn . . . and she had a hood

over her head. Her face was not visual (sic) . . . She was extremely nervous and very soft spoken . . . reluctant to talk."

¶ 6 Katy told Rodgers that she had attempted to talk to Defendant, and that is why she was inside of his car on 26 December 2016. Katy told Rodgers that Defendant had panicked and drove away, and that she had slept in a bed with him at his friend's house. Katy did not disclose any sexual activity with Defendant during the first interview.

¶ 7 Rodgers interviewed Katy again on 28 February 2020. At this interview, Katy told Rodgers she had been raped once, and Defendant had attempted to rape her again.

¶ 8 Katy was 18 years old when she testified at Defendant's trial. Katy told the jury she had met Defendant in the summer of 2016. Defendant began to show an interest in her, which made her feel uncomfortable. Katy testified that during the summer of 2016, she was asleep in her cousin's room and she "woke up to [Defendant being] knelt beside me, and he was touching me . . . [m]y breasts and my vagina." Katy testified Defendant was touching her on top of her clothing.

¶ 9 Katy testified of another incident when she was asleep at her aunt's house in a recliner and awoke to find Defendant touching her breasts. Defendant "pulled his penis out" and "pulled [Katy's] head toward that way" and asked her to perform oral sex on him.

¶ 10 The prosecutor asked Katy during direct examination if Defendant had engaged in sexual activities with her. Katy testified she had been asleep on her aunt's sofa and all she remembered "is him putting his penis inside of [my vagina]." The prosecutor asked Katy if Defendant had sex with her more than once, and Katy replied "Yes." Katy testified she was 14 years old, and Defendant was 28 years old when these incidents had occurred.

¶ 11 During trial, Defendant expressed dissatisfaction with his appointed counsel and claimed to have fired him "seven times." The trial judge heard Defendant's concerns regarding the witness list and the State's burden to prove elements of the charges and answered Defendant's questions. Defendant tried to "relieve [counsel] of his duties" on the second day of trial. Defendant stated he would like to represent himself, and the court denied his motion twice.

¶ 12 The jury found Defendant guilty of statutory rape and abduction of a child. Defendant was sentenced to an active term of imprisonment for 240 to 348 months for the statutory rape conviction to run concurrently to a term of active imprisonment of 16 to 29 months for the abduction of a child.

II. Jurisdiction

¶ 13 This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Issues

¶ 14 Defendant raises two issues on appeal. First, whether the trial court erred by not inquiring of Defendant's disagreements with his counsel's trial strategy and his request to represent himself. Second, whether the trial court committed plain error in allowing the State's expert witness to testify regarding Defendant's truthfulness, and in the alternative, whether Defendant received ineffective assistance of counsel.

IV. Argument

A. Defendant's Complaints Regarding His Counsel

1. Standard of Review

¶ 15 "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

2. Absolute Impasse

¶ 16 **[1]** Defendant argues the trial court committed errors during trial and each error prejudiced his constitutional rights as a matter of law. Defendant argues that he voiced dissatisfaction with his attorney on the first and second day of trial and then asked to have his attorney removed and to represent himself.

¶ 17 The Sixth Amendment to the Constitution of the United States gives a criminal defendant the "right to proceed without counsel when he voluntarily and intelligently elects to do so[.]" *Faretta v. California*, 422 U.S. 806, 807, 45 L. Ed. 2d 562, 566 (1975).

¶ 18 Defendant argues he is entitled to an "*Ali*" error and to have his strategic wishes honored by defense counsel. An *Ali* error occurs when "counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control[.]" *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991).

¶ 19 A defendant's disagreement with counsel will not always rise to the level of an absolute impasse as noted in *State v. Curry*, 256 N.C. App. 86, 97, 805 S.E.2d 552, 559 (2017). In *Curry*, the defendant argued an absolute impasse occurred with his attorney because his counsel did not believe him about the crime and charges. *Id.* at 98, 805 S.E.2d at

559. In *Curry*, this Court held "no actual impasse exists where there is no conflict between a defendant and counsel. . . . Moreover, when a defendant fails to complain about trial counsel's tactics and actions, there is no actual impasse." *Id.* at 97, 805 S.E.2d at 559 (citations omitted). This Court emphasized that conclusory allegations of impasse are not enough. *Id.* at 98, 805 S.E.2d at 559. This Court reasoned in *Curry*, the defendant "was the sole cause of any purported conflict that developed, and there has been no reasonable or legitimate assertion by [d]efendant that an impasse existed that would require a finding that counsel was professionally deficient in this case." *Id.*

¶ 20 The first colloquy between Defendant and the trial court occurred as follows:

> THE COURT: Did you have some concerns about your attorney that you wanted to express?
>
> . . . .
>
> THE DEFENDANT: It seems as though he couldn't do anything I asked him to do for some reason or another. You know, I asked for certain people to be taking the stand and I asked him for certain evidence, like, there was things that was said in court because everyone who was on the original case is no longer here, you know, and there's new charges are coming up out of the blue, so I wanted to fill you in on how the case has gone so far I guess.
>
> THE COURT: Okay. So your attorney -- you say you got some witnesses that you want to call that he doesn't want to call?
>
> THE DEFENDANT: Well, I mean, he said he couldn't -- he said he couldn't find them or he needed an address, but they already on the witness list it seems, so I will just cross-examine them.
>
> . . . .
>
> THE COURT: If they're on the witness list, they can be called. Whether or not they're called is a matter of legal strategy.
>
> THE DEFENDANT: Right. That's what I was saying. It seems as though he don't have my best interests at heart.

THE COURT: Well, I mean, why do you say that?

THE DEFENDANT: I mean, just the excuses that was kind of weak, you know, tactics to keep prolonging and buying time. I tried to fire him seven times, and he refused to admit that I fired him, I guess, so he keeping his voicemail secret. He's not making the district attorney prove anything she is saying or, you know –

THE COURT: Well, I can promise you, sir, that before this case goes to the jury, the State is going to prove every allegation beyond a reasonable doubt, and I get to make that final call.

THE DEFENDANT: Okay.

THE COURT: If they don't prove their case and there's not enough evidence to send it to the jury, I won't let it go to the jury.

THE DEFENDANT: And I also feel as though he's corroborating misconduct or turning a blind eye to a lot of misconduct, but, I mean, it's really speculation so I can't really –

THE COURT: Then you understand speculation, we can't do anything about that.

THE DEFENDANT: I hope we keep that attitude.

THE COURT: Okay. All right. Anything else?

THE DEFENDANT: No, sir.

¶ 21 The second colloquy occurred as follows:

THE DEFENDANT: I would like to relieve him of his duties. I asked him to do a few things yesterday he refused to do.

THE COURT: Mr. Ward, once again, I ruled on that motion yesterday. I am going to deny that motion, okay, and nothing is going to change between yesterday and today, so that motion is still denied, all right? Anything else?

. . . .

> THE DEFENDANT: I would really like to represent myself today.
>
> THE COURT: Well, again, for the last time, that motion is denied, okay?
>
> THE DEFENDANT: All right.

¶ 22 The trial judge heard Defendant's concerns, considered them, personally addressed, explained, and assured Defendant of the integrity of the process and of his rights. At the conclusion of the two colloquies, the trial judge gave Defendant another opportunity to voice any concerns and addressed them. Defendant communicated he was satisfied and had nothing further to say. Defendant's questions and comments cannot be said to rise to the level of an "absolute impasse as to such tactical decisions" as was described in *Ali*. *Ali*, 329 N.C. at 404, 407 S.E.2d at 189.

¶ 23 Defendant's complaints regarding the witness list and proving the elements of his charges were deemed misunderstandings that were corrected during the colloquies by the trial court. Like the defendant in *Curry*, Defendant may have had a personality conflict with his counsel, and asserted he did not believe defense counsel had his best interest at heart. Defendant has failed to show an "absolute impasse as to such tactical decisions" occurred during trial. *Id.* Defendant's argument is overruled.

3. Right to be Informed

¶ 24 Defendant concedes he can find no authority to support his notion that the trial court committed an *Ali* error. Defendant asserts "[i]t follows that a defendant has the right to be so informed[]" because "in order for a defendant to exercise his [*Ali*] right, he must be made aware that he has it."

¶ 25 In assessing the right to self-representation under the Sixth Amendment, our Supreme Court held that when the defendant effectively admits that no request for self-representation had been communicated to the trial court during the pretrial phase, the recognition of a right under the Constitution does not carry with it a concurrent recognition of a right to be notified of the existence of that right. *State v. Hutchins*, 303 N.C. 321, 337-38, 279 S.E.2d 788, 798-99 (1981).

¶ 26 After the jury was seated, sworn and during the second day trial, Defendant raised his motion to discharge his appointed counsel. Defendant asserts the trial court denied the motion without conducting a "thorough analysis" in accordance with N.C. Gen. Stat. § 15A-1242 (2021).

¶ 27 This Court has held "while the right to counsel may be waived only expressly, knowingly, and intelligently, the right to self-representation can be waived by failure timely to assert it, or by subsequent conduct giving the appearance of uncertainty." *State v. Walters*, 182 N.C. App. 285, 292, 641 S.E.2d 758, 762 (2007) (citation and internal quotation marks omitted). "Statements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself. *Hutchins*, 303 N.C. at 339, 279 S.E.2d at 800.

¶ 28 Here, the transcript shows Defendant expressed generalized dissatisfaction with his attorney on the first day of trial, as well as a substantial level of confusion regarding the nature of the charges and process. Defendant insinuated that various individuals, including witnesses, the prosecutor, and his attorney, were engaged in misconduct.

¶ 29 Defendant did not clearly express a wish to represent himself until the second day of trial. The trial court gave Defendant several opportunities to address and consider whether he wanted continued representation by counsel and personally addressed and inquired into whether Defendant's decision was being freely, voluntarily, and intelligently made. Defendant's arguments are without merit and overruled.

B. Expert Witness Testimony

1. Plain Error

¶ 30 **[2]** Defendant argues the trial court erred in permitting State's witness Ida Rodgers to use the terms "victim" and "disclosure" during her testimony.

¶ 31 "[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

> 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.

Id.

¶ 32 Our Supreme Court recently considered this issue and determined: "[d]efendant has not shown that the use of the word 'disclose' had a probable impact on the jury's finding that he was guilty." *State v. Betts*,

2021-NCSC-68, ¶ 21, 377 N.C. 519, 525, 858 S.E.2d 601, 606 (concluding the jury had heard substantial evidence the defendant inappropriately touched the victim and had ample opportunities to assess her credibility, thus making it improbable the word "disclose" had an impact on their verdict). Further "[e]ven if the trial court erred in [permitting] use of the term 'victim,' [the defendant] must show prejudice to receive a new trial." *State v. Jackson*, 202 N.C. App. 564, 569, 688 S.E.2d 766, 769 (2010).

¶ 33 The word "disclose" was used several times throughout the trial, and during the jury charge. The word "victim" also appears several times throughout the indictment, the pattern jury instructions, and several dozen times throughout the trial. We again caution of the State's repeated use of both terms, "disclose" and "victim," as the State carries the burden of proof and overuse of both characterizations may prejudice a defendant.

¶ 34 Here, the jury had the opportunity to hear from 18-year-old Katy, several of her family members, Katy's counselor, and others. Katy clearly articulated the kind and nature of the assaults inflicted on her by Defendant. Defendant had a fair and full opportunity to cross-examine her and all of the other State's witnesses and to present his own evidence and witnesses in rebuttal. The jury weighted the credibility of all witnesses and evidence to reach its verdicts. Defendant has failed to show plain error or prejudice to award a new trial.

2. Ineffective Assistance of Counsel

¶ 35 As an alternative to Defendant's appeal regarding the words Ida Rodgers used in her testimony, Defendant argues he received ineffective assistance of counsel because counsel failed to object to Rodger's use of those terms during her testimony.

> To succeed on an IAC claim, defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

State v. Womble, 272 N.C. App. 392, 402, 846 S.E.2d 548, 555 (2020) (citations omitted).

¶ 36 For the same reason plain error review fails under these facts as described above, Defendant's IAC argument also fails. Given the other overwhelming evidence of guilt presented, Defendant has shown no reasonable probability the jury would have reached a different verdict, if

his trial counsel had objected to the use of the terms "disclosure" and "victim" during trial to demonstrate prejudice. Defendant's IAC argument has no merit and is dismissed.

V. Conclusion

¶ 37 The trial court did not commit a reversible error by failing to conduct a more "thorough analysis" before denying Defendant's right to represent himself. The trial court did not commit a Constitutional error by failing to inform Defendant of his "*Ali*" error rights. *Ali*, 329 N.C. at 404, 407 S.E.2d at 189.

¶ 38 Defendant does not show plain error or prejudice by the trial court permitting an expert witness to use the words "disclose" during her testimony and the use of "victim" on several occasions. Defense counsel did not provide ineffective assistance of counsel by failing to object to the use of those same words during trial. Defendant received a fair trial free from prejudicial errors he preserved or as reviewed for plain error. We find no prejudicial error. *It is so ordered.*

NO PREJUDICIAL ERROR.

Judges CARPENTER and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 JANUARY 2022)

ENOCH v. MONARCH 2022-NCCOA-41 No. 20-585	N.C. Industrial Commission (15-769318)	Affirmed
IN RE J.B. 2022-NCCOA-42 No. 21-457	New Hanover (13JA187)	Affirmed
KIM v. CALLOWAY 2022-NCCOA-43 No. 21-52	Orange (12CVD142)	Vacated and Remanded
McGIRT v. DURHAM CNTY. GOV'T 2022-NCCOA-44 No. 21-261	Durham (20CVS3058)	Affirmed in Part, Dismissed in Part, and Remanded.
MILLER v. E. BAND OF CHEROKEE INDIANS 2022-NCCOA-45 No. 21-206	Graham (20CVS130)	Dismissed
REVIS v. SCHLEDER 2022-NCCOA-46 No. 21-360	Buncombe (20CVS3449)	Dismissed
ROTH v. ROTH 2022-NCCOA-47 No. 21-84	Wake (14CVD7863)	Affirmed.
STATE v. DAWSON 2022-NCCOA-48 No. 21-372	Surry (19CRS51017-19) (20CRS50555)	Affirmed
STATE v. HUGAYES 2022-NCCOA-49 No. 20-756	Lenoir (16CRS52315)	No Error
STATE v. JOHNSON 2022-NCCOA-50 No. 20-820	Alamance (17CRS53028) (17CRS53672) (19CRS1776)	No Error in Part; Dismissed in Part
WOODFOREST NAT'L BANK v. EDWARDS BROTHERS MALLOY, INC. 2022-NCCOA-51 No. 20-217	Harnett (18CVS1980)	Dismissed

ALEXANDER v. N.C. STATE BD. OF ELECTIONS

[281 N.C. App. 495, 2022-NCCOA-52]

KELLY ALEXANDER, JR., DONALD R. CURETON, JR., ALICIA D. BROOKS, KIMBERLY Y. BEST, LAURENE L. CALLENDER, AND LATRICIA H. WARD, PLAINTIFFS
v.
NORTH CAROLINA STATE BOARD OF ELECTIONS, STELLA ANDERSON, JEFF CARMON III, STACY EGGERS IV, WYATT T. TUCKER, SR., DAMON CIRCOSTA, KAREN BRINSON BELL, PHILLIP E. BERGER, AND TIMOTHY K. MOORE (ALL IN OFFICIAL CAPACITIES ONLY), DEFENDANTS

No. COA21-77

Filed 1 February 2022

1. Appeal and Error—jurisdiction—order resolving sole remaining issue—final judgment

After a three-judge panel in the superior court dismissed plaintiffs' facial constitutional challenge to a district court judicial elections law while reserving the issue of attorney fees, the panel's subsequent order granting plaintiffs' request for attorney fees resolved the only remaining issue in the case and, therefore, constituted a final order that defendants could challenge on immediate appeal.

2. Appeal and Error—mootness—exceptions—facial constitutional challenge—law repealed while action pending

A three-judge panel in the superior court properly dismissed plaintiffs' facial constitutional challenge to a district court judicial elections law as moot where the legislature repealed the law while plaintiffs' suit was pending. Plaintiffs' claims did not fall under the public interest exception to the mootness doctrine where, despite the importance of voter laws to the public, there was no controversy between the parties underlying the suit and no risk of further claims arising since the law had been repealed. Further, because the law at issue had been repealed, the mootness exception for claims that are "capable of repetition, yet evading review" did not apply to plaintiffs' claims because there was no reasonable expectation of plaintiffs being subjected to the same challenged action again.

3. Jurisdiction—superior court—three-judge panel—facial constitutional challenge—matters contingent upon result

After a three-judge panel in the superior court dismissed plaintiffs' facial constitutional challenge to a district court judicial elections law, the panel erred by awarding plaintiffs attorney fees and costs because it lacked jurisdiction to do so. When the original trial court transferred the case to the three-judge panel pursuant to Civil

Procedure Rule 42(b)(4), the trial court stayed all other matters that were contingent upon the resolution of the constitutional challenge and the exhaustion of all appeal rights; therefore, the trial court retained jurisdiction over those other matters, which included the attorney fees issue.

Appeals by plaintiffs from order entered 25 September 2020 and by defendants from order entered 23 November 2020 by Judges Wayland J. Sermons, Jr., Lora C. Cubbage, and R. Gregory Horne in Wake County Superior Court. Heard in the Court of Appeals 3 November 2021.

Higgins Benjamin, PLLC, by Robert Neal Hunter, Jr., for Plaintiffs.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Paul M. Cox, for State Board Defendants.

Ogletree Deakins Nash Smoak & Stewart P.C., by Thomas A. Farr, for Legislative Defendants.

CARPENTER, Judge.

¶ 1 Kelly Alexander, *et al.*, ("Plaintiffs") appeal pursuant to N.C. Gen. Stat. § 7A-27 from an order of a three-judge panel in Wake County Superior Court dismissing Plaintiffs' claims as moot. On appeal, Plaintiffs argue their claims are not moot or, in the alternative, that their claims fall into the public interest and "capable of repetition, yet evading review" exceptions to mootness. The North Carolina State Board of Elections, *et al.*, ("Defendants") appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(3)(c) (2019) from an order granting Plaintiffs attorney's fees. On appeal, Defendants argue the three-judge panel did not have jurisdiction to grant the award or, in the alternative, that Plaintiffs do not qualify as a prevailing party under 42 U.S.C. § 1988. After careful review, we affirm the three-judge panel's dismissal of Plaintiffs' claims as moot and hold the claims do not meet any exceptions to the mootness doctrine. We agree with Defendants' contention the three-judge panel lacked jurisdiction to grant Plaintiffs' request for attorney's fees, and we vacate and remand this order.

I. Factual and Procedural Background

¶ 2 In 2018, the North Carolina General Assembly enacted a law that converted district court judicial elections in Mecklenburg County from countywide to district-based elections. *See* S.L. 2018-14 § 2(a). The

law divided Mecklenburg County into eight districts, and the county's twenty-one district court seats were allocated amongst these eight electoral districts. *Id*. Previously, all twenty-one seats were filled through a single countywide election. The law also divided Wake County into districts for district court judicial elections; however, no challenge was raised to that portion of the law.

¶ 3 Plaintiffs, at time of filing, were: two district court judges, a former district court judge, a member of the General Assembly, and two voters. All Plaintiffs resided in Mecklenburg County. The complaint named as defendants the Governor of North Carolina ("Governor"), the North Carolina State Board of Elections and its appointed members, the Speaker of the North Carolina House of Representatives, and the President Pro Tempore of the North Carolina Senate (collectively, "Defendants"). The Governor and Defendants moved to dismiss the claims against them. The trial court granted the Governor's motion to dismiss and denied Defendants' motions in an order entered on 18 November 2019. The trial court's order also transferred the case to a three-judge panel in Wake County Superior Court pursuant to N.C. Gen. Stat. § 1-267.1 and Rule 42(b)(4) of the North Carolina Rules of Civil Procedure.[1]

¶ 4 On 20 November 2019, Plaintiffs moved for a temporary restraining order seeking to enjoin operation of S.L. 2018-14 § 2(a) during candidate filing, set to begin on 2 December 2019, in anticipation of the 2020 general election. The three-judge panel held a hearing on Plaintiffs' motion on 22 November 2019. Following the hearing, the parties entered an agreement to temporarily suspend the operation of the law during the 2020 general election cycle, and the three-judge panel entered a consent order formalizing the agreement on 27 November 2019.

¶ 5 On 1 July 2020, the General Assembly repealed the challenged law. *See* S.L. 2020-84, § 2. In response, on 13 July 2020, the three-judge panel ordered the parties to submit briefs detailing what issues, if any, remained in the matter. On 11 August 2020, Plaintiffs moved for summary judgment, seeking a declaratory judgment stating the repealed law had been unlawful. On 21 August 2020, Plaintiffs moved to tax costs and fees against Defendants. Defendants submitted briefs arguing Plaintiffs' claims were moot. On 25 September 2020, the three-judge panel entered an order denying the motion for declaratory judgment and

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1. When a trial court transfers a facial challenge raised as to the validity of a statute to a three-judge panel sitting in Wake County Superior Court, the trial court retains jurisdiction of all other collateral matters pending resolution of the facial challenge. *See* N.C. R. Civ. P. 42(b)(4) (2019).

dismissing Plaintiffs' claims as moot but reserving the issue of attorney's fees. Plaintiffs filed written notice of appeal on 23 October 2020. On 23 November 2020, the three-judge panel entered an order granting Plaintiffs' motion for attorney's fees and costs in the amount of $165,114.44. Defendants filed notice of appeal.

II. Jurisdiction

¶ 6 **[1]** Plaintiffs appeal from a final order dismissing their claims as moot pursuant to N.C. Gen. Stat. § 7A-27 (2019). Defendants appeal from an order awarding attorney's fees, pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019) or, in the alternative, N.C. Gen. Stat. § 7A-27(b)(3)(c).

¶ 7 Plaintiffs argue the three-judge panel's order awarding attorney's fees is interlocutory and does not affect a substantial right, thereby rendering Defendants' appeal improper. Defendants argue the order granting attorney's fees is final, as it resolved the only outstanding matter left in the case or, alternatively, if held to be interlocutory, the order affects a substantial right. We disagree with Plaintiffs and find the order is not interlocutory having resolved the issue of attorney's fees, the sole remaining issue between the parties. We therefore deny Plaintiffs' motion to dismiss Defendants' cross appeal.

¶ 8 An order is interlocutory if it does not determine the issues but directs some further proceeding preliminary to a final decree. *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). Moreover, "an order that completely decides the merits of an action constitutes a final judgment for purposes of appeal even when the trial court reserves for later determination collateral issues such as attorney's fees and costs." *In re Cranor*, 247 N.C. App. 565, 568-69, 786 S.E.2d 379, 382 (2016) (quoting *Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013)).

¶ 9 The three-judge panel's 25 September 2020 order reserved the issue of attorney's fees and determined all other matters were moot. By making a final determination on the merits of the case on 25 September 2020, the three-judge panel entered a final judgment. *See In re Cranor*, 247 N.C. App. at 568-69, 786 S.E.2d at 382. Reserving a collateral issue, such as attorney's fees, for a later determination does not affect the finality of the judgment on the merits. *See id.* at 568-69, 786 S.E.2d at 382. The issue of attorney's fees was the only issue outstanding after the 25 September 2020 order was entered. The three-judge panel's grant of Plaintiffs' motion for attorney's fees was not an interlocutory order, as no issue was left to be determined by further proceedings. *See Waters*, 294 N.C. at 207, 240 S.E.2d at 343. As the sole remaining issue, the panel's determination

on attorney's fees left nothing else to be determined. As such, the order is not interlocutory, and is therefore appealable as a final order pursuant to N.C. Gen. Stat. § 7A-27.

III. Issues

¶ 10 The issues on appeal are whether the three-judge panel erred by: (1) dismissing Plaintiffs' claims as moot, and (2) awarding Plaintiffs attorney's fees.

IV. Standard of Review

¶ 11 The issue of whether a trial court properly dismissed a case as moot is reviewed *de novo*. *Cumberland Cnty. Hosp. Sys., Inc. v. N.C. Dep't of Health & Human Servs.*, 242 N.C. App. 524, 528, 776 S.E.2d 329, 332 (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) (internal quotation marks and citation omitted). Likewise, we review the award of attorney's fees *de novo*. *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 206 N.C. App. 192, 201, 696 S.E.2d 559, 566 (2010).

V. Analysis

A. Mootness

¶ 12 **[2]** Plaintiffs argue the three-judge panel erred by dismissing their claims, as the claims were not moot or were within an exception to the mootness doctrine. For the following reasons, we disagree with Plaintiffs' contention their claims were not moot or were excepted from the bar of the mootness doctrine.

¶ 13 "That a court will not decide a 'moot' case is recognized in virtually every American jurisdiction." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978).

> Whenever, during the course of litigation . . . the relief sought has been granted or . . . questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

Id. at 147, 250 S.E.2d at 912.

¶ 14 Under North Carolina law, mootness is not a matter of jurisdiction, but is instead a "prudential limitation on judicial power." *Comm. to Elect*

Dan Forest v. Emps. Pol. Action Comm., 376 N.C. 558, 2021-NCSC-6, ¶ 29. In other words, it is "a form of judicial restraint." *Id.* at ¶ 65 n.39 (quoting *Peoples*, 296 N.C. at 147, 250 S.E.2d at 912). Our Supreme Court "consistently has refused to consider an appeal raising grave questions of constitutional law where . . . the cause of action had been destroyed so that the questions become moot." *Hoke Cty. Bd. of Educ. v. State*, 367 N.C. 156, 159, 749 S.E.2d 451, 454 (2013) (internal quotations omitted). Specifically, when "the General Assembly revises a statute in a material and substantial manner, with the intent to get rid of a law of dubious constitutionality, the question of the act's constitutionality becomes moot." *Id.* at 159, 749 S.E.2d at 454 (internal quotations omitted).

¶ 15 There are, however, limited exceptions to the mootness doctrine. "Even if moot . . . this Court may, if it chooses, consider a question that involves a matter of public interest, is of general importance and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). In addition, a court may proceed under the "capable of repetition, yet evading review" exception. *Calabria v. N.C. State Bd. of Elections*, 198 N.C. App. 550, 555-56, 680 S.E.2d 738, 744 (2009).

> Two elements are required for the capable of repetition, yet evading review" exception to the mootness doctrine to apply: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again.

Id. at 555-56, 680 S.E.2d at 744 (internal citations and quotations omitted).

¶ 16 Here, the original question in controversy, whether the judicial districts in Mecklenburg County were constitutional, was addressed when the General Assembly repealed that portion of the law and reverted to countywide elections in Mecklenburg County. S*ee* S.L. 2020-84, § 2. Likewise, Plaintiffs' request for dissolution of the judicial districts was also granted by the repeal. *See id.* Plaintiffs' argument that declaratory relief should be granted to put the General Assembly on notice is unpersuasive considering precedent clearly states the actions taken by the General Assembly render discussion of the repealed law's constitutionality moot. *See Hoke*, 367 N.C. at 159, 749 S.E.2d at 454. Therefore, the three-judge panel properly found Plaintiffs' claims to be moot.

¶ 17 Plaintiffs further contend that even if the claims are moot, this Court should reverse the three-judge panel's order because their claims fall

within the public interest and "capable of repetition, yet evading review" exceptions to the mootness doctrine.

¶ 18 First, Plaintiffs argue the public interest exception applies because voter laws are important to the North Carolina public and have been litigated several times in recent years. Plaintiffs primarily rely on the reasoning of *Chavez v. McFadden*, a case decided by the North Carolina Supreme Court where the Court held the public interest exception was applicable, in part, because immigration laws had "become the subject of much debate in North Carolina in recent years." *Chavez v. McFadden*, 374 N.C. 458, 468, 843 S.E.2d 139, 147 (2020). In *Chavez*, however, the parties all agreed the issue was moot by virtue of the petitioners' transfer from state law enforcement to federal immigration custody enforcement. *Id.* at 468, 843 S.E.2d at 147. Although no relief could be provided for either petitioner, the Court reasoned there was a dire public interest because the policies underlying the controversy were still in effect, more individuals would be subjected to the same conditions as petitioners, and immigration laws were a hotly discussed subject at the time. *Id.* at 468, 843 S.E.2d at 147. As such, the Court in *Chavez* held that, due to public interest, it would address the ongoing debate surrounding the policies. *Id.* at 468, 843 S.E.2d at 147.

¶ 19 Presently, however, there is no underlying controversy between Plaintiffs and Defendants and no risk of further claims arising as the law in question has been repealed. *See* S.L. 2020-84, § 2. *See also Cape Fear River Watch v. N.C. Envtl. Mgmt. Comm'n*, 368 N.C. 92, 100, 772 S.E.2d 445, 450. Moreover, even where there may be grave issues of constitutional concern, this Court will not except a case from the mootness doctrine solely to render an advisory opinion. *See Hoke*, 367 N.C. at 159, 749 S.E.2d at 454. This is particularly the case where the General Assembly has acted to address those constitutional concerns. *Id.* at 159, 749 S.E.2d at 454. Therefore, we decline to address Plaintiffs' claims under the public interest exception.

¶ 20 Plaintiffs next argue the "capable of repetition, yet evading review" exception applies to their claims, despite conceding they may not "technically meet the standards" of this exception. In order to meet this exception, Plaintiffs must show the duration of litigation was too short to be fully litigated, and there is a reasonable expectation the same complaining party will be subjected to the same action again. *See Calabria*, 198 N.C. App. at 555-56, 680 S.E.2d at 744. Here, regardless of the duration of litigation, there is no reasonable expectation the same complaining party will be subjected to the same action because the law has been repealed, and the judicial districts have been completely dissolved. *See*

S.L. 2020-84, § 2; *see also Calabria*, 198 N.C. App. at 557, 680 S.E.2d at 745 (holding legislative changes to the underlying applicable law rendered the possibility of repetition outside of a reasonable expectation and found the "capable of repetition, yet evading review" exception inapplicable). Although judicial districts exist in other jurisdictions, Plaintiffs are all located in Mecklenburg County, and Plaintiffs' claims relate only to judicial districts in Mecklenburg County. Therefore, we find the "capable of repetition, yet evading review" exception to the mootness doctrine inapplicable.

¶ 21 The three-judge panel properly found Plaintiffs' claims to be moot, as the General Assembly repealed the Mecklenburg County judicial districts. The three-judge panel also properly found no exception to the mootness doctrine. Therefore, we affirm the three-judge panel's dismissal of Plaintiffs' claims as moot.

B. Attorney's Fees

¶ 22 **[3]** Defendants argue the three-judge panel erred when it awarded Plaintiffs attorney's fees and costs associated with litigation because the three-judge panel lacked jurisdiction to enter the award or, alternatively, Plaintiffs were not entitled to attorney's fees. We agree with Defendants' contention the three-judge panel lacked jurisdiction to enter the award. As such, we do not reach the issue of whether Plaintiffs would have been entitled to attorney's fees had jurisdiction been proper.

¶ 23 North Carolina law provides, "any facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to [N.C. Gen. Stat. §] 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel." N.C. Gen. Stat. § 1-267.1(a)(1) (2019). Rule 42(b)(4) states in relevant part,

> [p]ursuant to [N.C. Gen. Stat. §] 1-267.1, any facial challenge to the validity of an act of the General Assembly . . . shall be heard by a three-judge panel in the Superior Court of Wake County . . . [t]he court in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity.

N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) (2019).

¶ 24 Once the facial challenge is transferred,

> [t]he 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.

Id.

¶ 25 "A facial challenge is an attack on a statute itself as opposed to a particular application." *Holdstock v. Duke Univ. Health Sys.*, 270 N.C. App. 267, 272, 841 S.E.2d 307, 311 (2020) (quoting *City of Los Angeles v. Patel*, 576 U.S. 409, 415, 192 L. Ed. 2d 435, 443, 135 S. Ct. 2443 (2015)). Complaints alleging broad constitutional violations constitute facial challenges. *Id.* at 272, 841 S.E.2d at 311.

¶ 26 Here, the trial court, after granting the Governor's motion and denying Defendants' motions to dismiss, transferred the case to the three-judge panel because Plaintiffs' complaint raised facial challenges to an act of the General Assembly. *See* N.C. Gen. Stat. §§ 1-267.1; 1A-1, Rule 42(b)(4) (2019). Upon transfer, the trial court stayed all matters contingent upon the facial challenge pending resolution by the three-judge panel and exhaustion of all appeals. *See Holdstock*, 270 N.C. App. at 272, 841 S.E.2d at 311. *See also* N.C. Gen. Stat. §1A-1, Rule 42(b)(4) (2019). As such, when the trial court transferred the case to the three-judge panel, it transferred only the facial challenge to the validity of the law, which stayed any attorney's fees issue until final resolution of the constitutional challenge. The issue of attorney's fees and costs is contingent on the outcome of the three-judge panel and any available appeals. *See Holdstock*, 270 N.C. App. at 272, 841 S.E.2d at 311.

¶ 27 Because the trial court retained jurisdiction over the issue of attorney's fees, the three-judge panel did not have the authority to award Plaintiffs attorney's fees. *See Holdstock*, 270 N.C. App. at 272, 841 S.E.2d at 311. *See also* N.C. Gen. Stat. § 1A-1, Rule 42(b)(4). Therefore, the three-judge panel erred in awarding Plaintiffs attorney's fees. As such, we do not reach the issue of whether Plaintiffs would have been entitled to attorney's fees had jurisdiction been proper, and instead vacate the three-judge panel's order awarding attorney's fees and remand to the trial court for a determination of this issue.

VI. Conclusion

¶ 28 We disagree with Plaintiffs' argument the three-judge panel erred in finding their claims moot without exception. The underlying controversy, by act of the General Assembly, was resolved, and Plaintiffs

effectively received the relief sought. We agree with Defendants' argument the three-judge panel lacked jurisdiction to award attorney's fees to Plaintiffs. When the trial court transferred the facial challenge to the three-judge panel, it retained jurisdiction over the attorney's fees pending final resolution of the facial challenge. Therefore, the three-judge panel was without jurisdiction to award attorney's fees. We remand to the trial court to determine the issue of whether Plaintiffs are entitled to attorney's fees. Should the trial court determine Plaintiffs are not entitled to attorney's fees, it will issue an order consistent with that determination. Should the trial court determine Plaintiffs are entitled to attorney's fees, it will also determine the amount of reasonable attorney's fees Plaintiffs are entitled to recover.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges COLLINS and HAMPSON concur.

GUY M. TURNER INCORPORATED, Plaintiff
v.
KLO ACQUISITION LLC, separately and doing business as KL Outdoor LLC, Defendant
and
JPMORGAN CHASE BANK, N.A., Garnishee

No. COA21-118

Filed 1 February 2022

1. Securities—perfection—priority—deposit accounts—garnishment—contract action

In a contract action between two companies, in which plaintiff sought to recover from a bank (as garnishee) with which defendant held two deposit accounts, the trial court erred by granting summary judgment for plaintiff as to its right to garnish the account funds because the bank—which had previously made substantial loans to defendant on which defendant had defaulted—had a perfected security interest in the accounts that shielded them from garnishment. Because the bank perfected its interest (pursuant to New York law, which governed defendant's credit agreement with the bank, by exercising control over the accounts) before plaintiff acquired its lien on the accounts, plaintiff's interest in the account funds was subordinate to the bank's. Moreover, the credit agreement's express terms gave the bank a right of setoff against defendant's deposits.

2. Garnishment—deposit accounts—bank-garnishee—assertion of setoff rights and security interest—no waiver

In a contract action between two companies, in which plaintiff sought to recover by garnishing funds from defendant's two deposit accounts at a bank—which had previously made substantial loans to defendant on which defendant had defaulted and, pursuant to a credit agreement, had a right of setoff against defendant's deposits—the trial court erred by granting summary judgment for plaintiff and ordering garnishment of the account funds. After plaintiff served the garnishment summons and notice of levy, the bank properly asserted its setoff rights and security interest in the accounts as allowed by North Carolina's garnishment statute, and the bank did not waive those rights by allowing defendant to continue accessing one of the accounts, since the garnishment statute did not require the bank to exercise its setoff rights by a certain time.

Judge ZACHARY dissenting.

Appeal by garnishee from judgment entered 10 November 2020 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 17 November 2021.

Keziah Gates, LLP, by Andrew S. Lasine, for Plaintiff-Appellee.

Womble Bond Dickinson (US) LLP, by Jonathon D. Townsend, for Garnishee-Appellant.

CARPENTER, Judge.

¶ 1 Garnishee JPMorgan Chase Bank, N.A. ("Chase Bank") appeals from the trial court's entry of summary judgment (the "Order") in favor of Plaintiff Guy M. Turner Incorporated ("GMT") as to GMT's right to recover from Chase Bank as garnishee. After careful review, we reverse and remand the Order.

I. Factual & Procedural Background

¶ 2 In January 2019, GMT and Defendant KLO Acquisition, LLC ("KLO")[1] entered into a contract pursuant to which GMT would "provide labor, equipment, and materials to rig or remove KLO's manufacturing

1. KLO is not a party to this appeal.

equipment from a KLO facility in Georgia, transport the equipment to KLO's vendor in Michigan for repairs, and then transport the equipment back to KLO's facility in Georgia and reinstall it in KLO's manufacturing line." On 16 October 2019, GMT filed suit against KLO in Guilford County Superior Court for breach of contract and quantum meruit. A few days later, on 29 October 2019, GMT served an order of attachment, summons to garnishee, and notice of levy on Chase Bank, with which KLO maintained two deposit accounts: the "Cash Collateral Account," and the "Operating Account" (together, the "Deposit Accounts"). Prior to the institution of GMT's suit, Chase Bank made substantial loans to KLO on which KLO defaulted, owing Chase Bank over twelve million dollars. That same day, Chase Bank exercised its right of setoff against the funds in the garnished accounts and debited the entire balance of the Cash Collateral Account, a total of $328,243.14. However, Chase Bank did not debit any funds from the garnished Operating Account and continued to allow KLO to actively draw upon the account after Chase Bank's receipt of the garnishment summons and notice of levy. By 28 February 2020, the Operating Account had a balance of $115,897.60, with significant activity by KLO during February 2020, including an opening balance of $8,357.73, deposits and credits of $1,163,724.90, and withdrawals and debits of $1,056,185.03.

¶ 3 On 12 October 2020, GMT moved for entry of default against KLO, which the clerk entered the same day. GMT also moved for summary judgment against KLO as the defendant in the contract action and against Chase Bank as garnishee.

¶ 4 GMT's motion for summary judgment came on for hearing on 2 November 2020 before the Honorable John O. Craig, III in Guilford County Superior Court. On 3 November 2020, Chase Bank moved for leave to amend its answer to the garnishment summons and notice of levy in order to assert that it had a perfected security interest in both of the Deposit Accounts.

¶ 5 On 10 November 2020, the trial court entered its summary judgment Order granting, *inter alia*, Chase Bank's motion for leave to amend its answer, GMT's motion for summary judgment as to GMT's right to recovery from Chase Bank pursuant to the garnishment summons and notice of levy, and GMT's motion for summary judgment as to its breach of contract claim against KLO. The trial court entered judgment against KLO in the amount of $168,712.59 plus interest and attorneys' fees, and it entered judgment against Chase Bank in the amount of $209,614.47 to satisfy GMT's demand as of the date of issuance of the garnishment summons and notice of levy directed to Chase Bank. Chase Bank gave timely notice of appeal.

II. Jurisdiction

¶ 6 This Court has jurisdiction to address Chase Bank's appeal from the order of summary judgment as a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019).

III. Issues

¶ 7 The issues before this Court are whether: (1) Chase Bank waived or undermined its security interest by allowing KLO access to its deposit accounts held at Chase Bank, and (2) the trial court erred by granting summary judgment in favor of GMT and against Chase Bank.

IV. Standard of Review

¶ 8 "Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and internal quotation marks omitted) (emphasis added).

V. Order of Summary Judgment

¶ 9 On appeal, Chase Bank argues the trial court erred in granting summary judgment for GMT because: (1) Chase Bank's perfected security interest in the Deposit Accounts shielded the funds from garnishment, and (2) Chase Bank did not waive or undermine its security interest by allowing KLO access to the Deposit Accounts. We agree.

A. Security Interest

¶ 10 **[1]** Chase Bank argues it had a perfected security interest in KLO's deposit account before 29 October 2019, the date on which the garnishment summons was served on Chase Bank, and interest superseded any interest held by GMT. GMT does not dispute Chase Bank had a security interest in the Deposit Accounts. For the reasons set forth below, we agree Chase Bank had a perfected security interest in KLO's Deposit Accounts.

¶ 11 Since the parties do not dispute Chase Bank had an enforceable security interest in KLO's Deposit Accounts, we need not consider whether Chase Bank's security interest attached. Therefore, we discuss perfection and priority of Chase Bank's security interest in the Deposit Accounts.

¶ 12 Section 25-9-304(a) of the North Carolina Uniform Commercial Code provides that "[t]he local law of a bank's jurisdiction governs perfection,

the effect of perfection or nonperfection, and the priority of a security interest in a deposit account maintained with that bank." N.C. Gen. Stat. § 25-9-304(a) (2019). A bank and its customer may dictate by agreement which jurisdiction's law will govern. N.C. Gen. Stat. § 25-9-304(b)(1).

¶ 13 Chase Bank argues that "[b]ecause [Chase Bank and KLO's Amended and Restated] Credit Agreement specifies that New York law governs, New York is the 'local law' for purposes of determining the perfection of Chase's security interest in the deposit accounts." GMT makes no argument with respect to which law governs perfection, the effect of perfection or nonperfection, nor the priority of Chase Bank's security interests in the Deposit Accounts maintained by Chase Bank. There is no other evidence in the record to indicate the law of a state other than New York governs. Because the Amended and Restated Credit Agreement (the "Agreement") between KLO and Chase Bank indicates that New York is the "bank's jurisdiction," we turn to New York law to determine whether Chase Bank has a perfected security interest in the Deposit Accounts and the priority of such interest.

¶ 14 Under New York's version of the Uniform Commercial Code, "a security interest in a deposit account may be perfected only by control . . . ." N.Y. U.C.C. Law § 9-312(b)(1) (McKinney 2021); *see* N.Y. U.C.C. Law § 9-314 (McKinney 2021). A secured party may exercise control over a deposit account as "the bank with which the deposit account is maintained . . . ." N.Y. U.C.C. Law § 9-104(a)(1) (McKinney 2021).

¶ 15 Here, Chase is a secured party with respect to KLO as evidenced by the Agreement, and Chase Bank exercised control over KLO's Deposit Accounts as "the bank with which the [Deposit Accounts are] maintained." *See* N.Y. U.C.C. Law § 9-104(a)(1). Thus, Chase Bank had a perfected security interest in KLO's Deposit Accounts pursuant to N.Y. U.C.C. Law § 9-312.

¶ 16 We next consider the priority dispute between Chase Bank and GMT with respect to the funds in KLO's Deposit Accounts. New York's Uniform Commercial Code provides: "[a] security interest held by a secured party having control of the deposit account under Section 9-104 has priority over a conflicting security interest held by a secured party that does not have control." N.Y. U.C.C. Law § 9-327(a) (McKinney 2021). Additionally, a lien creditor would only have superior rights over a secured party if the lien creditor acquired its lien before the security interest of the secured party was perfected. N.Y. U.C.C. Law § 9-317(a)(2)(A) (McKinney 2021). "A security interest in deposit accounts . . . is perfected by control under Section [9-104] when the secured party obtains

control and remains perfected by control only while the secured party retains control." N.Y. U.C.C. Law § 9-314(b). Upon default, a secured party may enforce the obligations of an account debtor by "apply[ing] the balance of the deposit account to the obligation secured by the deposit account" if the secured party "holds a security interest in a deposit account perfected by control under Section 9-104(a)(1)." N.Y. U.C.C. Law § 9-607(a)(4) (McKinney 2021).

¶ 17 In addition, Chase Bank and KLO's Agreement expressly contemplated that Chase Bank would have the right of setoff of mutual debts:

> SECTION 9.08. Right of Setoff. If an Event of Default shall have occurred and be continuing, each Lender and each of its Affiliates is hereby authorized at any time and from time to time, to the fullest extent permitted by law, to set off and apply any and all deposits (general or special, time or demand, provisional or final) . . . at any time held and other obligations at any time owing by such Lender or Affiliate to or for the credit or the account of any Loan Party against any of and all the due and payable Secured Obligations held by such Lender. The applicable Lender shall notify the Borrower Representative and the Administrative Agent of such set-off or application, provided that any failure to give or any delay in giving such notice shall not affect the validity of any such set-off or application under this Section. The rights of each Lender under this Section are in addition to other rights and remedies (including other rights of setoff) which such Lender may have.

¶ 18 In the instant case, it is undisputed that Chase Bank held a perfected security interest in KLO's Deposit Accounts before it was served with the garnishment summons and notice of levy by GMT. There is no evidence to suggest Chase Bank's control over the Deposit Accounts was not continuous. *See* N.Y. U.C.C. Law § 9-314(b). Because GMT cannot show that it became a lien creditor before Chase Bank's security interest was perfected, we conclude any claim of GMT with respect to the Deposit Accounts is subordinate to Chase Bank's perfected security interest obtained by control. *See* N.Y. U.C.C. Law § 9-317(a)(2)(A). Chase Bank, as a secured party that holds a perfected security interest in the Deposit Accounts, is allowed to "apply the balance of the [D]eposit [A]ccount[s] to the obligation secured by the [D]eposit [A]ccount[s]." *See* N.Y. U.C.C.

Law § 9-607(a)(4). Moreover, the express terms of the Agreement gave Chase Bank a right of setoff against KLO's deposits.

B. Garnishment

¶ 19 **[2]** We now determine the effect of Chase Bank's perfected security interest as it pertains to the rights that GMT obtained under North Carolina's garnishment statute. Chase Bank argues that under North Carolina law, the right of setoff asserted by Chase Bank "supersede[d] any interest accrued by GMT[,]" and therefore precluded GMT from "us[ing] the garnishment statute to force Chase [Bank] to surrender possession of the funds in the [D]eposit [A]ccounts." On the other hand, GMT contends it "stood in KLO's shoes and should have enjoyed the same right to the funds in the Operating Account as KLO." GMT further maintains that "[s]ince KLO accessed and used millions from the account over a period of months following service of the garnishment summons on Chase, GMT's garnishment summons attached to sufficient funds to satisfy GMT's claim because Chase never exercised its rights as secured creditor by exercising the right of setoff." We conclude Chase Bank asserted its right to setoff and asserted its security interest in the Deposit Accounts as statutorily allowed.

¶ 20 "Garnishment is not an independent action but is a proceeding ancillary to attachment and is the remedy for discovering and subjecting to attachment . . . [a]ny indebtedness to the defendant and any other intangible personal property belonging to him." N.C. Gen. Stat. § 1-440.21(a)(2) (2019).

¶ 21 N.C. Gen. Stat. § 1-440.28 provides in pertinent part:

> (f) [i]n answer to a summons to garnishee, a garnishee *may assert any right of setoff* which he may have with respect to the defendant in the principal action.
>
> (g) [w]ith respect to any property of the defendant which the garnishee has in his possession, a garnishee, in answer to a summons to garnishee, *may assert any lien or other valid claim amounting to an interest therein*. No garnishee shall be compelled to surrender the possession of any property of the defendant upon which the garnishee establishes a lien or other valid claim amount to an interest therein, which lien or interest attached or was acquired prior to service

> of the summons to garnishee, and such property only may be sold subject to the garnishee's lien or interest.

N.C. Gen. Stat. § 1-440.28(f)–(g) (2019) (emphasis added).

¶ 22 "Under our canons of statutory interpretation, where the language of a statute is clear, the courts must give the statute its plain meaning. However, where [a] statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent." *N.C. State Bar v. Brewer*, 183 N.C. App. 229, 236, 644 S.E.2d 573, 577, *disc. rev. denied*, 361 N.C. 695, 652 S.E.2d 649 (2007) (citations and internal quotation marks omitted).

¶ 23 We find the language of N.C. Gen. Stat. § 1-440.28 to be "clear"; hence, we do not need to go any further than giving the statute its plain meaning. *See N.C. State Bar*, 183 N.C. App. at 236, 644 S.E.2d at 577. In this case, Chase Bank answered GMT's garnishment summons and notice of levy addressed to it by stating, "JPMORGAN CHASE BANK NA HAS TAKEN THE RIGHT OF SETOFF. FUNDS NOT AVAILABLE." On 3 November 2020, Chase Bank moved to amend its answer in response to the garnishment summons and notice of levy to assert it had a perfected security interest in KLO's Deposit Accounts at Chase Bank prior to Chase Bank being served with the summons. In the trial court's 10 November 2020 summary judgment Order, it granted Chase Bank's motion for leave to amend its answer and granted GMT's motion for summary judgment in GMT's favor. Thus, Chase Bank both "assert[ed its] right of setoff" and "assert[ed a] lien or other valid claim amounting to an interest" in its answer and amended answer. *See* N.C. Gen. Stat. § 1-440.28(f)–(g).

C. Exercise and Waiver of Right of Setoff

¶ 24 In its next argument, Chase Bank contends it protected its interest in the Operating Account by claiming the right of setoff in answer to GMT's garnishment summons and notice of levy, and that it "did not waive or undermine its security interest by allowing KLO access" to the Operating Account after claiming its right of setoff. GMT argues Chase Bank's security interest does not defeat GMT's claim where Chase Bank never enforced its security interest through setoff and allowed KLO to operate using the funds in its Operating Account. As discussed below, we hold Chase Bank neither waived its right to setoff nor undermined its security interest in the Deposit Accounts.

¶ 25 In the instant case, as the bank with which KLO maintained the Deposit Accounts, Chase Bank could have exercised its right of setoff

against all of the funds in the Cash Collateral Account and the Operating Account, despite the garnishment. *See* N.C. Gen. Stat. § 1-440.28(f); *see also* N.Y. U.C.C. Law § 9-607(a)(4). As GMT concedes, Chase Bank promptly exercised its right of setoff regarding the Cash Collateral Account; after receiving GMT's garnishment summons and notice of levy on 29 October 2019, Chase Bank debited the entire Cash Collateral Account, acquiring $328,243.14 from the account on 6 November 2019 and notifying GMT of the setoff the same day.

¶ 26 The only evidence of Chase Bank's assertion of its right to setoff against the Operating Account is its statement, in response to GMT's garnishment summons and notice of levy, that "JPMORGAN CHASE BANK NA HAS TAKEN THE RIGHT TO SETOFF. FUNDS NOT AVAILABLE." In fact, the Operating Account statements reveal the funds in that account remained untouched by Chase Bank for months after it was served with GMT's garnishment summons and notice of levy, and the account had a balance of $115,897.60 on 28 February 2020.

¶ 27 Relying on this Court's decision in *Killette v. Raemell's Sewing Apparel* for support, Chase Bank nonetheless argues it did not waive its right of setoff by failing to take any action regarding the Operating Account. 93 N.C. App. 162, 377 S.E.2d 73 (1989). In *Killette*, this Court determined that a "waiver," in the context of the right of setoff against a garnished account, "is an intentional and permanent relinquishment of a known right that usually must be manifested in a clear and unequivocal manner." 93 N.C. App. at 164, 377 S.E.2d at 74 (citations omitted). The *Killette* Court concluded the garnishee-bank did not "waive its setoff right by honoring some of the company's checks after the note became due." *Id.* at 164, 377 S.E.2d at 74.

¶ 28 We acknowledge the facts of *Killette* are distinguishable from the instant case. Rather than "honoring some of the company's checks after the note became due[,]" *see id.* at 164, 377 S.E.2d at 74, here, Chase Bank did not exercise its right of setoff against the garnished Operating Account by debiting the account after KLO defaulted on its loan obligations and after Chase Bank's service with garnishment summons and notice of levy. Nevertheless, our Court's reasoning in *Killette* is similarly applicable to the case at bar. The North Carolina garnishment statute does not set out the time period by which Chase Bank was required to exercise its right to setoff. *But see Normand Josef Enters. v. Connecticut Nat'l Bank*, 230 Conn. 486, 507, 646 A.2d 1289, 1300 (1994) (holding a garnishee-bank failed to effectuate its right of setoff within the applicable, statutorily set midnight deadline). To the contrary, Chase Bank as a garnishee was not "compelled to surrender the possession of any

property of the defendant upon which [Chase Bank] establishe[d] a lien or other valid claim amounting to an interest" because Chase Bank established its perfected security interest in KLO's accounts held at Chase Bank in its amended answer. *See* N.C. Gen. Stat. § 1-440.28(g). The North Carolina garnishment statute and case law neither required Chase Bank to claim the full amount on deposit in KLO's Operating Account while the garnishment action was pending nor to act with respect to the Operating Account. Such actions would have surely been detrimental to KLO's ability to pay back its debts owed to its creditors, including Chase Bank and GMT. *See Killette*, N.C. App. at 164, 377 S.E.2d at 74–75. ("The law does not discourage leniency to one's debtors, and in our opinion the mere honoring of a depositor's checks after its note is due manifests only an intention by the bank to accommodate the depositor at that time; it does not indicate an intent to continue doing so in the future. If such indulgences were held to be a permanent waiver of the right of setoff it could only encourage banks to immediately offset their matured notes against the checking account balances of their depositor-debtors, a practice bound to embarrass if not ruin many hard pressed debtors."). Therefore, we conclude Chase Bank did not waive its right to setoff or undermine its perfected security interest in the Deposit Accounts. Other jurisdictions have also declined to find waiver of the right to setoff under similar factual circumstances, based in part on the language of the respective garnishment statutes. *See Ladd v. Motor City Plastics Co.*, 303 Mich. App. 83, 102, 842 N.W.2d 388, 399 (2013) (declining to find waiver of right to setoff where the garnishee-bank properly "declare[d] the right to a setoff that it *would* have," although it was not required to "actually exercise that right" under the applicable garnishment statute); *Myers v. Christensen*, 278 Neb. 989, 996–97, 775 N.W.2d 201, 207 (2009) (holding a bank's perfected security interest in a debtor's deposit account was superior to that of a bankruptcy trustee's claim by garnishment, and the bank did not waive its security interest in the account by making a "calculated business decision to honor certain checks drawn" on the account). Accordingly, we hold the trial court erred in granting summary judgment as to GMT's right to recovery from Chase Bank pursuant to the garnishment summons and notice of levy. Therefore, we reverse and remand the Order.

VI. Conclusion

¶ 29 Chase Bank had a perfected security interest in KLO's Deposit Accounts, which had priority over GMT's claim by garnishment to the account funds. Chase Bank asserted its right to setoff and asserted its security interest in KLO's bank account as allowed by the garnishment

statute. The language of N.C. Gen. Stat. § 1-440.28 did not require Chase Bank to exercise its right to setoff; thus, Chase Bank did not waive its right to setoff or undermine its security interest in KLO's accounts by allowing KLO to continue to use its Operating Account after receipt of the garnishment summons. Accordingly, we reverse the Order granting summary judgment in favor of garnishor GMT and remand the matter to the superior court for further proceedings if needed, and the entry of any necessary orders.

REVERSED AND REMANDED.

Judge GRIFFIN concurs.

Judge ZACHARY dissents by separate opinion.

ZACHARY, Judge, dissenting.

¶ 30 Chase Bank, the bank with which the judgment-debtor KLO maintained its accounts, could have exercised the right of setoff against both the Operating Account and the Cash Collateral Account, thereby insulating the Deposit Accounts from garnishment. Indeed, on 6 November 2019, Chase Bank responded in defense to GMT's garnishment summons and notice of levy regarding the Deposit Accounts that "JPMORGAN CHASE BANK NA HAS TAKEN THE RIGHT TO SETOFF. FUNDS NOT AVAILABLE." That same day, Chase Bank exercised its right of setoff against the funds in the garnished Cash Collateral Account, debiting the entire account, a total of $328,243.14. However, Chase Bank did not exercise its right of setoff against the funds in the garnished Operating Account, debiting no funds from that account. Instead, Chase Bank continued to allow KLO to actively draw upon the account for months, to the tune of millions of dollars, after Chase Bank's receipt of the garnishment summons and notice of levy.

¶ 31 The majority concludes that Chase Bank was not required, under N.C. Gen. Stat. § 1-440.28, to exercise its right to setoff after asserting its right to setoff against the Deposit Accounts. I respectfully disagree. By failing to take any affirmative action in furtherance of its right of setoff against the garnished Operating Account, Chase Bank waived its right to do so. Thus, under North Carolina law, Chase Bank rendered itself liable to GMT for the garnished amount. Accordingly, I would affirm the trial court's entry of summary judgment in favor of GMT, and I respectfully dissent.

Discussion

I. Security Interest and Garnishment

¶ 32 Chase Bank asserts that its perfected security interest in the garnished Deposit Accounts "supersede[d] any interest accrued by GMT[,]" and therefore precluded GMT from "us[ing] the garnishment statute to force Chase [Bank] to surrender possession of the funds in the [D]eposit [A]ccounts."

¶ 33 Section 25-9-304(a) of the North Carolina Uniform Commercial Code ("UCC") provides that "[t]he local law of a bank's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a deposit account maintained with that bank." N.C. Gen. Stat. § 25-9-304(a) (2019). Parties may dictate by agreement which jurisdiction's law will govern. *Id.* § 25-9-304(b)(1). Because the Amended and Restated Credit Agreement (the "Agreement") between KLO and Chase Bank specifies that New York law governs, New York law determines whether Chase Bank has a perfected security interest in the Deposit Accounts.

¶ 34 Under New York's version of the UCC, a secured party may exercise control over a deposit account as "the bank with which the deposit account is maintained[.]" N.Y. U.C.C. Law § 9-104(a)(1) (McKinney 2021). In addition, the parties' Agreement expressly contemplated that Chase Bank would have the right of setoff of mutual debts:

> SECTION 9.08. Right of Setoff. If an Event of Default shall have occurred and be continuing, each Lender and each of its Affiliates is hereby authorized . . . to set off and apply any and all deposits (general or special, time or demand, provisional or final) . . . at any time held and other obligations at any time owing by such Lender or Affiliate to or for the credit or the account of any Loan Party against any of and all the due and payable Secured Obligations held by such Lender. The applicable Lender shall notify the Borrower Representative and the Administrative Agent of such set-off or application, provided that any failure to give or any delay in giving such notice shall not affect the validity of any such set-off or application under this Section. The rights of each Lender under this Section are in addition to other rights and remedies (including other rights of setoff) which such Lender may have.

¶ 35 Accordingly, after KLO defaulted on its loan obligations, by the express terms of the Agreement, Chase Bank could have applied the proceeds of both of the Deposit Accounts to KLO's loan obligations.

¶ 36 Chase Bank's security interest would have shielded the Deposit Accounts from garnishment under North Carolina law, had Chase Bank exercised its right of setoff.

¶ 37 "Garnishment is not an independent action but is a proceeding ancillary to attachment and is the remedy for discovering and subjecting to attachment . . . [a]ny indebtedness to the defendant and any other intangible personal property belonging to him." N.C. Gen. Stat. § 1-440.21(a)(2).

¶ 38 "In answer to a summons to garnishee, a garnishee may assert any right of setoff which he may have with respect to the defendant in the principal action." *Id.* § 1-440.28(f). "As debtors of their general depositors[,] banks have long had the right to setoff against the deposits any matured debts the depositors owe them," including "the right to assert the setoff 'in answer to a summons to garnishee' . . . ." *Killette v. Raemell's Sewing Apparel*, 93 N.C. App. 162, 163–64, 377 S.E.2d 73, 74 (1989) (quoting N.C. Gen. Stat. § 1-440.28(f)).

¶ 39 A bank's right of setoff is a defense to a garnishment action in which it is served as garnishee. *See, e.g.*, *Moore v. Greenville Banking & Tr. Co.*, 173 N.C. 227, 231, 91 S.E. 793, 795 (1917) (holding that the garnishee-bank was "entitled to have its defense [of setoff] considered" in a garnishment proceeding). If, after service with a garnishment summons and notice of levy, a garnishee-bank does not exercise its right of setoff against a depositor's account, the trial court shall enter judgment against the garnishee-bank for the lesser of the following amounts: "(1) [a]n amount equal to the value of the property in question, or (2) [t]he full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs." N.C. Gen. Stat. § 1-440.28(d)(1)–(2).

¶ 40 In the present case, Chase Bank plainly had the right of setoff against the garnished Deposit Accounts, as it claimed upon service with the garnishment summons and notice of levy. Indeed, its exercise of the right of setoff against the Cash Collateral Account after receiving GMT's garnishment summons and notice of levy was clearly appropriate. *See id.* § 1-440.28(f). However, Chase Bank's interest in the Operating Account did not, in and of itself, secure the account from garnishment; rather, Chase Bank could protect its interest in the

garnished Operating Account by exercising its right of setoff, as outlined in N.C. Gen. Stat. § 1-440.28(f).

II. Exercise and Waiver of Right of Setoff

¶ 41 Chase Bank further contends that it protected its interest in the Operating Account by claiming the right of setoff in answer to GMT's garnishment summons and notice of levy, and that it "did not waive or undermine its security interest by allowing KLO access" to the Operating Account after claiming its right of setoff. I disagree, and would conclude that by failing to take any action in exercise of its right of setoff against the Operating Account, Chase Bank waived the right of setoff as to that garnished account.

¶ 42 As the bank with which KLO maintained the Deposit Accounts, Chase Bank could have exercised its right of setoff against all of the funds in the Cash Collateral Account and the Operating Account, despite the garnishment. *See id.* As GMT concedes, Chase Bank promptly exercised its right of setoff with regard to the Cash Collateral Account; after receiving GMT's garnishment summons and notice of levy on 22 October 2019, Chase Bank debited the entire Cash Collateral Account, acquiring $328,243.14 from the account on 6 November 2019 and notifying GMT of the setoff that day.

¶ 43 By contrast, the only evidence of Chase Bank's assertion of its right to setoff against the Operating Account is its statement, in response to GMT's garnishment summons and notice of levy, that "JPMORGAN CHASE BANK NA HAS TAKEN THE RIGHT TO SETOFF. FUNDS NOT AVAILABLE." In fact, the Operating Account statements reveal that the funds in that account remained untouched by Chase Bank for months after it was served with GMT's garnishment summons and notice of levy; by the end of February 2020, the Operating Account had a balance of $115,897.60, with significant activity by KLO during that month, including an opening balance of $8,357.73, deposits and credits of $1,163,724.90, and withdrawals and debits of $1,056,185.03.

¶ 44 Relying heavily on this Court's decision in *Killette* for support, Chase Bank nonetheless argues that it did not waive its right of setoff by failing to take any action regarding the Operating Account. In *Killette*, this Court determined that a "waiver," in the context of the right of setoff against a garnished account, "is an intentional and permanent relinquishment of a known right that usually must be manifested in a clear and unequivocal manner." 93 N.C. App. at 164, 377 S.E.2d at 74 (citation omitted). The *Killette* Court concluded that the garnishee-bank did not "waive its setoff right by honoring some of the company's checks after

the note became due," reasoning that "the mere honoring of a depositor's checks after its note is due manifests only an intention by the bank to accommodate the depositor at that time; it does not indicate an intent to continue doing so in the future." *Id.*

¶ 45 *Killette* presents a very different factual scenario than that at bar. Rather than "honoring some of the company's checks *after the note became due*[,]" *id.* (emphasis added), here, Chase Bank failed to exercise its right of setoff against the garnished Operating Account indefinitely, both after KLO defaulted on its loan obligations and *after Chase Bank's service with garnishment summons and notice of levy*. Despite Chase Bank's claim of the right of setoff against the Operating Account as a defense to the garnishment, Chase Bank permitted KLO to have access to millions of dollars passing through the Operating Account, while simultaneously taking no action in furtherance of its right of setoff.

¶ 46 The parties have not presented any reported North Carolina case law specifically on point in this regard; however, other jurisdictions have addressed the issue of waiver of the right of setoff against a garnished account. In *Normand Josef Enterprises, Inc. v. Connecticut National Bank*, the Connecticut Supreme Court concluded that "the act of setoff is not complete until three steps have been taken: (1) the decision to exercise the right; (2) some action which accomplishes the setoff; and (3) some record which evidences that the right of setoff has been exercised." 646 A.2d 1289, 1299 (Conn. 1994) (citation omitted). The Court ultimately held that "as a matter of law, a bank effectuates its right of setoff only after it has performed some binding overt act and has made a record to evidence that action." *Id.* Such an act "must be unequivocal, objectively ascertainable and final in order to be overt and binding." *Id.*

¶ 47 The Ohio Court of Appeals has explicitly delineated what a bank must do to avoid waiver of the right of setoff against a garnished account:

> [W]hen a garnishment action is pending, the bank must either release the amount on deposit to the garnishor or it must take the full amount on deposit (assuming that the full amount on deposit does not exceed the amount owed to the bank by the depositor) as setoff. *The failure to exercise setoff by claiming the full amount on deposit when a garnishment action is pending can be construed as waiver.*

Maines Paper & Food Serv.-Midwest, Inc. v. Regal Foods, Inc., 654 N.E.2d 355, 359 (Ohio Ct. App. 1995) (emphasis added).

¶ 48 I find the reasoning of these courts persuasive and applicable to the present case: to avoid waiver of its right of setoff against a garnished account, a bank must take some overt action, beyond a mere assertion of the right of setoff in defense of garnishment, evidencing the actual exercise of the right of setoff against the garnished account.

¶ 49 In the present case, although Chase Bank may have made "the decision to exercise the right" of setoff against the garnished Operating Account, it cannot demonstrate that it took "some action which accomplishe[d] the setoff[.]" *Normand Josef*, 646 A.2d at 1299. Indeed, the Operating Account records establish that KLO had uninterrupted control over the garnished account from October 2019 through February 2020. Chase Bank also failed to provide "some record which evidences that the right of setoff ha[d] been exercised[,]" as it admitted during discovery. *Id.*

¶ 50 Additionally, Chase Bank did not "release the amount on deposit [in the Operating Account] to the garnishor or . . . take the full amount on deposit[.]" *Maines Paper*, 654 N.E.2d at 359. Instead, Chase Bank allowed KLO unfettered access to the Operating Account and processed millions of dollars through the account. This stands in stark contrast to Chase Bank's handling of the Cash Collateral Account, from which Chase Bank debited *all* funds on the same day that it notified GMT that it had exercised the right of setoff. Chase Bank's "failure to exercise setoff by claiming the full amount on deposit when a garnishment action [wa]s pending[,]" therefore, "can be construed as waiver." *Id.*

¶ 51 Finally, Chase Bank's inaction with regard to the Operating Account meets the definition of "waiver" propounded by this Court in *Killette*: "an intentional and permanent relinquishment of a known right, . . . manifested in a clear and unequivocal manner." 93 N.C. App. at 164, 377 S.E.2d at 74 (citation omitted). Chase Bank was aware that it had the right of setoff in defense to the garnishment action; indeed, it claimed the right of setoff in its answer to GMT on 6 November 2019, and it exercised the right of setoff against the Cash Collateral Account that same day. Nonetheless, Chase Bank allowed KLO to continue to use and access the Operating Account for months after claiming its right of setoff. During this period, KLO not only withdrew funds from the account on the date on which Chase Bank was served with GMT's garnishment process, but also subsequently deposited millions of dollars into that account. Chase Bank's inaction with regard to the Operating Account was manifestly inconsistent with its claimed setoff.

¶ 52 The act of setoff against a garnished account is not complete until some action is taken to accomplish the setoff. Absent any corresponding action, Chase Bank's mere claim of a setoff against the Operating Account was insufficient to support its claim and to defeat GMT's ability to recover through garnishment. In light of these facts, Chase Bank's failure to take any affirmative actions in furtherance of its right of setoff against the Operating Account in defense of garnishment was "an intentional and permanent relinquishment of a known right" that was "manifested in a clear and unequivocal manner." *Id.* Where Chase Bank allowed KLO continued access to and use of the funds in the Operating Account despite the garnishment, Chase Bank waived the right of setoff with regard to that account, and Chase Bank is therefore liable to GMT as garnishee.

¶ 53 For the reasons stated herein, I would affirm the trial court's entry of summary judgment in favor of GMT's right to recover from Chase Bank as garnishee. Accordingly, I respectfully dissent.

IN THE MATTER OF PATRICIA BURNETTE CHASTAIN

No. COA21-127

Filed 1 February 2022

Clerks of Court—removal from office—state constitution—due process—statutory procedure

On appeal from an order entered by a superior court judge (but not the senior regular resident superior court judge serving the county, who recused himself) permanently removing respondent as the clerk of superior court for her county, where it was unclear whether the removal was for "misconduct" under Article IV of the state constitution or "corruption or malpractice" under Article VI, and where the removal was based in part on alleged acts not contained in the charging affidavit, the order was vacated and remanded for further proceedings consistent with the appellate opinion.

Appeal by Respondent from Order of Removal entered 16 October 2020 by Judge Thomas H. Lock in Franklin County Superior Court. Heard in the Court of Appeals 2 November 2021.

IN RE CHASTAIN

[281 N.C. App. 520, 2022-NCCOA-54]

Zaytoun Ballew & Taylor, PLLC, by Matthew D. Ballew, Clare F. Kurdys, and Robert E. Zaytoun, for Respondent-Appellant.

Davis, Sturges & Tomlinson, PLLC, by Conrad B. Sturges, III, for the Petitioner-Appellee.

DILLON, Judge.

¶ 1 Respondent Patricia Burnette Chastain appeals from an order entered by Judge Thomas H. Lock removing her as the Clerk of Superior Court for Franklin County. Though there was evidence in the record that could support his decision, Judge Lock erroneously based his decision, in part, on acts by Ms. Chastain not alleged in the charging affidavit or which do not rise to the level of misconduct. Accordingly, we vacate Judge Lock's Order and remand for his reconsideration in accordance with this opinion.

I. Background

¶ 2 In 2014, Ms. Chastain was elected by the people of Franklin County to serve as their Clerk of Superior Court. She was reelected to a second term in 2018.

¶ 3 In July 2020, Franklin County attorney Jeffrey Thompson commenced this proceeding seeking the removal of Ms. Chastain as Franklin County's Clerk, pursuant to N.C. Gen. Stat. § 7A-105 (2020), by filing an affidavit alleging that she had committed various acts of willful misconduct.

¶ 4 In October 2020, after a hearing on the matter, Judge Lock entered his Order permanently removing Ms. Chastain as the Franklin County Clerk of Court based on findings that Ms. Chastain had engaged in various acts of misconduct, some of which had not been alleged in Mr. Thompson's affidavit. Judge Lock ultimately based his decision on "[t]he nature and type of [her] misconduct in office, the frequency of its occurrence, the impact which knowledge of her misconduct would likely have on the prevailing attitudes of the community, and [her] reckless disregard for the high standards of the Office of Clerk of Superior Court[.]"

¶ 5 Ms. Chastain timely appealed Judge Lock's Order.

II. Analysis

¶ 6 A proceeding regarding the removal of an elected official "is neither a civil nor a criminal action." *In re Nowell*, 293 N.C. 235, 241, 237 S.E.2d 246, 250 (1977). Rather, it "is merely an inquiry into the conduct of one

exercising [official] power to determine whether [s]he is unfit to hold [her office]. Its aim is not to punish the individual but to maintain the honor and dignity of the [office] and the proper administration of justice." *Id.* at 241, 237 S.E.2d at 250. "Albeit serious," removal from office is "not to be regarded as punishment but as the legal consequence[ ] attached to adjudged [ ] misconduct or unfitness." *Id.* at 241, 237 S.E.2d at 251.

¶ 7 Here, we must determine whether the matter was properly before Judge Lock and whether he followed the law correctly in removing Ms. Chastain.

¶ 8 This matter was brought forth pursuant to Section 7A-105 of our General Statutes, enacted by our General Assembly to provide the procedural mechanism for the removal of the Clerk of Superior Court in a county. Our General Assembly, though, only has the authority to prescribe the procedure and the conditions under which an elected official may be removed, *where such is not otherwise provided for by our Constitution*:

> "[I]t is firmly established that our State Constitution is not a grant of power. All power which is not *expressly limited* by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution [or by the federal constitution]."

Baker v. Martin, 330 N.C. 331, 334-37, 410 S.E.2d 887, 888-91 (1991) (considering the authority of our General Assembly to enact legislation requiring any individual seeking appointment to serve out an unexpired term of an elected judge must be a member of the same political party as the judge being replaced).

¶ 9 We, therefore, must first determine the limitations placed on our General Assembly by our Constitution in prescribing a mechanism for the removal of a county's duly elected Clerk.

A. Article IV

¶ 10 The Clerk of Superior Court in a county is a constitutional officer, whose office is established by Article IV, section 9(3) of our Constitution. Our Constitution provides two different avenues by which an elected Clerk may be removed. Pertinent to this matter and as more fully examined below, one constitutional avenue allows for a Clerk to be removed from her *current* term of office for mere "misconduct" in office, while

the other avenue allows for a Clerk to be *permanently disqualified* from holding office for "corruption or malpractice in [ ] office."

¶ 11 The first constitutional avenue is found in Article IV of our Constitution. Article IV establishes our judicial branch, including the office of Clerk in each county. Section 17 empowers the "senior regular resident Superior Court Judge serving the county" to remove the county's Clerk for "**misconduct** or [for] mental or physical incapacity[.]" N.C. Const. art. IV, § 17(4) (emphasis added).

¶ 12 Significantly, Article IV confers on a single individual, the authority to remove the elected Clerk in a county; namely, the senior regular resident Superior Court Judge in that same county. Accordingly, no other judge may be conferred with jurisdiction over the subject matter of removing a Clerk for misconduct under Article IV. Indeed, consider that Article IV confers on our Senate only the authority to conduct an impeachment trial for the removal of our Governor. N.C. Const. art. IV, § 4. And it is unquestioned that our General Assembly may not confer on any other body or judge the authority to conduct such *impeachment* trial.

¶ 13 Accordingly, since Judge Lock is not the senior regular resident Superior Court Judge in Franklin County, he lacked any authority to remove Ms. Chastain for mere "misconduct" under Article IV. The only individual currently conferred with this authority under Article IV is Judge John Dunlow, Franklin County's current senior regular resident Superior Court Judge.

¶ 14 It may be that Judge Dunlow has an ethical conflict under our Code of Judicial Conduct to consider Ms. Chastain's removal for misconduct (or incapacity) under Article IV. Indeed, after a hearing on Ms. Chastain's motion to have Judge Dunlow disqualified from hearing the matter, another judge ordered that Judge Dunlow was ethically required to recuse himself based on a letter Judge Dunlow had written which contained "conclusory language regarding" one of the acts of misconduct that Ms. Chastain was alleged to have committed.

¶ 15 However, since our Constitution does not confer subject-matter jurisdiction on anyone else to consider an elected Clerk's removal for misconduct under Article IV, the Rule of Necessity applies. Under this Rule, a judge may hear a matter, notwithstanding that his participation may violate a judicial ethical canon, where his disqualification "would result in a denial of a litigant's constitutional right to have a question properly presented to such a court." *Lake v. State Health Plan for Teachers & State Emps.*, 376 N.C. 661, 664, 852 S.E.2d 888, 890 (2021).

¶ 16 Our Supreme Court has cited to the Rule of Necessity in holding that a Governor may decide a clemency request though he had previously been involved in the prosecution of the criminal making the request when previously serving as Attorney General. *Bacon v. Lee*, 353 N.C. 696, 717-18, 549 S.E.2d 840, 854-55 (2001) (noting that the Governor is the only individual constitutionally empowered to hear clemency requests). Our Business Court also relied on the Rule of Necessity in considering the propriety of members of a county board of commissioners to sit in judgment of the removal of one of its members, notwithstanding ethical concerns:

> The court cautions that it also has not held that any removal from office would be foreclosed even if bias could be proven in any further proceeding. The court is aware of no authority by which the Board could delegate its decision making by appointing a special committee as might a private corporation. As such, other than a recall election, it is the only body having authority to consider removal. There are cases where courts have upheld even biased *quasi*-judicial decisions when they were made by the only governmental body that had the power to make the finding. They did so employing a doctrine referred to as the "rule of necessity."

Berger v. New Hanover County Bd. of Comm'rs, 2013 NCBC 45, ¶74 (2013) (emphasis in original).

¶ 17 The fact that it was Ms. Chastain who sought Judge Dunlow's recusal does not change our analysis concerning Judge Lock's lack of authority to consider her removal under Article IV. As our Supreme Court has stated, "we have never found that a party can waive the fundamental requirement that a court have subject matter jurisdiction." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006).

B. Article VI

¶ 18 Having concluded that the Article IV avenue could not serve as the basis for Judge Lock's decision to remove Ms. Chastain from office, we must consider the other constitutional avenue by which a sitting Clerk may be removed, found in Article VI. Article VI prescribes that certain classes of individuals are *disqualified* from holding *any* office. Relevant to this present case, a Clerk may be removed from her current term *as a consequence of* being disqualified from holding any office under

Article VI where she is "adjudged guilty of **corruption** or **malpractice** in any office[.]" N.C. Const. art. VI, § 8 (emphasis added).[1]

¶ 19 Clearly, this Article VI standard is higher than the mere "misconduct" standard found in Article IV. But unlike Article IV, Article VI does *not* specify any procedure or confer authority on any particular judge or body to make disqualification determinations based on acts of corruption or malpractice. Our General Assembly may, therefore, prescribe a procedure. Indeed, well over a century ago, our Supreme Court recognized the inability of a court to declare an individual disqualified from holding office *without legislative authorization* to do so:

> If the courts were authorized by legislative enactment to pronounce in their judgments upon a conviction of [a felony] the disqualification of the defendant for office[,] then the judgments and punishments would be different and there would be much force in the argument, in the absence of any other legislation on the subject. But the courts have no such power. They can only render such judgments as the law annexes to the crimes, and empowers them to pronounce.

State v. Jones, 82 N.C. 685, 686 (1880). More recently, in a case involving the removal of an elected judge, our Supreme Court reiterated our General Assembly's authority to prescribe a procedure to disqualify an individual under Article VI:

> We conclude that the [use] of the term "adjudged guilty" [in Article VI] *permits the General Assembly to prescribe proceedings* in addition to criminal trials in which an adjudication of guilt will result in disqualification from office. Pursuant to that authorization, the legislature enacted G.S. 7A-376, barring a judge from future judicial office when he has been removed by this Court for wilful misconduct in office.

In re Peoples, 296 N.C. 109, 166, 250 S.E.2d 890, 923 (1978) (emphasis added).

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1. Other classes of individuals which our Constitution declares to be disqualified from holding office include those "adjudged guilty of [a] felony . . . and who has not been restored to the rights of citizenship[,]" any person "who has been removed by impeachment[,]" any person "not qualified to vote in an election for [the] office[,]" and "any person who shall deny the being of Almighty God." N.C. Const. art. VI, § 8.

¶ 20 Our General Assembly has enacted Section 7A-105, under which this present matter was brought. We, therefore, turn to its provisions in our evaluation of Judge Lock's Order.

¶ 21 Section 7A-105 states that a Clerk may be (1) "suspended or removed from office" (2) "for willful misconduct or mental or physical incapacity" and (3) that the proceeding "shall be initiated by the filing of a sworn affidavit" and heard "by the senior regular resident superior court judge serving the county of the clerk's residence." N.C. Gen. Stat. § 7A-105.

¶ 22 As we construe Section 7A-105, we are mindful that, while our General Assembly may prescribe a procedure for the disqualification of an elected Clerk under Article VI, our General Assembly may not add conditions which would render a Clerk disqualified from holding office to those already provided for in our Constitution. Indeed, our Constitution states that any "qualified voter in North Carolina who is 21 years of age" is eligible to be elected to any office, "except as in this Constitution disqualified." N.C. Const. art. VI, § 6. And our Supreme Court has instructed that "N.C. Const. art. VI, § 6 does expressly limit disqualifications to office for those who are *elected by the people* to those disqualifications set out in the Constitution." *Baker*, 330 N.C. at 339, 410 S.E.2d at 892 (emphasis added) (stating our General Assembly may add conditions of disqualifications for those seeking *appointment* to an office).

¶ 23 Also, our General Assembly lacks authority to allow for the imposition of a sanction against a Clerk which is not already provided for under our Constitution. *See Peoples*, 296 N.C. at 161, 250 S.E.2d at 920 (noting "the scope of removal proceedings [under the statute] cannot be broader than the constitutional [provision] which authorized the General Assembly to set up a procedure for removal and censure of judges").

¶ 24 Here, Judge Lock ordered Ms. Chastain "permanently removed" as Clerk. This sanction is certainly within the sanction allowed for in Article VI, as it is akin to being "disqualified." Further, we hold that the sanction in Section 7A-105 that a Clerk may be "removed" includes that a Clerk may be "permanently removed."

¶ 25 We now address whether a judge has authority to permanently remove someone from only the office of Franklin County Clerk, as Judge Lock did here, when acting pursuant to authority granted by Article VI, where Article VI prescribes the sanction of disqualification from holding any office. That is, can our General Assembly prescribe a procedure whereby a judge can order a "lesser-included" sanction to that provided for in our Constitution? Certainly, the disqualification from holding a

particular office is a lesser-included sanction than disqualification from holding any office.

¶ 26 We hold that any constitutional authority to sanction an elected Clerk in a particular way includes the authority to issue a lesser-included sanction. In so holding, we are persuaded by the fact that though Section 17 of Article IV authorizes our General Assembly to establish a procedure for the *censure* or *removal* of judges, our General Assembly has established a procedure whereby our Supreme Court may also "suspend" and "public[ly] reprimand" a judge. N.C. Gen. Stat. § 7A-376. And, our Supreme Court has imposed these lesser sanctions on offending judges pursuant to this statute. *See*, *e.g.*, *In re Hartsfield*, 365 N.C. 418, 431-32, 722 S.E.2d 496, 505 (imposing a 75-day suspension without pay); *In re Clontz*, 376 N.C. 128, 143, 852 S.E.2d 614, 624 (2020) (issuing a public reprimand).

¶ 27 We next address whether Judge Lock had authority to sanction Ms. Chastain under Article VI for her "misconduct in office[.]" The procedure in Section 7A-105 allows for a Clerk to be removed for "willful misconduct." While Article IV allows for the removal of a Clerk for "misconduct," which certainly includes "willful misconduct," only Judge Dunlow has authority under that Article to remove Ms. Chastain for "misconduct." In any event, the relevant portion of Article VI does not expressly provide for a Clerk's removal for "misconduct" or "willful misconduct," but rather for "corruption or malpractice in any office[.]"

¶ 28 Our Supreme Court, though, has held that, in a case involving egregious conduct, an "adjudication of [a judge's] '*willful* misconduct in office' . . . is equivalent to an adjudication of guilt of 'malpractice in any office' as used in N.C. Const., art. VI, § 8[,]" a finding which would disqualify the judge from holding any office in the future. *Peoples*, 296 N.C. at 166, 250 S.E.2d at 923. It is unclear, however, if our Supreme Court intended to suggest in *Peoples* that *every* act of "willful misconduct" rises to the level of "corruption or malpractice" to warrant disqualification under Article VI.

¶ 29 We do hold that acts of misconduct which do not rise to the level of willful misconduct do not equate to "corruption or malpractice" under Article IV. In any event, we note that under our case law and the plain language of our Constitution, not all "misconduct" is deemed to be willful. We do note that our Supreme Court has stated that "persist[ent]" acts of "misconduct" may rise to the level of "wilful misconduct." *In re Martin*, 302 N.C. 299, 316, 275 S.E.2d 412, 421 (1981).

¶ 30 Our Supreme Court has held in the context of a criminal statute that "willfully" means "something more than an intention to commit the offense. It implies committing the offense purposely and designedly in violation of law." *State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940). In the same vein, in the context of a proceeding to discipline a judge, our Supreme Court

> ha[s] defined "wilful misconduct in office" as involving "more than an error of judgment or a mere lack of diligence." We have also stated that "[w]hile the term would encompass conduct involving moral turpitude, dishonesty, or corruption, these elements need not necessarily be present." As we observed in *In re Martin*, *supra*, "if a judge *Knowingly and wilfully persists in indiscretions and misconduct* which this Court has declared to be, or *which under the circumstances he should know to be*, acts which constitute wilful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute, he should be removed from office."

In re Martin, 302 N.C. at 316, 275 S.E.2d at 421 (internal citations omitted) (italics in original).

¶ 31 Neither party cites to any other case defining what constitutes "corruption or malpractice," as used in Article VI. We construe the language to include at a minimum acts of willful misconduct which are egregious in nature, as those in *Peoples*. Further, we construe the language "willful misconduct" in Section 7A-105 in the context of an Article VI hearing to include only those acts of willful misconduct which rise to the level of "corruption or malpractice" in office. Accordingly, Judge Lock lacked authority to rely on any acts of Ms. Chastain that did not rise to this level to support his sanction under Article VI.

C. Due Process

¶ 32 We next consider the language in Section 7A-105 that the proceeding "shall be initiated by the filing of a sworn affidavit." We note that this procedure was followed, as this proceeding was initiated by the filing of Mr. Thompson's affidavit alleging various acts of misconduct by Ms. Chastain. However, Judge Lock made findings concerning acts that had not been alleged in Mr. Thompson's affidavit and relied on those findings, in part, to support his sanction. Our Supreme Court, though, has held that any procedure to remove an elected official must afford that

official due process. *See In re Spivey*, 345 N.C. 404, 413-14, 480 S.E.2d 693, 698 (1997) (holding that our Constitution does not prohibit our General Assembly from enacting methods for removal "so long as [the officers'] whose removal from office is sought are accorded due process of law"); *see also In re Nowell*, 293 N.C. 235, 241-42, 237 S.E.2d 246, 251 (1977) (holding that "fundamental fairness entitles [the officer] to a hearing which meets the basic requirements of due process"). We hold that Ms. Chastain has the due process (and statutory) right to notice of the acts for which her removal was being sought. We, therefore, conclude that Judge Lock's reliance on these acts that were not alleged in Mr. Thompson's affidavit violated Ms. Chastain's due process rights.

¶ 33 We note the appellee's argument that Ms. Chastain "opened the door" to the presentation of other acts. However, to the extent that she opened the door, Judge Lock could only consider those acts to assess Ms. Chastain's credibility, as she had no notice that she would be subject to removal for those acts. (In the same way, a criminal defendant who opens the door to the admission of past criminal acts can only be punished in that trial for the acts for which he was indicted; the past criminal acts may only be used to show the likelihood that he committed the acts for which he was indicted.)

D. Jurisdiction

¶ 34 Finally, we consider the language in Section 7A-105 that the matter be heard by the "senior regular resident superior court judge serving the county of the clerk's residence." We hold, though, that Judge Lock's involvement is not necessarily fatal. Unlike the provision in Article IV vesting jurisdiction in the senior resident judge to remove a Clerk for "misconduct", we hold the *statutory* requirement found in Section 7A-105 to be *procedural* in nature. Indeed, the statute speaks to the requirement as a matter of "procedure." *Id.* Jurisdiction to consider a matter under Section 7A-105 lies with our Superior Court division generally.

¶ 35 In this case, Judge Dunlow's participation was adjudicated as being in violation of our Code of Judicial Conduct. And though our General Assembly has not expressly prescribed a procedure allowing another judge to substitute for the senior resident judge in a Section 7A-105 matter, our Supreme Court recognizes that *the judiciary* may prescribe a procedure, not inconsistent with our Constitution, to fill in procedural gaps left open by our General Assembly:

> Within the guidelines of our Constitution, the legislature is charged with the responsibility of providing the necessary procedures for the proper commencement

> of a matter before the courts. Occasionally, however, the prescribed procedures of a statutory scheme fail to embrace the unanticipated and extraordinary proceeding such as that disclosed by the record before us. In similar situations, it has been long held that courts have the inherent power to assume jurisdiction and issue necessary process in order to fulfill their assigned mission of administering justice efficiently and promptly. We believe that this is one of those extraordinary proceedings and that our rules of procedure should not be construed so literally as to frustrate the administration of justice.

In re Investigation of Death of Eric Miller, 357 N.C. 316, 322, 584 S.E.2d 772, 778 (2003). Accordingly, we hold that this matter was properly before Judge Lock.

III. Conclusion

¶ 36 This matter was properly before Judge Lock to consider whether Ms. Chastain should be removed for "corruption or malpractice" in office under Article VI. However, it is not clear from his Order whether Judge Lock applied the correct standard. That is, it is unclear whether Judge Lock was removing Ms. Chastain for "misconduct" under Article IV, which he lacks the power to do, or whether he was removing Ms. Chastain because he thought her acts rose to the level of "corruption or malpractice in [her] office." Further, Judge Lock erroneously based his sanction of Ms. Chastain, in part, on acts which were not contained in the charging affidavit, in violation of her due process rights. We, therefore, vacate Judge Lock's Order and remand for further proceedings consistent with this opinion.

¶ 37 The subject of any rehearing before Judge Lock is limited to whether the acts alleged in the affidavit before him rose to the level of "corruption or malpractice" in office under Article VI of our Constitution. Any hearing to consider Ms. Chastain's removal from her current term of office for misconduct under Article IV must be before the senior regular resident Superior Court Judge of Franklin County.

VACATED AND REMANDED.

Judges WOOD and GORE concur.

MILLER v. LG CHEM, LTD.

[281 N.C. App. 531, 2022-NCCOA-55]

ERIC MILLER, PLAINTIFF
v.
LG CHEM, LTD., LG CHEM AMERICA, INC., FOGGY BOTTOM VAPES LLC, CHAD & JACLYNN DABBS D/B/A SWEET TEA'S VAPE LOUNGE, DOE DEFENDANTS 1-10, DEFENDANTS

No. COA20-687

Filed 1 February 2022

1. Jurisdiction—personal—specific—minimum contacts—nonresident corporations—product liability—no connection between claims and forum

In a product liability suit brought by plaintiff alleging he was injured when a battery in a vape pen exploded, defendants (the foreign battery manufacturer and its American subsidiary) were not subject to personal jurisdiction because they did not have the requisite minimum contacts with North Carolina. Plaintiff's claims did not "arise out of or relate to" defendants' contacts with this state as required for specific jurisdiction where neither corporation marketed, distributed, or sold the type of battery at issue in North Carolina as a consumer product to be used as a singular or standalone battery for individual uses.

2. Discovery—product liability case—jurisdictional discovery requests—abuse of discretion analysis

In a product liability action against two nonresident corporations, the trial court did not abuse its discretion by denying plaintiff's request for additional jurisdictional discovery where the trial court properly granted defendants' motions to dismiss the action based on lack of personal jurisdiction.

Judge INMAN dissenting.

Appeal by plaintiff from an order entered 20 April 2020 by Judge Michael J. O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 5 October 2021.

The Paynter Law Firm, PLLC, by Stuart M. Paynter, Celeste H.G. Boyd, David D. Larson, Jr., and Sara Willingham, for plaintiff-appellant.

Lewis Brisbois Bisgaard & Smith LLP, by Christopher J. Derrenbacher, for defendants-appellants LG Chem, Ltd., and LG Chem America, Inc.

Schwaba Law Firm, by Andrew J. Schwaba, and Cohen, Milstein, Sellers & Toll, PLLC, by Adam Langino, for amicus curiae North Carolina Advocates for Justice.

No briefs filed by defendants Foggy Bottom Vapes LLC, Chad & Jaclynn Dabbs d/b/a Sweet Tea's Vape Lounge, and Doe Defendants 1-10.

TYSON, Judge.

¶ 1 Eric Miller ("Plaintiff") appeals the trial court's decision granting LG Chem, Ltd.'s ("LG Chem") and LG Chem America, Inc.'s ("LG America") (together, "Defendants") motion to dismiss for lack of personal jurisdiction. We affirm.

I. Background

¶ 2 Defendant LG Chem is a South Korean company, which manufactures and markets lithium-ion batteries. LG Chem alleges it has no meaningful contacts or connections to North Carolina.

¶ 3 Defendant LG America is a Delaware corporation, which sells and distributes petrochemical products and materials in the United States. Its direct sales and distribution to North Carolina are limited to petrochemical products.

¶ 4 LG Chem became aware in early 2016 that single 18650 lithium-ion cells it had manufactured were being used as unauthorized standalone rechargeable batteries in e-cigarette "vape" pens. LG Chem learned an 18650 battery had caused a fire inside a vape pen user's bag.

¶ 5 LG Chem redesigned the 18650 battery cells to reduce their risk of fire, added warning labels to the batteries in September 2016. It also added a warning to its website cautioning against the unauthorized use of standalone 18650 cells in vape pens. LG Chem then took steps to limit its distributors and corporate customers from selling its manufactured 18650 lithium cells for standalone use in e-cigarette vape devices.

¶ 6 Plaintiff purchased a vape pen and LG Chem 18650 battery cell from Defendant, Foggy Bottom Vapes, LLC, ("Foggy Bottom") in Bahama, North Carolina in late 2016 or early 2017. On 23 October 2017, Plaintiff

purchased a second LG Chem 18650 battery cell for use in his vape pen from Defendants Chad and Jaclynn Dabbs, d/b/a Sweet Tea's Vape Lounge ("Sweet Tea") in Creedmoor, North Carolina. One of the 18650 battery cells allegedly exploded in Plaintiff's pocket, causing severe burns along his left leg on 4 March 2018.

¶ 7 Plaintiff filed suit in January 2019, seeking damages from both LG Defendants under various theories of products liability, ordinary negligence, and breach of the implied warranty of merchantability. The complaint asserts jurisdiction over the LG Defendants based upon the following allegations:

> 10. . . . At all times relevant to this Complaint, LG Chem . . . designed and manufactured 18650-sized cylindrical lithium-ion batteries and caused those batteries to be distributed and sold throughout the United States, including within the State of North Carolina.
>
> 11. . . . At all times relevant to this Complaint, LG [America] did substantial and continuous business in the State of North Carolina by marketing, distributing, and selling or causing to be sold lithium-ion batteries in the State.
>
> . . . .
>
> 17. . . . [O]n information and belief, [LG Chem] engages in substantial activity within this State by placing its lithium-ion batteries into the stream of commerce with the knowledge, understanding, and/or expectation that they will be purchased by consumers in the State. According to LG Chem. . . . the company "built a network for production, sales and R&D not only within Korea but also in major locations around the globe, conducting business all over the world," with approximately 6% of LG Chem['s] . . . worldwide business in 2015 taking place in the United States. The U.S. District Court for the Western District of North Carolina has found that LG Chem . . . "has knowingly and intentionally used nationwide distribution channels for its products, with the expectation that its products will be sold throughout the country, including in the state of North Carolina."
>
> 18. . . . [O]n information and belief, [LG America] engages in substantial activity with this State by

> causing its lithium-ion batteries to be distributed and sold in the State, and by placing its lithium-ion batteries into the stream of commerce with the knowledge, understanding, and/or expectation that they will be purchased by consumers in the State. The U.S. District Court for the Western District of North Carolina has found that:
>
> [LG America] has a physical presence in the state of NC in the form of being registered to do business here, having a registered process agent here, using property in this state for storage, and paying state taxes at least once. Additionally, [LG America] has participated in the economic markets of this state through its sales to NC customers.

¶ 8 LG Defendants moved to dismiss Plaintiff's complaint for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. Plaintiff pursued discovery against LG Defendants, serving both with interrogatories and requests for production of documents. LG Defendants gave limited responses to Plaintiff's interrogatories, but only LG Chem responded to Plaintiff's requests for production.

¶ 9 Plaintiff filed and served motions to compel LG Defendants to provide more comprehensive responses to his interrogatories and requests for production, and asked the trial court to order additional jurisdictional discovery rather than allow LG Defendants' pending motions to dismiss. Plaintiff then noticed his motions to compel and LG Defendants' motions to dismiss for hearing on 11 March 2020.

¶ 10 The parties submitted evidence to the trial court in advance of the hearing. LG Defendants filed affidavits attesting their 18650 cells were "never designed, manufactured, distributed, advertised, or sold for use by individual consumers as standalone, replaceable, rechargeable batteries in electronic cigarette or vaping devices," nor did they ever "authorize [any distributor, retailer, or re-seller] to sell or distribute any lithium-ion cells for use by individual consumers as standalone, replaceable, rechargeable batteries in electronic cigarette or vaping devices."

¶ 11 Plaintiff filed affidavits tending to show LG Defendants' contacts with North Carolina. The alleged contacts include: (1) the widespread availability of 18650 batteries in vape shops across the State; (2) LG America authorized shipments of 18650 batteries to or through North Carolina; (3) LG Chem marketing materials available online in the State and advertising 18650 batteries; (4) a press release from a North Carolina

lithium hydroxide company announcing a deal to supply LG Chem with materials for battery applications; and (5) decisions from other courts rejecting LG Defendants' personal jurisdiction arguments or compelling additional jurisdictional discovery.

¶ 12 The trial court took the matter under advisement and allowed the parties to submit supplemental affidavits pending resolution of the parties' motions. LG Chem filed a supplemental affidavit concerning its efforts to limit the unauthorized use of 18650 batteries in vaping devices.

¶ 13 The trial court considered the arguments of counsel, the pleadings, briefs, and filings of the parties, including all affidavits and submissions, and entered an order allowing LG Defendants' motions to dismiss on 20 April 2020. The order contains ten findings of fact that LG Chem never designed, manufactured, distributed, advertised, or sold lithium-ion cells "for use by individual consumers as standalone, replaceable, rechargeable batteries in electronic cigarette or vaping devices[.]" The trial court granted LG Defendants' motion to dismiss for lack of personal jurisdiction. Plaintiff appeals.

II. Jurisdiction

¶ 14 Appellate jurisdiction is proper pursuant to N.C. Gen. Stat. § 1-277(b) (2021).

III. Issues

¶ 15 Plaintiff argues the trial court erred in holding it lacked personal jurisdiction over the LG Defendants and the trial court abused its discretion in dismissing the case for lack of personal jurisdiction without compelling the LG Defendants to further respond to discovery requests.

IV. Argument

A. Jurisdiction

¶ 16 The Supreme Court of the United States recently addressed a similar jurisdictional issue. Plaintiff's claims against a non-resident defendant "must arise out of or relate to the defendant's contacts' with the forum." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, __ U.S. __, __, 209 L. Ed. 2d 225, 234 (2021) (citations omitted).

¶ 17 A defendant's conduct to establish personal jurisdiction is relevant only if it establishes "a connection between the forum and the specific claims at issue." *Id.* at __, 209 L. Ed. 2d at 241 (citation and parentheses omitted). Under the "arise out of or relate to" standard, "some relationships will support jurisdiction without a causal showing," but "[*t*]*hat*

does not mean anything goes." *Ford Motor Co.*, __ U.S. at __, 209 L. Ed. 2d at 236 (emphasis supplied). "In the sphere of specific jurisdiction, the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum." *Id.*

¶ 18 To establish personal jurisdiction over a non-resident defendant in a product-liability action, the defendant's contact with the forum State must involve the precise product at issue. *Id.* at __, 209 L. Ed. 2d at 238. The trial court correctly ruled Plaintiff had failed to make the required showing to establish personal jurisdiction over these non-resident Defendants.

B. Connection between the Forum and the Specific Claims

¶ 19 Plaintiff's and our dissenting colleague's argument, analysis, and conclusion show the "*anything goes*" danger Justices Kagan, Alito, and Gorsuch warned of in *Ford*: no "real limits" on unlimited liability in a foreign jurisdiction over a non-resident defendant with no contacts thereto. *Id.* at __, 209 L. Ed. 2d at 236. As is shown here: "The mere fact that [a defendant] was 'connected' to the manufacture and distribution of [a product] is not sufficient to support a conclusion that [the defendant] purposefully availed itself of North Carolina jurisdiction by injecting its products into the stream of commerce." *Cambridge Homes of N. C. Ltd. P'ship. v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 416, 670 S.E.2d 290, 297 (2008). The trial court correctly found and concluded all Plaintiff has shown here was LG Chem manufacturing and "injecting its products into the stream of commerce." *Id.*

¶ 20 The plaintiff's claims "must arise out of or relate to the defendant's contacts with the forum." *Ford Motor Co.*, __ U.S. at __, 209 L. Ed. 2d at 234 (citations and quotation marks omitted). Conduct is relevant only if it establishes "a connection between the forum and the specific claims at issue." *Id.* at __, 209 L. Ed. 2d at 241 (citation and parentheses omitted). "When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty.*, __ U.S. __, 198 L. Ed. 2d 395 (2017).

C. Deliberate, Systematic, and Extensive Market Service

¶ 21 In the absence of a causal connection between a non-resident defendant's contacts with the forum State and the plaintiff's claims, the defendant must "deliberately," "systematically," and "extensively" serve a market in the forum State "for the very [product] that the plaintiffs allege malfunctioned." *Id.* at __, 209 L. Ed. 2d at 237-38.

¶ 22 This Court's recent opinion in *Cohen v. Cont'l Motors, Inc.*, 279 N.C. App. 123, 2021-NCCOA-449, 864 S.E.2d 816 (2021) is instructive and supports the trial court's conclusion that insufficient jurisdictional contacts occurred in the facts before us. In *Cohen*, the plaintiffs were killed when their aircraft's starter adapter failed, causing a loss of oil pressure and ultimate failure of the engine. *Id.* ¶ 2, 279 N.C. App. at 125, 864 S.E.2d at 818. Continental Motors, Inc. was domiciled in Delaware, but had engaged in nearly 3,000 sales and earned nearly $4 million in revenue from North Carolina consumers. *Id.* ¶¶ 3, 4, 279 N.C. App. at 125, 864 S.E.2d at 819. Continental Motors provided and maintained a paid electronic subscription account that gave North Carolina-based clients access to its manuals and technical support. *Id.* ¶ 6, 279 N.C. App. at 126, 864 S.E.2d at 819. Continental Motors had worked closely with fourteen North Carolina online maintenance subscribers, including the company which installed the starter adapter into the plaintiff's aircraft. *Id.* ¶ 6, 279 N.C. App. at 126, 864 S.E.2d at 819. Although altered by a rebuilder, the starter adapter that failed and was the primary cause of the crash was a component of the defendant's original production. *Id.* ¶ 9, 279 N.C. App. at 127, 864 S.E.2d at 820.

¶ 23 Unlike Continental Motors, LG Chem is not a United States-based company. LG Chem manufactures and sells lithium-ion batteries which are designed and sold solely to corporate and industrial businesses for inclusion in battery packs used for specified products. The trial court found, and Plaintiff does not challenge, LG Chem does not manufacture, market, sale, nor distribute these batteries for individual or consumer sales or for uses in the vape devices for which they were inserted.

¶ 24 LG Chem does not promote, distribute nor sell these batteries to consumers for use as singular or standalone batteries for individual uses. In discovery, LG Chem showed it "has not sold or distributed . . . 18650 lithium-ion cells to or intended for North Carolina between January 1, 2014 and March 4, 2018." Plaintiff made no showing to refute these assertions.

¶ 25 LG Chem has never maintained an office in North Carolina, has never registered to do business here, and has no property or employees here. In short, LG Chem has no contacts whatsoever with or within North Carolina, other than products it manufactured ending up in North Carolina, solely through the actions of unrelated third-parties of its products for uses LG Chem never intended. Plaintiff does not challenge nor refute these facts.

¶ 26 The other defendant affected and before this Court is LG America, a Delaware corporation that sells and distributes petrochemical products and materials in the United States. Its direct sales and distribution to North Carolina are limited solely to petrochemical products, no batteries or battery components, and it properly maintains a registered agent with the North Carolina Secretary of State for that business.

¶ 27 LG America has never distributed nor sold 18650 cells directly to anyone in the United States or within North Carolina. It has no office, property, or employees in North Carolina. In discovery, LG America asserted:

> [LG America] did not manufacture, design, distribute, or sell the product allegedly in question. [LG America] assisted in the sale of LG 18650 battery cells to B2B Networks, Inc., Cna International, Inc., and Green Battery Technologies LLC in Illinois and Texas from approximately January 2012 to May 2016. [LG America] has never sold or distributed LG 18650 battery cells in, or to anyone in, North Carolina.

D. N.C. Gen. Stat. § 1-75.4(1)(d)

¶ 28 Plaintiff does not refute these assertions but alleges specific personal jurisdiction over LG Defendants pursuant to N.C. Gen. Stat. § 1-75.4(1)(d) (2021). This statute grants the courts of North Carolina jurisdiction "over defendant[s] to the extent allowed by due process." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 631 (1977). In the end, this inquiry is a constitutional due process test, "the question of statutory authority [under N.C. Gen. Stat. § 1-75.4(1)(d)] collapses into the question of whether [the defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process." *Sherlock v. Sherlock*, 143 N.C. App. 300, 303, 545 S.E.2d 757, 760 (2001) (alterations in original) (citations and quotation marks omitted).

¶ 29 LG Chem and LG America moved to dismiss Plaintiff's complaint for lack of personal jurisdiction and supported their motions with affidavits from an authorized representative, which contradicted the relevant jurisdictional allegations in Plaintiff's complaint. The trial court granted LG Defendants' motion to dismiss. The court's decision was based upon affidavits, other supplemental materials, and arguments submitted by both parties.

V. Personal Jurisdiction

A. Standard of Review

¶ 30 **[1]** "The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record[.]" *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011) (alterations original) (citations and quotation marks omitted). "We review *de novo* the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over a defendant." *Id.* (citation omitted). "When jurisdiction is challenged, plaintiff has the burden of proving that jurisdiction exists." *Stetser v. TAP Pharm. Prods. Inc.*, 162 N.C. App. 518, 520, 591 S.E.2d 572, 574 (2004) (citation omitted) (emphasis supplied).

¶ 31 "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 85 L. Ed. 2d 528, 542 (1985) (citation omitted).

B. Stream of Commerce

¶ 32 "The mere fact that [a defendant] was 'connected' to the manufacture and distribution of [a product] is not sufficient to support a conclusion that [the defendant] purposefully availed itself of North Carolina jurisdiction by injecting its products into the stream of commerce." *Cambridge*, 194 N.C. App. at 416, 670 S.E.2d at 297.

¶ 33 Plaintiff's stream of commerce theory cannot displace the fundamental rule that "it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for jurisdiction over him." *Walden v. Fiore*, 571 U.S. 277, 285, 188 L. Ed. 2d 12, 21 (2014).

¶ 34 In *Ford*, the consumer products at issue were a Ford Explorer and a Ford Crown Victoria, "the very vehicles," not all Ford vehicles. *Ford* __ U.S. at __, 209 L. Ed. 2d at 238. The Court emphasized that Ford "advertised, sold, and serviced those two car models in both [forum] States for many years." *Ford* __ U.S. at __, 209 L. Ed. 2d at 238. "In other words, Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned." *Ford* __ U.S. at __, 209 L. Ed. 2d at 238.

¶ 35 Here, the product at issue is an 18650 lithium-ion cell, not all models of "lithium-ion batteries generally," or every product that LG Chem manufactures. LG Chem's 18650 lithium-ion cells are not consumer

products; they are manufactured, marketed, distributed, and sold solely as industrial component products.

¶ 36 Plaintiff lists purported contacts between LG Chem and North Carolina, but he makes no attempt to demonstrate the necessary connection between these contacts and Plaintiff's claims. Moreover, LG Chem never served as a market in North Carolina for standalone, removable consumer batteries or made "purposeful efforts to flood North Carolina" with standalone consumer batteries. Whereas Ford urged consumers in the forum States to buy the specific products, Explorer and Crown Victoria vehicles, "[b]y every means imaginable[.]" *Id.* at __, 209 L. Ed. 2d at 237. LG Chem never advertised, sold, or distributed any lithium-ion cells to anyone for sale to individual consumers for use as standalone, removable batteries for the devices Plaintiff purchased.

VI. Abuse of Discretion

¶ 37 **[2]** The second issue before this Court is whether the trial court abused its discretion by declining to compel further responses to Plaintiff's discovery requests.

A. Standard of Review

¶ 38 This Court reviews trial court rulings "on discovery matters under the abuse of discretion standard." *In re J.B.*, 172 N.C. App. 1, 14, 616 S.E.2d 264, 272 (2005). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted). Plaintiff makes no showing of the trial court's abusing its discretion.

B. No Jurisdiction

¶ 39 Plaintiff did not allege facts to support assertion of jurisdiction over LG Chem or LG America. Plaintiff's "injecting its products into the stream of commerce" theory of jurisdiction over Defendants violates due process, is contrary to established precedents, and is invalid. *Cambridge*, 194 N.C. App. at 416, 470 S.E.2d at 297. Additional jurisdictional discovery was not warranted.

VII. Conclusion

¶ 40 Plaintiff bears the burden of proving jurisdiction. Plaintiff has failed to show any causal connection, purposeful availment or personal jurisdiction between North Carolina and LG Defendants. The trial court's order dismissing Plaintiff's complaints against LG Defendants for lack of specific personal jurisdiction is properly affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge STROUD concurs.

Judge INMAN dissents with separate opinion.

INMAN, Judge, dissenting.

¶ 41 Plaintiff, a North Carolinian, bought an LG 18650 battery in North Carolina, was injured by that battery in North Carolina, and has now sued the manufacturer and its American subsidiary—the LG Defendants[1]—in North Carolina. Because, in my view, Plaintiff's complaint contains unrebutted allegations sufficient to establish the LG Defendants' minimum contacts with North Carolina, I respectfully dissent from the majority's decision affirming the dismissal of Plaintiff's complaint at this early stage of litigation.

¶ 42 I also dissent from the majority's holding that the trial court did not abuse its discretion in denying Plaintiff's motion for further discovery. The trial court exercised its discretion on the sole basis that Plaintiff could not show a causal link between his claims and the LG Defendants' contacts with North Carolina. That limited view of specific jurisdiction has been repudiated by the United States Supreme Court. *Ford Motor Co. v. Montana Eighth Judicial District*, ___ U.S. ___, ___, 209 L. Ed. 2d 225, 236 (2021). The Supreme Court's holding in *Ford Motor Co*. is binding on our appellate review of the trial court's order, even though it was entered before *Ford Motor Co.* was decided. I would reverse the trial court's order and remand the matter for further proceedings or, failing that, remand the matter to the trial court to consider, in its sound discretion, whether jurisdictional discovery is warranted in light of the law of specific jurisdiction as it exists following *Ford Motor Co*.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 43 I supplement the majority opinion to describe in further detail the trial court's order dismissing Plaintiff's complaint. The order contains ten findings of fact collectively establishing: (1) LG Chem has never

1. I refer to both Defendants LG Chem, Ltd. and LG Chem America, Inc. as the "LG Defendants" to avoid confusion with the other named defendants in this case. I otherwise employ the same defined terms set forth in the majority opinion.

designed, manufactured, distributed, advertised, or sold lithium-ion cells "for use by individual consumers as standalone, replaceable, rechargeable batteries in electronic cigarette or vaping devices;" (2) "LG Chem has tried to limit the distribution of its 18650 lithium-ion cells for use by consumers as standalone, replaceable, rechargeable batteries in electronic cigarettes and vaping devices" and has never authorized them to be sold or distributed for such use; and (3) LG America's sales in North Carolina "are limited to petrochemical products" and "have no relationship to the distribution of 18650 lithium-ion cells for sale to North Carolina consumers for use in electronic cigarettes and vaping devices."

¶ 44 Based on its findings, the trial court concluded as a matter of law that Plaintiff's injury did not "arise from" the LG Defendants' contacts with North Carolina because the LG Defendants attempted to preclude the distribution and sale of 18650 cells for use by individual consumers in vaping devices and did not serve that market in the State. The trial court then dismissed Plaintiff's complaint—and by necessary implication denied further jurisdictional discovery—by focusing on causation, without considering whether Plaintiff's claims otherwise related to the LG Defendants' alleged contacts with North Carolina.

II. ANALYSIS

A. Motion to Dismiss and Specific Jurisdiction

¶ 45 Resolution of this appeal turns in no small part on recent developments in the law of specific jurisdiction and due process. After the trial court entered its order below, the Supreme Court of the United States decided *Ford Motor Co.*, which held that a non-resident defendant's contacts with a state need not be the direct cause of a resident plaintiff's injuries so long as the there is a sufficient "relationship[] [that] will support [specific] jurisdiction without a causal showing." ___ U.S. at ___, 209 L. Ed. 2d at 236.

¶ 46 The North Carolina Supreme Court has since weighed in as well. In *Mucha v. Wagner*, 378 N.C. 167, 2021-NCSC-82, it further clarified what conduct by out-of-state defendants suffices to demonstrate minimum contacts with North Carolina in accordance with due process, and held this State's courts lacked personal jurisdiction over a Connecticut defendant in a domestic violence protection order action when he made phone calls to his ex-girlfriend's cellphone on the day she happened to move from South Carolina to North Carolina.

¶ 47 Applying the constitutional law of specific jurisdiction as it currently stands to the case before us,[2] I would hold that the trial court erred in granting the LG Defendants' motions to dismiss and reverse the order dismissing Plaintiff's claims against them.

1. Standard of Review

¶ 48 The standard of review applicable to a trial court's dismissal of an action for lack of personal jurisdiction depends on the procedural posture of the case and the pleadings and evidence before the trial court. *Banc of Am. Sec. LLC v. Evergreen Intern. Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). There are generally three ways in which Rule 12(b)(2) motions are brought before our trial courts:

> (1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues.

Id.

¶ 49 If a defendant moves to dismiss without submitting any evidence as to personal jurisdiction, "[t]he trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court's exercise of personal jurisdiction." *Id.* Those allegations "must disclose jurisdiction although the particulars of jurisdiction need not be alleged." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (2000).

¶ 50 When a defendant supports a motion to dismiss with affidavits, the trial court resolves the motion by considering: (1) allegations in the complaint not controverted by the defendant's affidavit; and (2) facts

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2. The LG Defendants did not challenge the applicability of North Carolina's "long-arm" statute, N.C. Gen. Stat. § 1-75.4 (2019), before the trial court or in their briefing to this Court. Because the parties focus on the Due Process Clause of the Fourteenth Amendment, I likewise focus my analysis on that question. *Cohen v. Continental Motors, Inc.*, 2021-NCCOA-449, ¶ 25. And, in any event, Plaintiff alleged personal jurisdiction over the LG Defendants pursuant to N.C. Gen. Stat. § 1-75.4(1)(d), which grants the courts of North Carolina jurisdiction over defendants "to the extent allowed by due process." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630-31 (1977). Thus, "the question of statutory authority [under N.C. Gen. Stat. § 1-75.4(1)(d)] collapses into the question of whether [the defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process." *Sherlock v. Sherlock*, 143 N.C. App. 300, 303, 545 S.E.2d 757, 760 (2001) (citation omitted).

in the defendant's affidavit not controverted because of the plaintiff's failure to offer evidence. *Banc of Am. Sec.*, 169 N.C. App. at 693-94, 611 S.E.2d at 182-83. Allegations in the complaint that are controverted by evidence are no longer taken as true. *Id.* at 693, 611 S.E.2d at 182. "In such a case, the plaintiff's burden of establishing *prima facie* that grounds for personal jurisdiction exist can still be satisfied if some form of evidence in the record supports the exercise of personal jurisdiction." *Bruggeman*, 138 N.C. App. at 616, 532 S.E.2d at 218 (citation omitted).

¶ 51 If the parties file competing affidavits, as was done here, the trial court "may hear the matter on affidavits presented by the respective parties, . . . or the court may direct that the matter be heard wholly or partly on oral testimony or depositions." *Banc of Am. Sec.*, 169 N.C. App. at 694, 611 S.E.2d at 183 (quotation marks and citations omitted) (cleaned up). In the absence of an evidentiary hearing, "[t]he trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Id.* (quotation marks and citations omitted) (cleaned up). The burden remains on the plaintiff to make out a *prima facie* case for personal jurisdiction, and "this procedure does not alleviate the plaintiff's ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence." *Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217 (citations omitted).

¶ 52 When this Court reviews a trial court's ruling on a motion to dismiss for lack of personal jurisdiction, we consider "whether the findings of fact by the trial court are supported by competent evidence on the record." *Lab. Corp. of Am. Holdings v. Caccuro*, 212 N.C. App. 564, 567, 712 S.E.2d 696, 699 (2011) (quotation marks and citations omitted). Unchallenged findings are binding on appeal. *Id.* We review *de novo* whether the trial court's findings support its conclusion as to personal jurisdiction. *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011).

2. Due Process and Specific Jurisdiction

¶ 53 The Due Process Clause of the Fourteenth Amendment limits a state court's authority to exercise personal jurisdiction over a defendant. *Mucha*, ¶ 8. Whether the Due Process Clause permits such an exercise in a given case "requires a forum-by-forum, or sovereign-by-sovereign, analysis." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884, 180 L. Ed. 2d 765, 776 (2011). It is a fact-intensive inquiry that protects "a nonresident defendant['s] . . . liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations." *Beem USA Ltd.-Liab. Ltd. P'ship*

v. Grax Consulting LLC, 373 N.C. 297, 302, 838 S.E.2d 158, 162 (2020) (quotation marks and citations omitted).

¶ 54 The broader concept of personal jurisdiction embodied in the Due Process Clause is also divisible into two distinct forms: (1) general jurisdiction, where the defendant "is essentially at home in the State" where the suit is brought and thus subject to suit, *Ford Motor Co.*, ___ U.S. at ___, 209 L. Ed. 2d at 233 (cleaned up) (citations omitted); and (2) specific jurisdiction, which "covers defendants less intimately connected with a State, but only as to a narrower class of claims." *Id.*

¶ 55 Typically, general jurisdiction attaches anywhere a defendant is domiciled, incorporated, or maintains its principal place of business. *Id.* Specific jurisdiction, by contrast, arises only where a defendant, directly or indirectly, "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d. 1283, 1298 (1958) (citing *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 319, 90 L. Ed. 95 (1945)); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501-02 (1980) ("[I]f the sale of a product . . . is not an isolated occurrence, but arises from efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others."). The defendant's activities must be intentional, voluntary, "and not random, isolated, or fortuitous." *Ford Motor Co.*, ___ U.S. at ___, 209 L. Ed. 2d at 234 (quotation marks and citation omitted). Examples of such actions include "exploiting a market in the forum state or entering a contractual relationship centered there." *Id.* (cleaned up) (quotation marks and citation omitted). Taken together, the defendant's contacts with the forum must be "such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297, 62 L. Ed. 2d at 501 (citations omitted).

¶ 56 The North Carolina Supreme Court followed this precedent in *Mucha*, explaining that "[a]t a minimum, there must be some evidence from which the court can infer that in undertaking an act, the defendant purposefully established contacts with the State of North Carolina specifically." ¶ 32. The decision in *Mucha* clarified that to support the State's exercise of jurisdiction, a defendant need not know that its purposeful act *will* result in contacts here so long as it *reasonably should know* that it is "establishing a connection with the State of North Carolina." *Id.* ¶ 11. "This awareness—whether actual *or imputed*—is what permits

a court in North Carolina to exercise judicial authority over the nonresident defendant." *Id.* (emphasis added).

¶ 57 Any exercise of specific jurisdiction also turns on the plaintiff's particular claims, which " 'must arise out of or relate to the defendant's contacts' with the forum." *Ford Motor Co.*, ___ U.S. at ___, 209 L. Ed. 2d at 234 (quoting *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, ___ U.S. ___, 198 L. Ed. 2d 395, 403 (2017)). This is not a "causation-only approach," as it encompasses both "strict causal relationships between the defendant's in-state activity and the litigation" and "some relationships . . . without a causal showing." *Ford Motor Co.*, ___ U.S. at ___, 209 L. Ed. 2d at 235-36. The latter category of claims, although not requiring causation, is not unconstrained and "incorporates real limits," *id.* at ___, 209 L. Ed. 2d at 236, however unspecific those limits are at present. *See Cohen*, ¶ 48 (Tyson, J., concurring in part and concurring in the result in part) ("The majority's opinion in *Ford* does not articulate any guardrails or outer limits for lower courts to follow when evaluating whether due process concerns prevent a court from establishing specific personal jurisdiction over a non-forum defendant." (citation omitted)).

¶ 58 Wherever those limits actually fall, they must "adequately protect defendants foreign to a forum." *Ford Motor Co.*, ___ U.S. at ___, 209 L. Ed. 2d at 236. Any exercise of specific jurisdiction must "comport with fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 85 L. Ed. 2d 528, 543 (1985) (quotation marks and citation omitted). Such a determination turns on several factors, including:

> the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.

Id. at 477, 85 L. Ed. 2d at 543 (quotation marks and citation omitted). These fairness concerns "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.* at 477, 85 L. Ed. 2d at 544 (citations omitted).

¶ 59 Broadly summarized, any exercise of specific jurisdiction is subject to a three-pronged test under the Due Process Clause, and it attaches when: (1) the out-of-state defendant purposefully avails itself of the

privileges and laws of the forum state and thus establishes minimum contacts with the jurisdiction, *Hanson*, 357 U.S. at 253, 2 L. Ed. 2d. at 1298; (2) the plaintiff's claims arise out of or relate to the defendant's minimum contacts with the forum state, *Ford Motor Co.*, ___ U.S. ___, ___, 209 L. Ed. 2d at 234; and (3) the exercise of jurisdiction "comport[s] with fair play and substantial justice." *Burger King Corp.*, 471 U.S. at 476, 85 L. Ed. 2d at 543.

3. Prima Facie Showing of Specific Jurisdiction

¶ 60 Applying the above principles to this case, and in light of the applicable standard of review, I would hold that Plaintiff has met his burden of establishing a *prima facie* case of specific jurisdiction at this stage of the proceedings. I limit my analysis to whether the LG Defendants purposefully availed themselves of North Carolina's laws and whether Plaintiff's claims arise out of or relate to that purposeful availment—the first two prongs of any specific jurisdiction analysis—as the LG Defendants do not argue that fair play and substantial justice concerns preclude an exercise of jurisdiction under the third prong of the specific jurisdiction test.

a. Purposeful Availment and Stream of Commerce

¶ 61 Plaintiff's complaint alleges that both LG Defendants caused the batteries at issue in this case to be sold in North Carolina. The complaint alleges that LG Chem "caused those batteries to be distributed and sold throughout the United States, including within the State of North Carolina," and that LG Chem did so "with the knowledge, understanding, and/or expectation that they will be purchased by consumers in this State." The complaint contains similar allegations regarding LG America, claiming that it "did substantial and continuous business in the State of North Carolina by marketing, distributing, and selling or causing to be sold lithium-ion batteries in the State," all with the "knowledge, understanding, and/or expectation that they will be purchased by consumers in the State." These factual allegations, which need not contain particulars at this stage of litigation, *Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217, establish that the LG Defendants purposefully caused LG 18650 batteries to be sold to consumers in North Carolina, and thus served a market for the product in the State.

¶ 62 The LG Defendants' discovery responses and affidavits only partially rebut the jurisdictional allegations of Plaintiff's complaint. While LG Chem stated in its discovery responses that it did not sell or distribute 18650 batteries "intended" for North Carolina, LG Chem's subjective intent is not dispositive. *See Mucha*, ¶ 11 (holding that a defendant

purposefully avails itself of North Carolina's laws when it "knew or reasonably should have known that by undertaking some action, the defendant was establishing a connection with the State of North Carolina. This awareness—whether actual or imputed—is what permits a court in North Carolina to exercise judicial authority over the nonresident defendant."); *see also J. McIntyre Mach., Ltd.*, 564 U.S. at 883, 180 L. Ed. 2d at 776 ("[I]t is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment."). Nor does LG America's discovery responses—representing LG America only assisted with sales of 18650 batteries to companies in Texas and Illinois and never itself sold or distributed the batteries in North Carolina—dispense with the issue. *See, e.g.*, *World-Wide Volkswagen*, 444 U.S. at 297, 62 L. Ed. 2d at 501 (acknowledging "indirect" service of a market may establish personal jurisdiction).

¶ 63 So, while LG Chem may not have sold or distributed 18650 batteries directly to North Carolina or "intended" for them to be used in vape pens in the State, one can infer that it nonetheless may have indirectly served a North Carolina market for these batteries when it knowingly "caused those batteries to be distributed and sold . . . within the State of North Carolina," as alleged in Plaintiff's complaint. Similarly, that LG America has not itself sold or distributed to anyone in North Carolina does not mean that LG America, by marketing batteries in North Carolina and assisting with out-of-state transactions, did not knowingly "caus[e] [batteries] to be sold . . . in the State," as the complaint contends, directly or otherwise.

¶ 64 Consistent with the LG Defendants' limited and specific denials, the trial court found that the LG Defendants did not directly distribute or sell 18650 batteries to anyone in North Carolina for use in vaping or e-cigarette devices. Those findings focus strictly on whether the LG Defendants made contact with the State for the specific purpose of selling 18650 batteries to individual consumers for use in vape pens and e-cigarettes. The trial court made no findings as to whether the LG Defendants served, directly or indirectly, other markets for these same batteries in North Carolina. The latter scenario, unrebutted by the LG Defendants' evidence, can be inferred from Plaintiff's jurisdictional allegations. *See Williams v. Institute for Computational Studies at Colorado State University*, 85 N.C. App. 421, 428, 355 S.E.2d 177, 182 (1987) ("The failure to plead the particulars of jurisdiction is not fatal to the claim so long as the facts alleged permit the inference of jurisdiction."). We must therefore take those allegations as true. *Banc of Am. Sec.*, 169 N.C. App. at 693-94, 611 S.E.2d at 182-83. And, following

specific jurisdiction caselaw, these unrebutted allegations are sufficient to establish purposeful availment at this early stage of litigation.

¶ 65 That Plaintiff is not in *the* North Carolina market intended by the LG Defendants does not negate the allegations that they knowingly serve *a* market for batteries here. And knowingly serving *a* market in the forum state is a purposeful availment of that jurisdiction's laws. *See Ford Motor Co.*, ___ U.S. at ___, 209 L. Ed. 2d at 236 ("[T]his Court has stated that specific jurisdiction attaches in cases identical to the ones here—when a company cultivates *a* market for a product in the forum State and the product malfunctions there." (citing *World-Wide Volkswagen*, 444 U.S. 286, 62 L. Ed. 2d 490) (emphasis added)); *see also Walden v. Fiore*, 571 U.S. 277, 285, 188 L. Ed. 2d 12, 20 (2014) ("[W]e have upheld the assertion of jurisdiction over defendants who have purposefully reached out beyond their state and into another by, for example, . . . circulating magazines to 'deliberately exploit' *a* market in the forum State." (cleaned up) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781, 79 L. Ed. 2d 790, 801 (1984) (emphasis added))); *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 171 (2nd Cir. 2010) ("[J]urisdiction is appropriate in New York because Queen Bee has developed and served *a* market for its products there." (citations omitted) (emphasis added)); *Genetic Implant Systems, Inc. v. Core-Vent Corp.*, 123 F.3d 1455, 1458 (Fed. Cir. 1997) (holding a defendant could be sued in Washington in part because "it engaged in a program to develop *a* market in Washington").[3]

¶ 66 Finally, our Supreme Court's recent holding in *Mucha* that the record must support at least an "infer[ence] that in undertaking an act, the defendant purposefully established contacts with the State of North Carolina specifically," ¶ 32, does not compel a different resolution. Plaintiff made an unrebutted allegation in his complaint that LG America specifically marketed lithium-ion batteries in North Carolina. As for LG Chem, the complaint alleges that it "plac[ed] its lithium-ion batteries into the stream of commerce with the knowledge, understanding, and/or expectation that they will be purchased by consumers in the State." Though LG Chem denied that it sold or distributed 18650 batteries to or intended for North Carolina, Plaintiff's allegations encompass

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3. At least one other court has held that specific jurisdiction could be exercised over LG Chem in an 18650 vape-pen products liability suit under this exact rationale despite virtually identical evidence from LG Chem showing it only served a market for sophisticated, industrial consumers who installed the batteries in other manufactured products like power tools. *Tieszen v. EBay, Inc.*, 2021 WL 4134352, *5-*6 (unpublished) (D. S.D. Sept. 10, 2021).

indirect service of the North Carolina marketplace through distributors that LG Chem knew, understood, and expected to reach North Carolina. Given: (1) the particulars of these relationships need not be alleged in the complaint, *Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217; (2) *Mucha*'s acknowledgment that specific jurisdiction attaches when "the defendant knew or reasonably should have known that by undertaking some action, the defendant was establishing a connection with the State of North Carolina," ¶ 11; and (3) uncontroverted evidence that LG Chem's 18650 batteries are readily available for purchase in dozens of vape shops across North Carolina, I am satisfied that the record permits a necessary inference that LG Chem "purposefully established contacts with the State of North Carolina specifically." *Id.* ¶ 32. *See also id.* ¶ 14 (quoting and citing favorably to *Keeton*, 465 U.S. at 781, 79 L. Ed. 2d at 801, which held specific jurisdiction attached to a magazine publisher because the ready availability of the magazine in the forum state evidenced a "continuous[] and deliberate[] exploit[ation]" of the state's market).

b. Arising Out of or Relating to

¶ 67 Whether Plaintiff's claims arise out of or relate to the LG Defendants' contacts with North Carolina also presents a complicated question. As the trial court's order recognizes, the fact that neither of the LG Defendants manufactures, sells, or distributes 18650 batteries for individual use in vaping devices means "Plaintiff's alleged injuries did not arise from any activities of LG Chem . . . [or] from any activities of [LG America]."

¶ 68 Since the trial court's ruling, however, we now have the benefit of *Ford Motor Co.*, which clarified that the "arise out of *or relate to*" standard encompasses two distinct concepts: "[t]he first half of that standard asks about causation; but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing." ___ U.S. at ___, 209 L. Ed. 2d at 236. Applying that decision to the record before us, I would hold that Plaintiff has at this time[4] established a *prima facie* showing that his claim "relates to" the LG Defendants' contacts with North Carolina.

¶ 69 United States Supreme Court decisions addressing specific jurisdiction in the products liability context have not generally concerned themselves with how the injured plaintiffs used the products in question

4. Whether that *prima facie* showing can be maintained after further discovery and at a later stage of this litigation is not a question before us today.

or the products' intended consumers or uses. Instead, the Court has focused strictly on the injection of the product itself into the forum's marketplace. The Court in *Ford Motor Co.* altogether omitted intended consumer use in its analysis of the "related to" prong:

> [S]pecific jurisdiction attaches in cases identical to the ones here—*when a company like Ford serves a market for a product in the forum State and the product malfunctions there*. . . . Or said another way, *if Audi and Volkswagen's business deliberately extended into Oklahoma (among other States), the Oklahoma's courts could hold the companies accountable for a car's catching fire there*—even though the vehicle had been designed and made overseas and sold in New York.

___ U.S. at ___, 209 L. Ed. 2d at 237 (citing *World-Wide Volkswagen*, 444 U.S. at 295, 297, 62 L. Ed. 2d at 501-02) (emphasis added). *Ford* also expressly held that the reason for the injured plaintiff's purchase of a product is not a jurisdictional concern. *See id.* at ___, 209 L. Ed. 2d at 239 ("Nor should jurisdiction in cases like these ride on the exact reasons for an individual plaintiff's purchase, or on his ability to present persuasive evidence about them."). And *Ford Motor Co.* was just the latest of many decisions considering the broader market rather than intended use within a jurisdiction. *See id.* at ___, 209 L . Ed. 2d at 237 (cataloging similar cases).

¶ 70 Holding Plaintiff's injury in this case was "related to" the LG Defendants' contacts with North Carolina as detailed above is consistent with *Ford Motor Co.* Applying the same analysis to the record here, Plaintiff's claim is related to the LG Defendants' North Carolina-focused activities because it alleges: (1) the LG Defendants serve a market for 18650 batteries in North Carolina; (2) Plaintiff purchased such a battery in North Carolina; and (3) the battery Plaintiff purchased in North Carolina malfunctioned, caught fire, and injured Plaintiff in North Carolina. This analysis is also consistent with holdings by other courts that are not binding, but that I find persuasive. In *LG Chem, Ltd. v. Lemmerman*, the Georgia Court of Appeals relied on *Ford Motor Co.* and held that specific jurisdiction existed over the LG Defendants in an 18650 vaping case because LG Chem served a market for the battery in Georgia, and the plaintiff "is a resident of Georgia, used LG Chem's allegedly defective battery in Georgia, and suffered injuries when that battery allegedly malfunctioned in Georgia." 863 S.E.2d 514, 524 (2021). *See also Tieszen*, 2021 WL 4134352 at *6 (rejecting LG Chem's argument

that specific jurisdiction did not attach because it did not serve a market for standalone e-cigarette batteries and holding its contacts with South Dakota related to the plaintiff's claim, "even if he was not LG Chem's intended consumer," because "(1) LG Chem sells and distributes 18650 . . . batteries in South Dakota, (2) [the plaintiff] purchased such a battery online while in South Dakota, and (3) [the plaintiff] was injured by an 18650 . . . battery in South Dakota"). *Cf. Cohen*, ¶ 30 (holding specific jurisdiction attached when the out-of-state defendant served the North Carolina market for airplane Starter Adapters "directly or indirectly" and "its allegedly defective Starter Adapter has there been the source of injury to its owners." (cleaned up) (quotation marks and citation omitted)).

¶ 71 The LG Defendants argue that Plaintiff's claims are not related to their contacts with North Carolina because they never injected 18650 batteries into North Carolina's marketplace for use by individual consumers as standalone batteries for vape pens. But any alleged alteration or misuse of an 18650 battery is a defense on the merits to Plaintiff's products liability suit, not a dispositive factor in the specific jurisdiction analysis. North Carolina's product liability statutes provide:

> No manufacturer or seller of a product shall be held liable in any product liability action where a proximate cause of the personal injury . . . was either an alteration or modification of the product by a part other than the manufacturer or seller . . . . [A]lteration or modification includes changes in the . . . use of the product from that originally designed, tested, or intended by the manufacturer.

N.C. Gen. Stat. § 99B-3 (2019).

¶ 72 Other jurisdictions, both before and after *Ford Motor Co.*, have reached this same conclusion. *See*, *e.g.*, *Berven v. LG Chem*, *Ltd.*, 2019 WL 1746083, *11 (E.D. Cal. April 18, 2019) (unpublished), *adopted by Berven v. L.G. Chem*, *Ltd.*, 2019 WL 4687080 (E.D. Cal. Sept. 26, 2019) (unpublished) (holding that whether use of an 18650 battery by an individual consumer in a vape pen was the result of unintended distribution and misuse went to the merits of a product liability suit, not specific jurisdiction); *LG Chem Am.*, *Inc. v. Morgan*, 2020 WL 7349483, *10 (Tex. App. Ct. Dec. 15, 2020) (unpublished) ("[W]hether LGC's batteries were used in a foreseeable manner or were misused goes to the merits of a products liability action. . . . Jurisdiction cannot turn on whether a defendant denies wrongdoing—as virtually all will." (quotation marks and citation omitted)); *Lemmerman*, 863 S.E.2d at 524 ("[W]hether there

was an unforeseeable misuse of the product by the injured plaintiff goes to the substantive merits of a products liability action and can be addressed in that context").[5] I acknowledge that decisions by courts in other states, and particularly unpublished decisions, are not controlling authority. But, given the developing state of specific jurisdiction caselaw, their analysis applying that law to products liability suits brought against the LG Defendants for exploding 18650 batteries used in vape pens is a helpful source of reference and persuasive in this case.

¶ 73 Such a holding does not contravene the "real limits" of the "related to" prong acknowledged by the United States Supreme Court. *Ford Motor Co.*, ___ U.S. at ___, 209 L. Ed. 2d at 236. I would not hold, for example, that Plaintiff may sue LG Chem here because it sources lithium materials from North Carolina companies, nor would I hold that LG America may be sued for the injuries alleged because it sells and markets petrochemical products in the State. Neither of those contacts involves the injection of an 18650 battery into the North Carolina marketplace and injury to a North Carolinian from that product. Nor would my holding permit a South Carolina resident, injured in that state by an 18650 battery sold there, to bring suit in North Carolina's courts, as the South Carolina plaintiff's injury would not be related to the LG Defendants' contacts with North Carolina. Indeed, such an out-of-state plaintiff would run up against the same "real limit" imposed in *Bristol-Myers Squibb*, in which the United States Supreme Court held that residents of California injured in that state could bring products liability claims against a non-resident defendant consistent with specific jurisdiction principles, but non-California plaintiffs suing

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5. The LG Defendants also cite decisions from other jurisdictions ruling in their favor on specific jurisdiction. However, those cases were either decided pre-*Ford Motor Co.*, are distinguishable on their facts or law, or both. For example, several of those decisions found the plaintiffs' allegations failed to specifically allege a causal connection to the plaintiff's claims. *See, e.g.*, *Schexnider v. E-Cig Central, LLC*, 2020 WL 6929872, *8-*9 (Ct. App. Tx. Texarkana Nov. 25, 2020) (unpublished) (holding Texas lacked specific jurisdiction over LG Chem because: (1) there were no unnegated allegations or evidence that LG Chem indirectly targeted Texas through third-party distributors; and (2) "[t]here was no evidence or unnegated allegations that [plaintiff's] claims arose from LG Chem's only Texas contacts"). Under North Carolina law, however, a plaintiff's allegations of jurisdiction need not contain such particulars at the 12(b)(2) stage, *Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217, and *Ford Motor Co.* makes clear that claims may be brought through specific jurisdiction if they *either* arise out of *or* relate to the plaintiff's claims. *Ford Motor Co.*, ___ U.S. ___, ___, 209 L. Ed. 2d at 236. Other decisions cited by the LG Defendants are distinguishable on their facts. *See, e.g.*, *Davis v. LG Chem, Ltd.*, 849 Fed. Appx. 855, 857-58 (11th Cir. 2021) (unpublished) (holding Oklahoma plaintiffs who purchased 18650 batteries in Oklahoma that exploded in Oklahoma could not sue LG Chem in Georgia simply because LG America is based there).

for identical injuries suffered outside the state were barred from pursuing any claims there. ___ U.S. at ___, 198 L. Ed. 2d at 14-16.

¶ 74 I also note that such a holding would not be the final word on this issue in this case. The LG Defendants could ultimately introduce sufficient evidence showing that they have not maintained minimum contacts with North Carolina relating to Plaintiff's claims as the matter proceeds to trial. *See Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217 (observing that denial of a motion to dismiss for lack of personal jurisdiction based on affidavits "does not alleviate the plaintiff's ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence" (citations omitted)). I, however, cannot reach that conclusion based on the caselaw, our standard of review, and the record before us at this early stage of litigation.

B. Denial of Discovery

¶ 75 I also dissent from the majority's determination that the trial court did not abuse its discretion by denying Plaintiff's motion to compel additional jurisdictional discovery. To be sure, whether to grant such a motion lies in the sound discretion of the trial court. *Sessions v. Sloane*, 248 N.C. App. 370, 381, 789 S.E.2d 844, 853-54 (2016). But a discretionary ruling made under a misapprehension of law amounts to an abuse of discretion. *Orren v. Orren*, 253 N.C. App. 480, 482, 800 S.E.2d 472, 474 (2017). A trial court likewise abuses its discretion when it "is clothed with discretion, but rules as a matter of law, without the exercise of discretion." *Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E.2d 137, 141 (1960). Commission of "[a]n error of law is by definition an abuse of discretion." *Sen Li v. Zhou*, 252 N.C. App. 22, 26, 797 S.E.2d 520, 523 (2017) (citations omitted).

¶ 76 The trial court dismissed the complaint and impliedly denied further jurisdictional discovery based on the legal conclusion that Plaintiff's claims do not "arise out of" the LG Defendants' contacts with North Carolina; that is, Plaintiff could not show a causal link between his claims and the LG Defendants' contacts with the State. But a causal link is not necessary if the claims nonetheless "relate to" a defendant's contacts with the forum. *Ford Motor Co.*, ___ U.S. at ___, 209 L. Ed. 2d at 236. I note that the trial court did not have the benefit of *Ford Motor Co.* at the time it entered its order. But *Ford Motor Co.* is nonetheless controlling, even in a matter the trial court decided before the Supreme Court's decision.

¶ 77 Because, in my view, Plaintiff has made a *prima facie* showing that the LG Defendants have purposefully availed themselves of North

Carolina, I would remand the matter to the trial court to consider whether further jurisdictional discovery is warranted in light of the "related to" standard as defined in *Ford Motor Co. See*, *e.g.*, *Capps*, 253 N.C. at 22, 116 S.E.2d at 141 ("Where, as here, the court is clothed with discretion, but rules as a matter of law, without the exercise of discretion, the offended party is entitled to have the proposition reconsidered and passed upon as a discretionary matter. . . . [W]here it appears that the judge below has ruled upon the matter before him upon a misapprehension of the law, the cause will be remanded to the Superior Court for further hearing in the true legal light." (quotation marks and citation omitted)).

III. CONCLUSION

¶ 78 The LG Defendants introduced evidence rebutting allegations that they directly sold or distributed 18650 batteries into North Carolina for individual use as standalone batteries in vaping and e-cigarette devices. But this evidence does not negate the jurisdictional allegations in Plaintiff's complaint, which encompass sales, marketing, and distribution, both direct *and indirect*, into North Carolina to serve other, non-vaping related markets for 18650 batteries in this State. Those unrebutted jurisdictional allegations and the inferences drawn therefrom establish minimum contacts with North Carolina. Further, Plaintiff's claims "relate to" these contacts, as he is a North Carolina consumer of 18650 batteries who purchased and was injured by such a battery in North Carolina. *See Ford Motor Co.*, ___ U.S. at ___, 209 L. Ed. 2d at 236. I would therefore hold that Plaintiff has met its burden of establishing a *prima facie* case of specific jurisdiction at this stage of the action, reverse the trial court's order to the contrary, and remand for further proceedings not inconsistent with this opinion. Short of that, I would remand the matter back to the trial court to evaluate, in its discretion, whether further jurisdictional discovery is warranted on the issue of whether Plaintiff's claims "relate to" the LG Defendants' contacts with North Carolina. I respectfully dissent.

MOORE v. TROUT

[281 N.C. App. 556, 2022-NCCOA-56]

JASON T.S. MOORE, PLAINTIFF
v.
MATT TROUT, AND WIFE, KAREN ANN TROUT, INDIVIDUALLY AND AS TRUSTEE OF THE KAREN ANN TROUT TRUST DATED JUNE 22, 2000, DEFENDANTS

No. COA20-166

Filed 1 February 2022

Appeal and Error—interlocutory appeal—easement rights—insufficient grounds for review—dismissed for lack of jurisdiction

In a declaratory judgment action—in which plaintiff sought an easement by necessity over defendants' land, and to which defendants responded by raising affirmative defenses including cessation of necessity and laches—the Court of Appeals dismissed for lack of jurisdiction defendants' appeal from the trial court's order granting plaintiff's motion for summary judgment and denying defendants' motion for summary judgment because the order was interlocutory and did not affect a substantial right.

Appeal by Defendants from order entered 25 September 2019 by Judge William H. Coward in Clay County Superior Court. Heard in the Court of Appeals 22 September 2020.

Cannon Law, P.C., by William E. Cannon, Jr., Mark A. Wilson, and Tiffany F. Yates, for plaintiff-appellee.

Offit Kurman, P.A., by Zipporah Basile Edwards and Robert B. McNeill, for defendants-appellants.

PER CURIAM.

¶ 1 Defendants Matt Trout and his wife, Karen Ann Trout, appeal from the trial court's order granting Plaintiff Jason Moore's motion for summary judgment and denying the Trouts' motion for summary judgment. After careful review, we dismiss the Trouts' appeal as interlocutory.

BACKGROUND

¶ 2 On 21 May 2018, Moore filed a *Complaint for Declaratory Judgment* against the Trouts, asserting a claim for an easement by necessity over the Trout Parcel. In their Answer, the Trouts asserted seven affirmative defenses, including cessation of necessity and laches.

¶ 3 On 26 August 2019, the Trouts filed a motion for summary judgment, arguing

> there is no genuine issue of material fact as to the cessation of any such necessity upon [Ashe-Pirkle's] acquisition of title to the 4.75 acre tract of land conveyed to [Moore] . . . ; as such any easement by necessity over the Trouts' property terminated and judgment should be granted in favor of the Trouts as a matter of law.

On 3 September 2019, Moore filed a cross-motion for summary judgment, arguing "there is no genuine issue as to any material fact with regard to [his] claims and with regard to all of [the Trouts'] affirmative defenses and [Moore] is entitled to judgment in his favor as a matter of law." The Trouts opposed this motion on the grounds that "the claimed easement by necessity had terminated as a matter of law and alternatively, that there were issues of fact as to whether Moore's claim for an easement by necessity was barred by the doctrine of laches."

¶ 4 On 9 September 2019, the trial court held a hearing on both summary judgment motions. The trial court granted Moore's motion for summary judgment and denied the Trouts' motion for summary judgment. In its *Order on Summary Judgment Motions*, the trial court determined "[t]here are no genuine issues of material fact" in regard to Moore showing the elements of an easement by necessity and the Trouts' defense of laches was not appropriate in this proceeding. The Trouts timely appealed the *Order on Summary Judgment Motions*.

ANALYSIS

¶ 5 As an initial matter, we must determine whether we have appellate jurisdiction to hear the parties' arguments. The Trouts argue two separate grounds for appellate review: (1) "the trial court's order is a final judgment on the merits from which immediate appeal lies pursuant to [N.C.G.S.] § 7A-27(b)(1)[,]" and (2) "alternatively, if the order is deemed interlocutory, it affects a substantial right" and appeal lies pursuant to N.C.G.S. § 1-277(a).

¶ 6 N.C.G.S. § 7A-27(b)(1) provides that "appeal lies of right directly to the Court of Appeals . . . [f]rom any final judgment of a [S]uperior [C]ourt . . . ." N.C.G.S. § 7A-27(b)(1) (2019). Although the trial court's order does not resolve the issue of where the easement is to be located, the Trouts argue the order is still a final judgment because "it resolves the sole cause of action in the case – whether Moore is entitled to an

easement by necessity over the Trouts' property – and leaves nothing to be determined between the parties other than the collateral matter of locating the easement." The Trouts cite to various cases to assert "North Carolina appellate courts have concluded that orders determining a petitioner had the right to a cartway over the land of the respondent, without yet locating the cartway, were immediately appealable." However, we do not find the Trouts' argument persuasive, as a cartway proceeding is not the same as an easement proceeding. A cartway proceeding is a creation of the legislature for a limited set of specific uses, available in limited circumstances, and entitles the encumbered landowner to just compensation. *See* N.C.G.S. §§ 136-68-136-70 (2019). While similar in their effect on the impacted tract, an easement by necessity is itself a property right under the common law and not a creation of the legislature. *See Pritchard v. Scott*, 254 N.C. 277, 282, 118 S.E.2d 890, 894 (1961) ("A way of necessity is an easement arising from an implied grant or implied reservation; it is of common-law origin and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation.").

¶ 7 The Trouts also argue N.C.G.S. § 1-277(a) provides grounds for appellate review. N.C.G.S. § 1-277(a) provides grounds for appellate review when a "judicial order or determination of a judge of a [S]uperior [C]ourt or [D]istrict [C]ourt . . . affects a substantial right claimed in any action or proceeding[.]" N.C.G.S. § 1-277(a) (2019). In asserting the trial court's order affects a substantial right, the Trouts argue:

> Orders affecting title to real property have been held to affect a substantial right. *See Watson v. Millers Creek Lumber Co.*, 178 N.C. App. 552, 554-[55], 631 S.E.2d 839, 840[-41] (2006) (substantial right affected where determination of status of title to real property was a threshold [] question to be answered before liability on additional claims could be determined); *Phoenix Ltd. Partnership of Raleigh v. Simpson*, 201 N.C. App. 493, 499, 688 S.E.2d 717, 721-22 (2009) (substantial right affected where trial court ordered [the] defendants to convey property to [the] plaintiff); *Bodie Island Beach Club Ass'n, Inc v. Wray*, 215 N.C. App. 283, 287-88, 716 S.E.2d 67, 72 (2011) (substantial right affected in action to set aside a deed due to claimed fraud and undue influence).
>
> Here, the [o]rder directly affects the Trouts' title to real property, diminishing the title by concluding that

> an easement by necessity exists over their property. This determination is analogous to ordering the conveyance of real property. The threshold question of the status of title to the Trouts' property (whether an easement by necessity does or does not [exist]) should be answered before proceeding with the mechanism for locating any such easement – a mechanism which is lengthy, costly, burdensome, and a potentially inefficient use of the parties' and court's resources.

¶ 8 We reject the Trouts' substantial rights argument based on the arguments presented in their brief, as we do not find the cases referenced to be analogous to rights determined by the *Order on Summary Judgment Motions*. The Trouts did not present any other grounds for appellate review, and it is not our duty "to construct arguments for or find support for [the] appellant's right to appeal from an interlocutory order[.]" *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994); *see also Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant.").

¶ 9 The location of the easement remains outstanding. The Trouts' arguments on appeal do not evince sufficient grounds for an interlocutory appeal. We have no jurisdiction to hear this matter at this time.

CONCLUSION

¶ 10 For the reasons stated above, the Trouts' interlocutory appeal is dismissed.

DISMISSED.

Panel consisting of Judges DIETZ, TYSON, and MURPHY.

DARRYL RIMMER, EMPLOYEE, PLAINTIFF
v.
TOWN OF CHAPEL HILL, EMPLOYER, NORTH CAROLINA INTERLOCAL RISK MANAGEMENT AGENCY (NCIRMA), ADMINISTERED BY THE NORTH CAROLINA LEAGUE OF MUNICIPALITIES, CARRIER; DEFENDANTS

No. COA20-895

Filed 1 February 2022

Workers' Compensation—timeliness of claim—notice to employer of occupational disease—post-traumatic stress disorder—timing of diagnosis

The Industrial Commission erred by denying plaintiff's claim for workers' compensation for failure to timely give notice to his employer of his post-traumatic stress disorder (PTSD) (N.C.G.S. § 97-22) and failure to timely file his claim (N.C.G.S. § 97-58(c)) where plaintiff gave notice and filed his claim shortly after being clearly, simply, and directly informed that his PTSD was related to his cumulative exposure to trauma as a firefighter. Although the employer argued that plaintiff learned that he had PTSD many years earlier, medical records indicated that plaintiff at times self-reported PTSD symptoms or that his doctors considered PTSD when evaluating him, but he was not actually diagnosed with PTSD as a work-related condition by a medical authority until much later after displaying more severe and particularized symptoms.

Appeal by Plaintiff from opinion and award entered 10 September 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 October 2021.

Patterson Harkavy LLP, by Christopher A. Brook, Henry N. Patterson, and Paul E. Smith, for Plaintiff-Appellant.

Teague Campbell Dennis & Gorham, LLP, by Dayle A. Flammia and Lindsay A. Underwood, for Defendants-Appellees.

Edelstein and Payne, by M. Travis Payne, for amicus curiae Professional Fire Fighters and Paramedics of North Carolina.

The McGuinness Law Firm, by J. Michael McGuinness, for amici curiae North Carolina Police Benevolent Association and Southern States Police Benevolent Association.

COLLINS, Judge.

¶ 1 Plaintiff Darryl Rimmer appeals from an Opinion and Award of the Industrial Commission denying his claim for workers' compensation benefits for his post-traumatic stress disorder ("PTSD"). Plaintiff argues that the Commission erred by concluding that his claim was barred by his failure to timely give notice of his PTSD to his employer and to timely file his claim. We reverse and remand for a determination of the merits of Plaintiff's claim.

I. Background

¶ 2 Plaintiff joined the Chapel Hill Fire Department ("CHFD") as a firefighter on 20 June 1995. Plaintiff first worked "as a member of a crew of three to five people" with "general fire fighting duties" and then as a "driver/operator." In 2000, Plaintiff was promoted to the rank of captain and became responsible for overseeing "a crew, a truck, and a station."

¶ 3 On 9 December 2002, Plaintiff was struck by falling debris while fighting a house fire and briefly lost consciousness. Following this incident, Plaintiff filed a workers' compensation claim for injuries to his cervical spine and left shoulder. The claim was accepted as compensable. Plaintiff was entirely out of work from 10 December 2002 through 31 March 2003, and then worked on light duty through 17 July 2003. Plaintiff returned to full duty with no restrictions on 18 July 2003.

¶ 4 In either late 2003 or early 2004, Dr. Brian Benjamin, Plaintiff's family doctor, referred Plaintiff for a neurocognitive evaluation due to "a one-year history of cognitive and behavioral changes following" the December 2002 incident. Neuropsychologist Dr. Kristine Herfkens evaluated Plaintiff on 6 January 2004. In her report, Dr. Herfkens noted that Plaintiff "complained of poor concentration and memory, difficulty learning new information, and a 'spacey feeling.' He particularly struggles with sustaining his attention on longer, slower tasks." Dr. Herfkens also noted that,

> In the past, [Plaintiff] has had problems with work related depression and PTSD. He sought treatment, and improved considerably. He has been told that his cognitive problems may be related to mild depression, but he does not feel like he did in the past when he was depressed and anxious.

Dr. Herfkens recorded that Plaintiff "reported a history of depression and PTSD related to events in his work as a firefighter."

¶ 5 Dr. Herfkens concluded that it was "possible that [Plaintiff] has mild residual depressive and PTSD symptoms as a result of" the December 2002 incident. Her "diagnostic impressions" included "Post concussion syndrome, mild"; "Depression NOS"; and "Anxiety NOS."[1] After a follow-up appointment with Plaintiff on 20 January 2004, Dr. Herfkens noted that Plaintiff "continues to be bothered by forgetfulness + fatigue."

¶ 6 In notes dated 5 February 2004, Dr. Benjamin listed Plaintiff's "Problem #1" as "Closed head injury." Dr. Benjamin wrote:

> S: Mr. Rimmer still continues to suffer from the sequelae of the injuries he suffered on 12/9/02 . . . . He did lose consciousness, and suffered significant problems. Many of the physical problems have improved; however, he still is experiencing a post concussive syndrome with reduction in his cognitive function, and resultant post traumatic stress disorder symptoms of depression and anxiety. This was confirmed by neuropsychological testing done by Dr. H[e]rfkens. Please refer to her report, dated 1/6/04.
>
> . . . .
>
> A: Post concussive syndrome with resultant post traumatic stress disorder, anxiety disorder, and depression.
>
> P: He will continue to work with his environment, and enacting Dr. H[e]rfkens recommendations. We are going to start him on Effexor XR . . . and I will see him back in 2-3 weeks.

When asked if he recalled that "it was [Dr. Benjamin's] assessment that [he was] suffering from Post-Concussive Syndrome, with resultant Post-Traumatic Stress Disorder, anxiety disorder, and depression,"

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1. "NOS," though not defined in the record, appears to be an abbreviation for "Not Otherwise Specified." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* at 4 (4th ed. 2000). "NOS" was a category of diagnosis applicable where (1) "[t]he presentation conforms to the general guidelines for a mental disorder in the diagnostic class, but the symptomatic picture does not meet the criteria for any of the specific disorders"; (2) "[t]he presentation conforms to a symptom pattern that has not been included in the DSM-IV Classification but that causes clinically significant distress or impairment"; (3) "[t]here is uncertainty about etiology"; or (4) "[t]here is insufficient opportunity for complete data collection . . . or inconsistent or contradictory information, but there is enough information to place it within a particular diagnostic class." *Id.*

Plaintiff responded, "If that's in the notes – again, 2004 is a long time ago for me to remember, but I would say yes."

¶ 7 In notes dated 4 March 2004, Dr. Benjamin listed Plaintiff's "Problem #1" as "Depression, anxiety, and closed head injury." Dr. Benjamin noted that Plaintiff was experiencing "[m]ild anxiety and depression" but was "doing well," "sleeping some better at nighttime," and had an improved mood.

¶ 8 Plaintiff served as a captain with the CHFD until 2012, when he requested assignment as an assistant fire marshal. In this role, Plaintiff was required to conduct "fire inspections and investigations" and "report to active fires and other significant incidents like multiple vehicle car accidents or hazardous materials incidents." Plaintiff's duties at an active scene included "patrolling the scene, listening for radio traffic, and monitoring the structure for signs of fire extension, structural failure, or other hazards."

¶ 9 In the spring of 2017, following a call involving two dogs burning in a fire, Plaintiff started vomiting "on almost a daily basis" when he arrived at work, opened the door of his vehicle, and smelled his gear. Plaintiff began suffering anxiety and panic attacks, particularly upon going into the town of Chapel Hill. Plaintiff also began experiencing intrusive thoughts of "victims of fires and accidents he had responded to over his years of service" and "nightmares which severely disrupted his sleep, limiting him to one to two hours of sleep per night." Plaintiff's intrusive thoughts and nightmares concerned calls spanning his career with the CHFD, including: Plaintiff's participation in "salvage and overhaul operations" and the removal of victims' bodies following a 1996 fire at the Phi Gamma Delta fraternity, response to a 1997 mobile home fire where Plaintiff found a father who had attempted to shield his son, discovery of the body of a college student who died by suicide in 1998, response to a victim who had fallen down an elevator shaft in either 1998 or 1999, involvement in resuscitation efforts for an accident victim while the victim's spouse "beat on [Plaintiff's] chest and called [Plaintiff] an animal" sometime between 2006 and 2008, discovery of an elderly decedent who had been severely neglected in approximately 2008, and participation in victim recovery efforts after a 2009 explosion at the Garner ConAgra plant.

¶ 10 On 9 October 2017, "[a]fter approximately six months of emotional symptoms," Plaintiff explained his difficulties to two of his superiors, Chief Matthew Sullivan and Fire Marshal Thomas Gregory. Sullivan and Gregory referred him to the Employee Assistance Program.

¶ 11 Plaintiff saw licensed professional counselor Mary Livingston Azoy through the Employee Assistance Program on 11 October 2017. Azoy wrote in her notes for this visit that Plaintiff had "developed severe PTSD as a result of cumulative trauma on the job," with "[s]ymptoms worsening over last 6 months." The notes, which spanned three visits and which Azoy did not sign until 2 March 2018, list Plaintiff's diagnosis as PTSD. Azoy told Plaintiff at his first appointment that he "needed to seek the help of a psychiatrist[.]"

¶ 12 Plaintiff saw Dr. Hansen Su, a psychiatrist, for an evaluation on 30 October 2017. In notes from this visit, Dr. Su wrote that Plaintiff had a "reported hx of PTSD, related to his line of work as a firefighter." Dr. Su noted that Plaintiff "[r]eports long hx of symptoms which have worsened in the past several months. More nightmares, flashbacks, distortions of perception, hyperarousal, memory loss, poor concentration." Dr. Su's notes also indicate "[n]o history of psychiatric issues." Dr. Su testified that this information came from Plaintiff's own self-reporting. Dr. Su's notes reflect diagnoses of "Post-traumatic stress disorder, unspecified"; "Other depressive episodes"; and "Major depressive disorder, single episode, unspecified[.]" Plaintiff continued to see Dr. Su regularly.

¶ 13 Plaintiff began treatment with Gregory Allen, a licensed clinical social worker, on 7 November 2017. Allen's notes from this visit list a diagnosis of "[p]ost-traumatic stress disorder, unspecified." Allen wrote that Plaintiff "has been suffering with PTSD symptoms for several years now. About six months ago they became very bad again. . . . [Plaintiff] states he has been experiencing the problem(s) for 6 months." Allen also wrote that Plaintiff had "PTSD: Diagnosed at age 35. Received Outpatient Treatment at age 35." Allen indicated that Plaintiff has "a history of being treated for PTSD symptoms since 2002." Allen explained these entries during his deposition:

> Q. And were you aware that as early as 2002, after a work comp injury, and from 2002 to 2004, during that time period, [Plaintiff] was diagnosed with depression and PTSD?
>
> A. Yeah.
>
> Q. How did you know that?
>
> A. He talked about it.
>
> . . . .
>
> Q. But you are aware that he was diagnosed with PTSD as early as early 2000s, weren't you?

> A. Yeah. I would imagine that -- what he was going through, yeah.

Plaintiff continued to see Allen regularly for outpatient therapy.

¶ 14 On 18 December 2017, Plaintiff requested his diagnosis and prognosis during an appointment with Dr. Su. On 22 December 2017, Plaintiff emailed Chief Sullivan and Human Resources Director Clifton Turner to inform them of his request from Dr. Su. In the email, Plaintiff wrote that Dr. Su had advised him that his "diagnosis was PTSD and [his] prognosis was very poor as to whether [he] would return to duty." Plaintiff further wrote that Dr. Su "advised this illness is due to [his] career in the fire service and is related to [his] job."

¶ 15 On 2 January 2018, Plaintiff filed a claim seeking workers' compensation benefits for "[p]sychological disability diagnosed as Post-Traumatic Stress Disorder" caused by "traumatic exposures in [his] job as a firefighter" with the CHFD. After Defendants denied the claim, Plaintiff sought a hearing before the Industrial Commission.

¶ 16 Prior to the hearing, Defendants referred Plaintiff to Dr. Moira Artigues, a general and forensic psychiatrist, who conducted an interview and examination with Plaintiff on 5 September 2018. Dr. Artigues gave her opinion that, to a reasonable degree of medical certainty, Plaintiff's symptoms met the criteria for PTSD in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Dr. Artigues noted that Plaintiff "said that he saw a psychiatrist or a psychologist for one to two appointments" after the 1996 fraternity fire and "recalled having nightmares at that time." Dr. Artigues further noted that Plaintiff "said he eventually got over his symptoms through talking with coworkers" and "[b]etween 1996 and 2016, [Plaintiff] said he did not have much in the way of symptoms except for minor increases in his anxiety." Dr. Artigues reviewed Plaintiff's primary care records dating back to 2014 and found that "[o]f note, there was no documentation of any psychiatric symptoms[.]" Upon reviewing Dr. Herfkens' report, Dr. Artigues surmised that Plaintiff may have self-reported suffering from PTSD; Dr. Artigues could not determine "if a doctor actually diagnosed him with PTSD or if he [was] self-diagnosed[.]"

¶ 17 The Deputy Commissioner held a hearing and entered an Opinion and Award on 5 June 2019. The Deputy Commissioner found, contrary to Defendants' assertion, that Plaintiff was not advised by a competent medical authority that he had PTSD in 2004. Accordingly, the Deputy Commissioner concluded that Plaintiff's claim was not barred by failure to timely give notice of his PTSD to Defendants, as required by N.C. Gen.

Stat. § 97-22, or by failure to timely file his claim, as required by N.C. Gen. Stat. § 97-58(c). In the alternative, the Deputy Commissioner found that Plaintiff had shown a reasonable excuse for not having given written notice in 2004 and Defendants had not shown that they were prejudiced by any failure of notice. The Deputy Commissioner concluded that Plaintiff's PTSD was a compensable occupational disease resulting from Plaintiff's exposure to cumulative trauma in his job with the CHFD and awarded Plaintiff temporary total disability compensation, payment for treatment and counseling, and costs of the action.

¶ 18 Defendants appealed to the full Commission, which held a hearing and entered an Opinion and Award on 10 September 2020. The Commission concluded that Plaintiff failed to timely give notice of his PTSD to Defendants and failed to timely file his claim. The Commission also concluded that Plaintiff did not establish a reasonable excuse for the failure to timely notify Defendants, and Defendants were prejudiced by the late notice. The Commission denied Plaintiff's claim. Plaintiff appealed to this Court.

II. Discussion

¶ 19 Plaintiff argues that the Commission's opinion and award denying his claim must be reversed because he timely gave Defendants notice of his PTSD diagnosis in 2017 and timely filed his claim for compensation.

¶ 20 This Court's review of an opinion and award of the Industrial Commission is generally "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citations omitted). Where the Commission's "findings of fact are not challenged and do not concern jurisdiction, they are binding on appeal." *Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014) (citing N.C. Gen. Stat. § 97-86). Jurisdictional findings of fact, however, are "not conclusive on appeal, even if supported by competent evidence." *Perkins v. Arkansas Trucking Servs.*, 351 N.C. 634, 637, 528 S.E.2d 902, 903-04 (2000) (citations omitted). Instead, " '[t]he reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.' " *Id.* (quoting *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976)).

> In performing our task to review the record *de novo* and make jurisdictional findings independent of those made by the Commission, we are necessarily charged

> with the duty to assess the credibility of the witnesses and the weight to be given to their testimony, using the same tests as would be employed by any fact-finder in a judicial or quasi-judicial proceeding.

Morales-Rodriguez v. Carolina Quality Exteriors, Inc., 205 N.C. App. 712, 715, 698 S.E.2d 91, 94 (2010). "This Court makes determinations concerning jurisdictional facts based on the greater weight of the evidence." *Capps v. Se. Cable*, 214 N.C. App. 225, 227, 715 S.E.2d 227, 229 (2011) (citation omitted). We review the Commission's conclusions of law de novo. *Medlin*, 367 N.C. at 423, 760 S.E.2d at 738.

¶ 21 An employee's PTSD may be compensable as an occupational disease under the Workers' Compensation Act if it is "proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment" and is not an "ordinary disease[] of life to which the general public is equally exposed outside of the employment." N.C. Gen. Stat. § 97-53(13) (2020); *see also Smith-Price v. Charter Pines Behav. Ctr.*, 160 N.C. App. 161, 171, 584 S.E.2d 881, 888 (2003) (holding the employee's PTSD fell within the statutory definition of occupational disease). Generally, no compensation for an occupational disease "shall be payable unless" the employee gives written notice to the employer within 30 days or "reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." *See* N.C. Gen. Stat. § 97-22 (2017) (requiring injured employees to give notice of accident); *id.* § 97-58(b) (2017) (providing that the notice requirement in section 97-22 is applicable "in all cases of occupational disease except in case[s] of asbestosis, silicosis, or lead poisoning"). The 30-day period in which an employee must give notice of an occupational disease runs "from the date that the employee has been advised by competent medical authority that he has the same." *Id.* § 97-58(b).

¶ 22 An employee seeking compensation for an occupational disease must also file a claim "with the Industrial Commission within two years after death, disability, or disablement as the case may be." *Id.* § 97-58(c) (2017). Our Supreme Court has construed section 97-58 to provide that this two-year period

> begins running when an employee has suffered injury from an occupational disease which renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity

> by such injury, and the employee is informed by competent medical authority of the nature and work related cause of the disease. The two year period for filing claims for an occupational disease does not begin to run until all of these factors exist.

Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 706, 304 S.E.2d 215, 218-19 (1983). "An employee must be informed clearly, simply and directly that he has an occupational disease and that the illness is work-related" to trigger the two-year period. *Lawson v. Cone Mills Corp.*, 68 N.C. App. 402, 410, 315 S.E.2d 103, 107 (1984) (citations omitted).

¶ 23 Because the two-year period for filing claims under section 97-58(c) "is a condition precedent with which a claimant must comply in order to confer jurisdiction on the Industrial Commission," whether a plaintiff timely filed a claim is a "jurisdictional finding[] of fact fully reviewable by this Court." *Dowdy*, 308 N.C. at 704-05, 304 S.E.2d at 218; *see also Rainey v. City of Charlotte*, 247 N.C. App. 594, 595, 785 S.E.2d 766, 768 (2016) (holding that the timely filing of an occupational disease claim under section 97-58(c) is "an issue of jurisdiction for the commission"); *Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 86, 401 S.E.2d 138, 140 (1991) ("[T]he timely filing of a claim for compensation is a condition precedent to the right to receive compensation and failure to file timely is a jurisdictional bar for the Industrial Commission.").

¶ 24 We first determine when plaintiff was informed by competent medical authority of the nature and work-related cause of his PTSD. *See Dowdy*, 308 N.C. at 710, 304 S.E.2d at 221; *Rainey*, 247 N.C. App. at 597, 785 S.E.2d at 768. Plaintiff first saw Azoy through the Employee Assistance Program on 11 October 2017; Azoy directed Plaintiff to seek treatment with a psychiatrist. Though Azoy's notes reflect a diagnosis of PTSD, those notes were not signed until 2 March 2018, and there is no indication that Azoy communicated a diagnosis to Plaintiff.

¶ 25 Plaintiff began treatment with Dr. Su on 30 October 2017 and then with Allen on 7 November 2017. Plaintiff sought his diagnosis and prognosis from Dr. Su on 18 December 2017 and four days later emailed Sullivan and Turner that Dr. Su's "diagnosis was PTSD," Plaintiff's "prognosis was very poor as to whether [he] would return to duty," and Plaintiff's illness was "due to [his] career in the fire service and is related to [his] job." The greater weight of the evidence shows that Plaintiff was not clearly, simply, and directly informed of the nature and work-related cause of his present PTSD by competent medical authority until 18 December 2017.

¶ 26 Defendants argue that Plaintiff was informed by competent medical authority of the nature and work-related cause of his PTSD in or before 2004. This argument is without merit.

¶ 27 Defendants rely in significant part on the four records from Dr. Herfkens and Dr. Benjamin. Defendants contend that when Plaintiff "saw Dr. Herfkens in 2004" he "had a noted history of depression and PTSD, which [Dr. Herfkens] stated were diagnosed as a result of [Plaintiff's] employment." Defendants overstate the contents of Dr. Herfkens' report and notes. In her 6 January 2004 report, Dr. Herfkens wrote only that it was "possible that [Plaintiff] has mild residual depressive and PTSD symptoms as a result of" the December 2002 incident. Dr. Herfkens' "diagnostic impressions" did not include PTSD and her notes from Plaintiff's 20 January 2004 follow-up appointment did not mention PTSD. While Dr. Herfkens indicated that Plaintiff had "reported a history of depression and PTSD related to events in his work as a firefighter," she neither wrote nor testified that she or another medical provider had diagnosed Plaintiff with PTSD.

¶ 28 Defendants' own expert, Dr. Artigues, opined that Dr. Herfkens' records may have reflected Plaintiff's self-report of suffering from PTSD symptoms. Dr. Artigues testified that based on these records, she could not determine "if a doctor actually diagnosed him with PTSD or if he self-diagnosed[.]" Plaintiff's own testimony suggests that he may have self-reported in the past; he explained that when he first "open[ed] up" about his condition in 2017, he was self-reporting based on his understanding of PTSD, and he had used the term PTSD "for lack of better words." Evidence indicating Plaintiff self-reported that he had PTSD symptoms or PTSD falls short of showing that Plaintiff was advised by competent medical authority that he had work-related PTSD. *See Terrell v. Terminix Servs.*, 142 N.C. App. 305, 308, 542 S.E.2d 332, 335 (2001) (the Workers' Compensation Act "does not require an employee to diagnose himself or file a claim based on his own suspicions").

¶ 29 Defendants also state that Dr. Benjamin "specifically diagnosed post-concussive syndrome with resultant PTSD, anxiety disorder, and depression in February 2004." Dr. Benjamin's 5 February 2004 notes include one line which states, "A: Post concussive syndrome with resultant post traumatic stress disorder, anxiety disorder, and depression." However, Dr. Benjamin expressly noted that he had referred to and relied on the report in which Dr. Herfkens found only that it was "possible" that Plaintiff had residual depressive and PTSD "symptoms" as a result of the December 2002 incident. Additionally, the lack of reference to PTSD in Dr. Benjamin's notes from a follow-up visit with Plaintiff

just weeks later indicates that Dr. Benjamin had not in fact diagnosed Plaintiff with PTSD.

¶ 30 Dr. Benjamin's 5 February 2004 notes otherwise state that Plaintiff suffered a "post concussive syndrome" with "symptoms" of PTSD. This too is insufficient to show that Plaintiff was advised by competent medical authority that he had work-related PTSD in 2004. Instead, the evidence suggests that Plaintiff may have been informed that he was experiencing symptoms of PTSD in 2004 without a formal diagnosis of work-related PTSD. Dr. Artigues testified that "most of the time . . . people have some symptoms along the way, and then PTSD declares itself." Dr. Artigues further explained that a person may initially have "subclinical PTSD" which presents "some symptoms of PTSD" but does not meet all the criteria for diagnosis.

¶ 31 Defendants also argue that Allen's records and testimony demonstrate that Plaintiff was informed by competent medical authority of the nature and work-related cause of his PTSD in or before 2004. Allen's notes from his assessment of Plaintiff state, "PTSD: Diagnosed at age 35. Received Outpatient Treatment at age 35" under the heading "Psych & SA Dx – Past and Present." But when asked to confirm that he was "aware that [Plaintiff] was diagnosed with PTSD as early as early 2000s," Allen responded only, "Yeah. I would imagine that – what he was going through[.]" Allen's equivocal deposition testimony undercuts the assertion in his notes that Plaintiff was diagnosed with PTSD at age 35. Moreover, Allen did not identify any particular individual as a "competent medical authority" responsible for the purported early 2000s diagnosis of PTSD, or reveal the extent of information, if any, that Plaintiff was given concerning such a diagnosis. This evidence therefore fails to establish that by 2004, competent medical authority informed Plaintiff of the nature and work-related cause of the trauma-related PTSD that he is now experiencing.

¶ 32 Defendants contend that "all of the traumatic events which [Plaintiff] points to, which he indicates caused his conditions and symptoms, took place well before [Plaintiff] moved to the administrative position of fire marshal" in 2012, "with the most recent cited event taking place in 2009[.]" Yet the record demonstrates that even after these dates, Plaintiff was still required to respond to "active fires and other significant incidents" and experienced further trauma which contributed to his condition. In particular, Plaintiff identified the spring of 2017 fire which killed two dogs as precipitating some of his symptoms:

> [I]t was the smell that I remember. It's burnt hair, burnt flesh. I was proud that day because I sat and

> watched our Fire Fighters bury those – that family's animals in their yard. . . . But that smell, it stayed . . . . And it was shortly after that that I opened my car door one day and the smell hit me and I vomited in the woods behind my car.

More fundamentally, the date of Plaintiff's last exposure to traumatic events is immaterial. The inquiry under sections 97-22 and 97-58(c) is not the date of the employee's last exposure to a harmful stimulus, but the date of death, disability, or disablement and the date the employee was informed of the nature of his disease and its work-related cause by competent medical authority. *Dowdy*, 308 N.C. at 706, 304 S.E.2d at 218-19.

¶ 33 Even assuming for the sake of argument that Plaintiff was diagnosed with PTSD in or before 2004, sections 97-22 and 97-58(c) would not operate to bar his claim. The record demonstrates that the PTSD for which Plaintiff now seeks compensation is distinct in cause, more severe in nature, and remote in time from any PTSD he may have suffered in or before 2004. As Plaintiff argues, the medical consensus is that his cumulative exposure to trauma throughout his employment with the CHFD was a significant contributing factor to his current PTSD. By contrast, Plaintiff's medical records indicate that many of the symptoms he was experiencing in the early 2000s were secondary to, and attributable to, his 2002 injury.

¶ 34 Additionally, the symptoms Plaintiff began suffering in 2017 differ from his previous symptoms in their nature and severity. Plaintiff testified that he began experiencing some of the more debilitating symptoms in the spring of 2017 and had "never been at the point I'm at right now." Plaintiff explained that he had been able to work through some of the traumatic situations he had faced in the past and did not recall missing work due to depression or other psychological conditions, prior to October 2017. Plaintiff also indicated that the severity of his sleep issues was new. Plaintiff's wife testified that "she had been married to Plaintiff for thirty-one years, and had not seen him exhibit his current symptoms before 2017."

¶ 35 Lastly, the evidence shows that more than a decade passed between Plaintiff's symptoms in 2002 to 2004 and his current symptoms. On 4 March 2004, Dr. Benjamin noted that Plaintiff was "doing much better" and had "noticed a difference as ha[d] his wife and co-workers." As the Commission found, Plaintiff did not miss any more work due to any alleged work-related condition between his July 2003 return to full duty and October 2017, and there is no "evidence that Plaintiff received

any treatment for any neurocognitive or emotional symptoms between March 2004 and October 2017." Daniel Jones, chief of the CHFD from the time Plaintiff was hired until 2015, "was not aware of any time Plaintiff had to miss work due to emotional or psychological symptoms[.]"

¶ 36 The greater weight of the evidence shows that Plaintiff was not clearly, simply, and directly informed of the nature and work-related cause of his present PTSD until 18 December 2017.[2] Because Plaintiff filed his claim on 2 January 2018, the Commission erred by concluding that Plaintiff failed to timely file his claim within the two-year period provided by section 97-58(c). Additionally, because Plaintiff gave notice of his diagnosis and prognosis to Sullivan and Turner on 22 December 2017, the Commission erred by concluding that Plaintiff failed to comply with the 30-day notice requirement in section 97-22. We reverse the Commission's opinion denying Plaintiff's claim and remand for a determination of the merits of Plaintiff's claim. *See Rutledge*, 105 N.C. App. at 311, 412 S.E.2d at 904 (reversing the Commission's determination of lack of jurisdiction due to noncompliance with section 97-58(c) and remanding to the Commission for consideration of plaintiff's claim).

III. Conclusion

¶ 37 The greater weight of the evidence demonstrates that Plaintiff was not informed of the nature and work-related cause of his current PTSD by competent medical authority until 18 December 2017. Because Plaintiff notified his employer of his condition on 22 December 2017 and filed his claim on 2 January 2018, the Commission erred by concluding that his claim was barred by sections 97-22 and 97-58(c). We reverse the Commission's opinion and award denying Plaintiff's claim and remand for a determination of the merits of Plaintiff's claim.

REVERSED AND REMANDED.

Judges ZACHARY and ARROWOOD concur.

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2. Because Plaintiff was not advised by competent medical authority of the nature and work-related cause of his PTSD until December 2017, the two-year filing period could not begin to run until that time. *See Dowdy*, 308 N.C. at 706, 304 S.E.2d at 218-19 ("The two year period for filing claims for an occupational disease does not begin to run until" the employee is disabled by an occupational disease and is informed by competent medical authority of the nature and work related cause of the disease). Accordingly, we need not determine precisely when Plaintiff became disabled by his condition. *Cf. Rutledge v. Stroh Companies*, 105 N.C. App. 307, 311, 412 S.E.2d 901, 904 (1992) (finding it unnecessary to address the "date on which plaintiff was informed by competent medical authority of the nature and work-related cause of his disease" because plaintiff filed his claim within two years of becoming disabled); *Underwood v. Cone Mills Corp.*, 78 N.C. App. 155, 158, 336 S.E.2d 634, 637 (1985) (same).

STATE OF NORTH CAROLINA
v.
STANLEY MARCUS DRAUGHON AND PHYLLIS ANN MULL

No. COA21-177

Filed 1 February 2022

1. Appeal and Error—preservation of issues—suppression of evidence—failure to make motion before or during trial—general objection

In a prosecution for charges arising from an assault with a deadly weapon, defendant waived appellate review of challenged evidence obtained from his cell phone where he failed to file a motion to suppress before or during trial (defendant asserted that the State did not file a notice of intent) and made only a general objection during trial.

2. Conspiracy—assault—with a deadly weapon with the intent to kill inflicting serious injury—sufficiency of evidence

The State presented substantial evidence that defendant was guilty of conspiracy to commit assault with a deadly weapon with the intent to kill inflicting serious injury where, in the light most favorable to the State, defendant and his co-defendant were in a relationship (supported by numerous calls and text messages between them); the victim previously had discovered defendant in the home that the victim shared with the co-defendant, which raised a conflict between defendant and the victim (who had previously been in a romantic relationship with the co-defendant, had a child with her, and still lived with her); the victim saw defendant, the co-defendant, and an unidentified man in the doorway of his home right before the assault; defendant and the unidentified man worked together in beating the victim; and the co-defendant later gave the box cutter that the victim had used to defend himself to a friend.

3. Conspiracy—assault—with a deadly weapon with the intent to kill inflicting serious injury—sufficiency of evidence

In a prosecution of two individuals for charges arising from an attack on the female co-defendant's former boyfriend, whom she had a child with and still lived with, the State presented substantial evidence that the female co-defendant was guilty of conspiracy to commit assault with a deadly weapon with the intent to kill inflicting serious injury where, in the light most favorable to the State, defendants were in a relationship together (supported by numerous

calls and text messages between them); the victim previously had discovered defendant in the home that the victim shared with the co-defendant, which raised a conflict between defendant and the victim; the victim saw defendant, the co-defendant, and an unidentified man in the doorway of his home right before the assault; and the co-defendant later gave the box cutter that the victim had used to defend himself to a friend, acknowledging that it was the victim's and that he "had it that night." It was not necessary that the co-defendant take an active part in the assault to be convicted on the conspiracy charge.

4. Appeal and Error—preservation of issues—specific grounds for motion for judgment notwithstanding the verdict—verdicts not legally contradictory

In a prosecution of two individuals for charges arising from an attack on the female co-defendant's former boyfriend, whom she had a child with and still lived with, the issue of the trial court's alleged error in denying the co-defendant's motion for judgment notwithstanding the verdict was not preserved for appellate review because the co-defendant failed to state the specific grounds for the motion. The co-defendant failed to demonstrate on appeal that the alleged error merited Appellate Rule 2 review, because her substantive argument was meritless—specifically, the jury verdicts finding her not guilty of assault with a deadly weapon with the intent to kill inflicting serious injury (AWDWIKISI) but guilty of conspiracy to commit AWDWIKISI were not legally contradictory.

Appeal by defendants from judgments entered 4 December 2019 by Judge Michael A. Stone in Hoke County Superior Court. Heard in the Court of Appeals 11 January 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kayla D. Britt and Assistant Attorney General Nicholas R. Sanders, for the State.

Jarvis John Edgerton, IV, for defendant-appellant Draughon.

Hynson Law, PLLC, by Warren D. Hynson, for defendant-appellant Mull.

ARROWOOD, Judge.

¶ 1 Stanley Marcus Draughon ("Draughon") and Phyllis Ann Mull ("Mull") appeal from judgments entered upon jury verdicts finding Draughon guilty of assault with a deadly weapon with the intent to kill inflicting serious injury ("AWDWIKISI") and conspiracy to commit AWDWIKISI, and finding Mull guilty of conspiracy to commit AWDWIKISI. Draughon argues the trial court erred in denying his motion to suppress cell phone evidence and in denying his motion to dismiss for insufficient evidence. Mull argues the trial court erred in denying her motion to dismiss for insufficient evidence and in denying her motion for judgment notwithstanding the verdict. For the following reasons, we hold that both defendants received fair trials free from error.

I. Background

¶ 2 On 16 November 2015, a Hoke County grand jury indicted Draughon for AWDWIKISI and robbery with a dangerous weapon. On 3 April 2017, a Hoke County grand jury indicted Mull for AWDWIKISI, robbery with a dangerous weapon, and conspiracy to commit AWDWIKISI. The grand jury returned superseding indictments on 9 April 2018 charging Mull with the same crimes and adding an additional charge against Draughon for conspiracy to commit AWDWIKISI.

¶ 3 The cases were joined for trial over Draughon's objection and came on to be tried at the 18 November 2019 Criminal Session of Hoke County Superior Court, Judge Stone presiding. Both defendants pleaded not guilty to all charges. The evidence presented at trial tended to show as follows.

¶ 4 Beginning in 1994, Perry McBryde ("McBryde") lived with Mull in a home on a 35-acre property in Raeford, North Carolina. At some point in 1997, the relationship between McBryde and Mull "had kind of advanced to where [they] were going to get married," and Mull's name was added to the deed for the property. McBryde and Mull had a child together in 2007, but the relationship steadily deteriorated; by early 2011, there was not "much to" the relationship, but the two continued to live together for their daughter's benefit.

¶ 5 On 26 September 2014, McBryde picked his daughter up from school early because they "were going to go shopping" for McBryde's birthday. When McBryde and his daughter walked into McBryde's home, they saw Mull in the kitchen with a man who was sitting at the kitchen bar. McBryde's daughter asked Mull who the man was, and Mull responded, "Stan." McBryde then asked the man for his name, and the man immediately responded by asking McBryde for his name. McBryde approached the man and said "Look, you're in my house. What is your name?" The

man responded, "I'm Stanley Draughon." McBryde recognized the name and told Draughon that he "didn't want him there because of [McBryde's] daughter and that he needed to go." Draughon did not leave and said, "I'll be here as long as [Mull] wants me here," to which McBryde responded, "You need to go because if you don't go, there's going to be trouble. I don't want you around my daughter." McBryde and his daughter left to go shopping.

¶ 6 On 16 October 2014, McBryde spent the evening watching football in his office, located in a building on the same property as his home. After the football game ended, McBryde drove his truck back to his house from the office building. When McBryde went to unlock and open the door, it "opened just a little bit, a few inches, and it abruptly shut right back and then it just swung open." As the door swung open, McBryde saw Draughon and a man he did not recognize standing in the doorway; both were wearing "black toboggan[s]" that did not cover their faces. McBryde also saw Mull standing behind the two men "wearing a white-ish colored nighty with . . . roses on it."

¶ 7 Almost immediately after the door opened, Draughon hit McBryde above his left eye with a blunt object that "was two or three [feet] long." McBryde "bear-hugged" Draughon to prevent Draughon from continuing to hit McBryde, but McBryde began to get hit in the back "with something that was burning" which McBryde later learned was a taser. McBryde tried to get away but tripped over the tongue of the trailer attached to his truck and fell on his back.

¶ 8 The unidentified man put McBryde in a chokehold, so McBryde pulled out a box cutter[1] that he "always" kept on the right-hand pocket of his jeans so that he could defend himself. McBryde was then hit in the back of the head with an object and attempted to use his arms and legs to shield himself from the beating. McBryde eventually "just laid there and . . . kind of tried to play dead." Draughon and the other man then left the scene, and McBryde called 911 on his cell phone.

¶ 9 Officers Alan Sanchez ("Officer Sanchez") and Tracy Grady ("Officer Grady") and Detective Kelly Jacobs ("Detective Jacobs") with the Hoke County Sheriff's Office responded to the scene. Officer Sanchez was the first to arrive at the scene and noted that McBryde was lying on his back near the truck and appeared to have been "severely beaten[.]" McBryde "[a]ppeared to be in excruciating pain" but told the officers that Draughon had assaulted him. Officer Grady entered the home and

1. McBryde later stated that it was a "blue cobalt box cutter."

continuously yelled "Sheriff's department" and "Come out" but received no response. Officer Grady eventually found Mull in a bedroom in bed with her child; when Officer Grady asked Mull if she had heard or seen "what was going on," Mull stated that she had neither heard nor seen anything. When Officer Grady told Mull that McBryde was laying outside and had been injured, Mull "didn't say anything" and had "[n]o expression." At trial, Detective Jacobs testified that based on his understanding at the scene, the situation was "being looked at so far as an assault, but still in the misdemeanor capacity."

¶ 10 McBryde was transported to the hospital, where he was diagnosed with two broken arms, a laceration above the left eye, two scalp lesions, three right lower extremity wounds, and two left upper extremity wounds. McBryde was referred to Orthopedic Physician Assistant Scott Olson ("Olson") who found several other fractures in his arms and legs. Specifically, Olson determined that McBryde had a displaced fracture in the right ulna, a non-displaced fracture in the left ulna, and a fracture of the ulnar head in McBryde's left arm. Olson described McBryde's injuries as "nightstick fractures."[2] Olson placed McBryde in casting throughout his body, and a surgeon operated on his right displaced ulnar fracture.

¶ 11 On 29 October 2014, McBryde went to the Hoke County District Attorney's office, where he spoke to a prosecutor and gave a statement to Detective William Tart ("Detective Tart"). Detective Tart subsequently retrieved security camera footage from McBryde's office. After reviewing the footage, Detective Tart confirmed that the footage showed something "consistent with a disturbance, assault[,]" but was unable to identify "specific people[.]"

¶ 12 Detective Tart "reopened the investigation as a felonious assault" after speaking to McBryde and seeing the extent of his injuries. Detective Tart went to McBryde's property and took pictures, checked for traces of blood or biological evidence, and swabbed the truck for DNA. Detective Tart did not submit the swabs for analysis and did not take fingerprints, as nearly two weeks had passed since the assault and the scene was "contaminated" by that time.

¶ 13 On 31 October 2014, Detective Tart called Mull to schedule an interview and take a statement, which took place on 4 November 2014. On 5 November 2014, Detective Tart swore to an arrest warrant on Draughon

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2. According to Olson, the term originally "came from Britain" and referred to people hit in the arms with "billy clubs" that "would crack the ulna[.]"

for charges of felony AWDWIKISI and robbery with a dangerous weapon. Draughon turned himself in at the Hoke County Sheriff's Office on 10 November 2014.

¶ 14 When Draughon turned himself in, Detective Tart seized Draughon's cell phone. At trial, when the State began to question Detective Tart about the cell phone, Draughon's trial counsel objected, and the trial court conducted a bench conference outside the presence of the jury. The objection was as follows:

> If Your Honor, please, I lodged an objection to the State making a reference to Mr. Draughon's telephone, and the reason I make that objection is because it was illegally obtained. There were several search warrants that were contained in discovery and one of the search warrants says to search the phone, but looking back at the discovery, none of those search warrants gives law enforcement authority to search a vehicle or vehicle that belonged -- that transported Mr. Draughon to the sheriff's department.
>
> Our information is that on November 10th, 2014, Mr. Draughon turned himself in. He was driven there by his father. He went inside the sheriff's department and while he was inside the sheriff's department, someone from the - either Mr. Tart or someone from the sheriff department came outside and began searching the vehicle in which Mr. Draughon was a passenger.
>
> We would contend that there was no search warrant for that telephone. There was no search warrant that would allow him to go in that car to search that vehicle. We would contend that a passenger in the vehicle has just as much rights as the driver of that vehicle. The fact that they illegally obtained this telephone, we would ask the Court to not allow them to introduce, number one, any testimony that the phone was seized and, number two, any evidence pertaining to the telephone under the circumstances under which it was seized in this particular case.
>
> So that is my objection. It is illegally obtained, it was illegally seized. There was no search warrant, no permission given to take the phone, and they took this

> phone and now [are] trying to introduce it into evidence, Your Honor.

Draughon's objection was overruled, and Draughon's trial counsel noted his exception to the ruling, which was noted for the record.

¶ 15 Detective Tart testified that he obtained a search warrant for the contents of the cell phone. In searching the contact list of Draughon's cell phone, Detective Tart found a number associated with Mull under the name "Phillip Miller." A data extraction of Draughon's phone showed a total of 557 phone calls and 533 text messages made on Draughon's phone between 18 October 2014 and 10 November 2014. Of the 533 text messages, 123 entries were either sent to or from the "Phillip Miller" contact. Sixty-nine of the phone call entries on Draughon's phone had been deleted, many of which apparently had nothing to do with the case; many of the text messages from "Phillip Miller" were not deleted. The data extraction was limited to metadata and did not contain substantive content of the communications.

¶ 16 In October 2016, Mull moved in with Toni Caruso ("Caruso") and stayed with her until around Christmas of that year. At some point while Mull was staying with Caruso, Mull gave Caruso a box opener. At trial, Caruso testified that she asked Mull where it came from, and Mull responded that "[i]t was [McBryde's] and he had it that night." Caruso described the box cutter as "maybe six inches long, blue and silver looking." After reading a news article about the case, Caruso became concerned about possessing the box cutter and called the Hoke County District Attorney's Office to "see what [she] needed to do with it." A detective collected the box cutter from Caruso's home.

¶ 17 At the close of the State's evidence, both defendants made motions to dismiss all charges. The trial court denied both motions.

¶ 18 Draughon tendered three alibi witnesses in his defense. Paul Alducin ("Alducin") testified that he was an acquaintance of Draughon's and had worked with him at a sound and lighting production company. Alducin testified that on 16 October 2014, he arrived at Louie's Bar in Fayetteville, North Carolina at around 10:15 p.m. and saw Draughon at Louie's Bar at around 10:30 p.m., 11:00 p.m., and 1:00 a.m. that night. Jerry Wayne Godfrey ("Godfrey") also testified that he was at Louie's Bar on the night of 16 October 2014. Godfrey stated that he arrived "[b]etween 8:00 and 8:15" and saw Draughon "standing and walking around" within 15 or 20 minutes of his arrival. Godfrey testified that he left Louie's Bar around 11:30 p.m., and Draughon was still there when he left. Jack Bussey ("Bussey") similarly testified that he arrived at

Louie's Bar between 8:00 p.m. and 8:30 p.m., saw Draughon socializing, and saw that Draughon was still at the bar when Bussey left at around 12:30 a.m. Mull did not present any witnesses or evidence.

¶ 19 At the close of all evidence, Draughon and Mull moved to dismiss all charges for insufficient evidence. The trial court denied Draughon's and Mull's motions with respect to the charges of AWDWIKISI and conspiracy and granted the motions with respect to robbery with a dangerous weapon, dismissing that charge for both defendants.

¶ 20 On 4 December 2019, the jury returned verdicts for both defendants. The jury found Draughon guilty of AWDWIKISI and conspiracy to commit AWDWIKISI. The jury found Mull not guilty of AWDWIKISI and guilty of conspiracy to commit AWDWIKISI.

¶ 21 After the jury returned its verdicts and before proceeding to sentencing, Draughon made an oral motion for judgment notwithstanding the verdict, which Mull joined:

> THE COURT: All right. Mr. John Thompson, moving to sentencing.
>
> [Draughon's counsel]: Your Honor, we would make a motion at this time for judgment notwithstanding the verdict in this case.
>
> THE COURT: All right. Mr. Van Camp, any issues?
>
> [Mull's counsel]: I will join in that motion.
>
> THE COURT: The motion for dismissal of both [Draughon's counsel] and [Mull's counsel] is denied.

¶ 22 The trial court sentenced Draughon to a term of 96 to 128 months imprisonment on the AWDWIKISI conviction and 67 to 93 months imprisonment on the conspiracy conviction, running consecutively. The trial court sentenced Mull to a term of 84 to 113 months imprisonment on her conspiracy conviction. Draughon and Mull gave oral notice of appeal in open court.

II. Discussion

¶ 23 Draughon contends the trial court erred in denying his motions to suppress and to dismiss. Mull contends the trial court erred in denying her motions to dismiss and for judgment notwithstanding the verdict. We address each defendant's appeal in turn.

A. Defendant Draughon

1. Motion to Suppress

¶ 24 **[1]** In superior court, a defendant is generally required to make a motion to suppress prior to trial "unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial" under the remaining statutory subsections. N.C. Gen. Stat. § 15A-975(a) (2021).

> A motion to suppress may be made for the first time during trial when the State has failed to notify . . . the defendant, sooner than 20 working days before trial, of its intention to use the evidence, and the evidence is . . . obtained by virtue of a search without a search warrant[.]

N.C. Gen. Stat. § 15A-975(b).

¶ 25 A motion to suppress "must state the grounds upon which it is made[.]" N.C. Gen. Stat. § 15A-977(a) (2021). A motion to suppress may be summarily denied if the motion "does not allege a legal basis for the motion[,]" or if the supporting affidavit "does not as a matter of law support the ground alleged." N.C. Gen. Stat. § 15A-977(c). "A motion to suppress made during trial may be made in writing or orally and may be determined in the same manner as when made before trial. The hearing, if held, must be out of the presence of the jury." N.C. Gen. Stat. § 15A-977(e).

¶ 26 "A motion to suppress made at trial, whether oral or written, should state the legal ground upon which it is made." *State v. Roper*, 328 N.C. 337, 361, 402 S.E.2d 600, 614 (1991). "While an affidavit is not required for a motion timely made at trial, the defendant must, however, specify that he is making a motion to suppress and request a *voir dire*." *Id.*

> When a defendant files a motion to suppress before or at trial in a manner that is consistent with N.C.G.S. § 15A-975, that motion gives rise to a suppression hearing and hence to an evidentiary record pertaining to that defendant's suppression arguments. But when a defendant . . . does *not* file a motion to suppress at the trial court stage, the evidentiary record pertaining to his suppression arguments has not been fully developed, and may not have been developed at all.

State v. Miller, 371 N.C. 266, 269, 814 S.E.2d 81, 83 (2018). This failure may constitute a complete waiver of appellate review. *Id.* at 273, 814 S.E.2d at 85 ("By doing so, [the defendant] completely waived appellate review of his Fourth Amendment claims.")

¶ 27 Draughon asserts the State did not file any notice of intent to introduce the challenged cell phone evidence as required under N.C. Gen. Stat. § 15A-975(a), and accordingly Draughon's motion to suppress was timely made during trial. A review of the transcript, however, reflects that Draughon's trial counsel made a general objection without specifying that he was making a motion to suppress. Draughon's trial counsel also never requested a *voir dire*. At no point during the argument did Draughon, the State, or the trial court acknowledge that a motion to suppress was being addressed. The record and transcript reveal that Draughon only made a general objection, and Draughon has failed to meet the burden of establishing that he made a motion to suppress in proper form. Because Draughon did not file a motion to suppress the cell phone evidence before or during trial, he has completely waived appellate review of the issue.

2. Motion to Dismiss

¶ 28 **[2]** Although Draughon made motions to dismiss all charges at the close of the State's evidence and at the close of all evidence, Draughon's appeal only addresses the conspiracy conviction. Accordingly, our review of the trial court's ruling on Draughon's motion to dismiss is limited to the charge of conspiracy to commit AWDWIKISI.

¶ 29 "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (quotation marks omitted) (quoting *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002)). "Substantial evidence is [the] amount . . . necessary to persuade a rational juror to accept a conclusion." *Id.* (quoting *Mann*, 355 N.C. at 301, 560 S.E.2d at 781). In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom[.]" *Id.* (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

¶ 30 If the record developed at trial contains "substantial evidence, whether direct or circumstantial, or a combination, 'to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should

be denied.' " *Id.* at 575, 780 S.E.2d at 826 (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018) (citation and quotation marks omitted).

¶ 31 " 'A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means.' " *State v. Billinger*, 213 N.C. App. 249, 255, 714 S.E.2d 201, 206 (2011) (quoting *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975)).

¶ 32 "A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense." *State v. Bindyke*, 288 N.C. 608, 615-16, 220 S.E.2d 521, 526 (1975) (citation and quotation marks omitted). "The conspiracy is the crime and not its execution." *Id.* at 616, 220 S.E.2d at 526 (citing *State v. Lea*, 203 N.C. 13, 164 S.E. 737 (1932)). "Therefore, no overt act is necessary to complete the crime of conspiracy[,]" and "[a]s soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *Id.* (citation omitted). "The existence of a conspiracy may be established by direct or circumstantial evidence." *Id.* Direct proof of a conspiracy "is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *Id.* (citation and quotation marks omitted).

¶ 33 Draughon argues that the evidence raised no more than a mere suspicion that an agreement existed between him and either Mull or the unidentified man to commit the offense of AWDWIKISI. We disagree.

¶ 34 The evidence presented at trial reflected that Draughon and Mull had a relationship, supported by numerous calls and texts between the two and Draughon's presence at McBryde's house on 26 September 2014. Draughon's presence at McBryde's house raised a conflict between the two, and Draughon stated that he would remain at the house "as long as" Mull wanted him there. McBryde testified that when he was assaulted, he saw Draughon and the unidentified man in the doorway of his home, with Mull standing in the doorway behind them. Draughon and the unidentified man worked together in beating McBryde, with Draughon using a blunt object and the unidentified man placing McBryde in a chokehold and using a taser. Draughon and the unidentified man continued to beat

McBryde until he "play[ed] dead." And in October 2016, Mull gave to a third-party the box cutter that McBryde "had that night."

¶ 35 Although each of these indefinite acts and occurrences may have little weight standing alone, taken collectively, they constitute substantial evidence that a conspiracy existed between either Draughon and Mull or between Draughon and the unidentified man to assault McBryde with a deadly weapon, with the intent to kill. The trial court did not err in denying Draughon's motion to dismiss the conspiracy charge.

B. Defendant Mull

1. Motion to Dismiss

¶ 36 **[3]** The standard of review and rules of law for this issue are the same as previously stated with respect to Draughon.

¶ 37 As previously stated, the evidence presented at trial reflected that Mull had a friendly relationship with Draughon and that Draughon was at McBryde and Mull's home "as long as" Mull wanted him there. The data extraction on Draughon's phone also revealed a significant volume of calls and text messages between Draughon and Mull between 18 October 2014 and 10 November 2014. McBryde testified that on the night of the assault, he again saw Mull and Draughon together in the home, this time standing in the doorway just before the assault began. And approximately two years after the assault, Mull gave away a box cutter belonging to McBryde, which "he had . . . that night."

¶ 38 The evidence reflects that although Mull and McBryde had been engaged in a romantic relationship, shared a child, and continued to live on the same property, their relationship had deteriorated and animosity existed between the two. On 16 October 2014, Mull invited Draughon and the unidentified man into the house, where they waited for McBryde to return so that they could assault him. Mull was present at the house when police arrived, and McBryde testified that he saw her standing immediately behind Draughon and the unidentified man before the assault took place. Finally, Mull maintained possession of the box cutter that went missing during the assault, and when she gave it to Caruso, she confirmed that it belonged to McBryde and that McBryde had the box cutter "that night."

¶ 39 Taken together, and considering the evidence "in the light most favorable to the State," the evidence points unerringly to the existence of an agreement between Mull and Draughon for Draughon and an unidentified man to assault McBryde with a deadly weapon, with intent to kill. Although Mull did not take an active part in the assault, "[t]he

conspiracy is the crime and not the execution." *Bindyke*, 288 N.C. at 616, 220 S.E.2d at 526 (citation omitted). The trial court did not err in denying Mull's motion to dismiss.

2. Motion for Judgment Notwithstanding the Verdict

¶ 40 **[4]** Mull next argues the trial court erred in denying her motion for judgment notwithstanding the verdict because the jury's verdicts "were legally inconsistent and contradictory," and accordingly this Court should vacate Mull's conviction and grant her a new trial. We disagree.

¶ 41 A motion for judgment notwithstanding the verdict is treated the same as a motion for directed verdict. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985) (citations omitted). "In a criminal case, a motion for directed verdict and a motion to dismiss have the same effect and are reviewed under the same standard of review on appeal." *State v. Coleman*, 254 N.C. App. 497, 500, 803 S.E.2d 820, 823 (2017) (citation omitted). Accordingly, a motion for judgment notwithstanding the verdict and a motion to dismiss have the same effect and are reviewed under the same standard of review on appeal.

¶ 42 Rule 10 of the North Carolina Rules of Appellate Procedure provides:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a). Although this Court may suspend the Rules of Appellate Procedure to review an unpreserved issue, it may only do so "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C. R. App. P. 2. "[T]he exercise of Rule 2 was intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (citations and quotation marks omitted).

¶ 43 In this case, Mull joined Draughon's oral motion for judgment notwithstanding the verdict, with Mull's trial counsel stating: "I will join in that motion." Mull's trial counsel did not state that the basis of her motion was the alleged inconsistent verdicts of guilty to conspiracy and not guilty to AWDWIKISI, which is the argument Mull now presents on

appeal. Mull's trial counsel did not make any further statements or arguments with respect to the motion to make apparent the specific grounds for the motion. Because Mull failed to state the specific grounds for the ruling Mull desired, the issue is not preserved for appellate review.

¶ 44 Mull requests that we invoke Rule 2 to review the matter because Mull was sentenced to a minimum of seven years imprisonment "on the basis of what appear to be legally inconsistent and mutually exclusive verdicts, warranting invocation of Rule 2 to prevent manifest injustice." The State, on the other hand, argues that Mull has not shown that the circumstances of this case warrant suspension of the Rules of Appellate Procedure. To resolve this question, we address the merits of Mull's argument.

¶ 45 "In North Carolina jurisprudence, a distinction is drawn between verdicts that are merely inconsistent and those which are legally inconsistent *and* contradictory." *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010) (citation omitted). "[W]hen there is sufficient evidence to support a verdict, 'mere inconsistency will not invalidate the verdict.' " *Id.* (quoting *State v. Davis*, 214 N.C. 787, 794, 1 S.E.2d 104, 108 (1939)). "Verdicts are inconsistent when they reflect some logical flaw or compromise in the jury's reasoning." *State v. Watson*, 2021-NCCOA-186, ¶ 38. "[A] verdict is legally contradictory, or mutually exclusive, when it purports to establish that the defendant is guilty of two separate and distinct criminal offenses, the nature of which is such that guilt of one necessarily excludes guilt of the other." *Id.* ¶ 39 (quotation marks omitted).

¶ 46 In *Mumford*, our Supreme Court concluded the verdicts were inconsistent but not contradictory because a conviction for felony serious injury by vehicle "does not require a *conviction* of driving while impaired under N.C.G.S. § 20-138.1 or N.C.G.S. § 20-138.2, but only requires a finding that the defendant was engaged in the conduct described under either of these offenses." *Mumford*, 364 N.C. at 401, 699 S.E.2d at 916.

¶ 47 Conspiracy is a distinct and separate crime from a principal offense, even where the principal offense is based on an "acting in concert" theory. *State v. Kemmerlin*, 356 N.C. 446, 477, 573 S.E.2d 870, 891 (2002). "The crime of conspiracy is complete when there is a meeting of the minds and no overt act is necessary." *State v. Christopher*, 307 N.C. 645, 649, 300 S.E.2d 381, 383 (1983) (citation omitted).

¶ 48 In this case, the jury found Mull not guilty of AWDWIKISI and guilty of conspiracy to commit AWDWIKISI. These verdicts are not inconsistent and legally contradictory *or* mutually exclusive. The two crimes are not "such that guilt of one necessarily excludes guilt of the other" and

are instead legally consistent. *See Watson*, ¶ 39. Substantial evidence established that Mull and Draughon had a meeting of the minds with respect to the assault on McBryde; this completed the crime of conspiracy, and no overt act on Mull's part was necessary. Mull has failed to show that this case presents a "rare occasion" warranting the exercise of Rule 2, and has also failed to show that the verdicts were legally contradictory or mutually exclusive. Accordingly, we hold that the trial court did not err in denying Mull's motion for judgment notwithstanding the verdict.

III. Conclusion

¶ 49 For the foregoing reasons, we hold that Draughon and Mull received fair trials free from error, and that the trial court did not err in denying their motions.

NO ERROR.

Judges HAMPSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
DARIUS HEASLEY KING, DEFENDANT

No. COA21-93

Filed 1 February 2022

1. Appeal and Error—murder trial—oral notice of appeal—imperfect wording—no prejudice to State

Defendant gave proper oral notice of appeal from his first-degree murder conviction where, at trial, his counsel informed the trial court that "[w]ith respect to jury's verdict, we enter a notice of appeal." Although defense counsel did not track the language in Appellate Rule 4 by specifying that defendant was appealing from the trial court's "judgment" entering the verdict, counsel's words clearly conveyed defendant's intent to appeal the murder conviction, and the State was not prejudiced by defense counsel's imperfect wording where both parties complied at each stage of the appellate process. On the other hand, defendant's oral notice did not preserve for appellate review any issues regarding his pretrial competency hearing, which he raised for the first time on appeal.

2. Homicide—first-degree murder—premeditation and deliberation—sufficiency of evidence

At a first-degree murder trial arising from an altercation at the victim's apartment, the trial court properly denied defendant's motion to dismiss where the State presented substantial evidence of premeditation and deliberation. Although defendant testified that he "blacked out" when the victim pulled out a knife, other evidence showed that: defendant went to the apartment to collect money the victim owed him and threatened to "beat the [expletive] out of [the victim]" when the victim refused to pay; the victim sustained many stab wounds, blunt force injuries, and hemorrhaging from where defendant (by his own admission) had choked the victim; and defendant—rather than calling the police or seeking medical assistance—went home after the fight, slept, then disposed of his bloodied jeans and the knife in a dumpster the next day.

3. Criminal Law—defenses—automatism—first-degree murder—jury instruction—defendant's self-serving statements

The trial court did not commit plain error at a first-degree murder trial by failing to instruct the jury ex mero motu on the defense of automatism, where there was no evidence beyond defendant's own self-serving statements which tended to show that he was unconscious during his fatal altercation with the victim. Although defendant told law enforcement during an interview that he "blacked out" during the fight after the victim wielded a knife, he later contradicted this claim in the same interview by stating that "he knew what was going on" and by recounting specific details that occurred after the victim had taken out the knife.

4. Jury—voir dire—prosecutor's questions to prospective jurors—application of the law of self-defense

The trial court did not abuse its discretion at a first-degree murder trial by not intervening ex mero motu during the State's voir dire of prospective jurors where, rather than improperly asking the jurors to consider fact-specific hypotheticals and to forecast their ultimate verdict, the State's questions asked the jurors whether they agreed with the law of self-defense as it exists in North Carolina and whether they would be willing to accurately apply that law to the case—a key matter for defendant's theory of defense.

5. Criminal Law—prosecutor's closing argument—reasonable inferences from the evidence—not grossly improper

At a first-degree murder trial arising from an altercation at the victim's apartment, the trial court did not commit reversible error

by failing to intervene ex mero motu in the State's closing argument, where the State argued to the jury that, during the altercation, defendant rummaged through the victim's kitchen drawers, took a knife, and then stabbed the victim. Although these statements contradicted defendant's theory of self-defense, they did not contradict the evidence presented at trial; rather, the State's arguments drew reasonable inferences from the evidence presented, and therefore they were not grossly improper.

Judge MURPHY concurring in result only.

Appeal by Defendant from judgment entered 17 March 2020 by Judge Alan Z. Thornburg in Burke County Superior Court. Heard in the Court of Appeals 2 November 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc Bernstein, for the State.

Hynson Law, PLLC, by Warren D. Hynson, for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Darius Heasley King appeals from the trial court's judgment entering a jury verdict finding Defendant guilty of first-degree murder. Defendant contends (1) the State failed to present substantial evidence of premeditation and deliberation; (2) the trial court committed plain error by failing to instruct the jury *ex mero motu* on the defense of automatism; (3) the trial court abused its discretion by not intervening *ex mero motu* to prevent improper juror questioning during *voir dire*; and (4) the trial court reversibly erred by not intervening *ex mero motu* to prevent improper remarks in the State's closing statement. We discern no error.

I. Factual and Procedural Background

¶ 2 This case arises out of the murder of Hubert Roland Hunter, Jr., by Defendant in Hunter's apartment on 24 March 2018. The evidence at trial tended to show as follows:

¶ 3 Defendant and Hunter lived across the hall from one another in the Sienna apartment complex in Morganton. Mary Williams lived in the apartment directly underneath Hunter. Around midnight on the night of 24 March 2018, Williams heard a "big ruckus upstairs" coming from Hunter's apartment and thought someone "was just playing or

something." Williams heard a "whole lot of stomping and moving around and shuffling", but was not concerned because she routinely heard running noises coming from Hunter's apartment. Williams did not call the police.

¶ 4 The next afternoon, two of Hunter's friends attempted to visit with Hunter at his apartment and instead found his body lying on the apartment floor. Hunter's friends called the police. Police arrived at Hunter's apartment and discovered his body still lying on the floor, surrounded by signs of an altercation. Hunter's body was lying face-down across the threshold between his bedroom and hallway, blood staining the side of his face and his right arm bent behind his back. A plastic bag and an orange and blue sweatshirt were on the floor near Hunter's head. Bloodstains scattered the nearby floor and walls. Three kitchen drawers were left open. In the living room, an area rug was "[b]unched up" and the couch and other furniture were in disarray.

¶ 5 Shortly thereafter, a maintenance worker with the Sienna apartment complex reported to police that he discovered a white plastic bag containing bloodstained clothing in a dumpster behind the apartments. Police recovered the bag from the dumpster, and found a pair of jeans and an eight-inch kitchen knife inside the bag. The jeans and knife were also stained with what appeared to be blood.

¶ 6 The State conducted DNA analysis on items found in Hunter's apartment and the dumpster. DNA on the knife and a section of the orange and blue sweatshirt matched Hunter's DNA. DNA found on the knife also indicated a second, minor contributor, but the analysis was inconclusive and the State could not determine whether Defendant "did or did not handle the handle of the knife." The collar of the sweatshirt and the waist of the jeans contained DNA matching Defendant. The State's medical examiner also examined the injuries on Hunter's body. Hunter sustained three stabbing and slashing wounds to his neck, one of which was deep enough to fracture his spine. He also sustained blunt force injuries to his head, arms, and legs. Additionally, the medical examiner identified evidence of hemorrhaging in Hunter's blood vessels, neck muscles, and tongue, which led the medical examiner to conclude that strangulation was the ultimate cause of Hunter's death.

¶ 7 Law enforcement interviewed Defendant multiple times. The State played recordings of Defendant's interviews for the jury. During the first interview on 26 March 2018, Defendant told law enforcement that, though he knew Hunter, he did not know Hunter had been killed, did not

know any reason why Hunter would have been killed, and personally would not have fought with Hunter.

¶ 8 Law enforcement arrested Defendant and interviewed him again the next day. During this second interview, Defendant told law enforcement that he went to Hunter's apartment on March 24 to collect three dollars that Hunter owed him for a cell phone. Defendant said that Hunter refused to pay him. Defendant explained that he threatened to "beat the [expletive] out of [Hunter]", and Hunter "pulled a knife" in response. Defendant then "walked up on [Hunter]" and the two began fighting. Defendant admitted that he punched Hunter, choked him, and put the plastic bag over his head, but denied stabbing Hunter. According to Defendant, Hunter held the knife during the entirety of the fight and was incidentally stabbed in the neck while Hunter and Defendant wrestled. Defendant admitted that he took the knife out of Hunter's neck, then threw his own bloodstained jeans and the knife into the dumpster behind the apartment complex.

¶ 9 Throughout the second interview, Defendant maintained that he fought in self-defense after Hunter grabbed the knife. Defendant told law enforcement that he believed Hunter wanted to hurt him with the knife. Defendant insisted Hunter had used the knife to cut him, and showed law enforcement cuts on his hands and arms. Defendant admitted that he had choked Hunter in an attempt to make him pass out and stop fighting. Defendant claimed that he had also passed out at some point during the struggle, and that he had "blacked out" and "go[ne] off" out of anger.

¶ 10 Law enforcement took Defendant to the magistrate's office following his arrest, where Defendant gave a third interview to news media. Defendant once again explained that he went to collect money from Hunter, then beat Hunter with his fists in self-defense when Hunter pulled out a knife.

¶ 11 Defendant presented a single witness before the jury, a friend who testified that he was with Defendant most of the day and evening on 24 March 2018 and claimed Defendant never mentioned Hunter. At the close of the State's evidence and at the close of all evidence, Defendant moved to dismiss the charge of first-degree murder, arguing the State failed to show sufficient evidence of premeditation and deliberation. The trial court denied both motions. The jury found Defendant guilty of first-degree murder. The trial court entered judgment on the jury's verdict and sentenced Defendant to life imprisonment without the possibility of parole. Defendant gave notice of appeal in open court.

II. Analysis

A. Preservation

¶ 12 **[1]** Defendant filed a conditional petition for writ of certiorari alongside his brief on appeal, asking this Court to consider his appeal of the trial court's judgment in the event that defense counsel's oral notice of appeal was insufficient. Rule 4 of the North Carolina Rules of Appellate Procedure states that a party may "appeal from a *judgment* or order of a superior or district court rendered in a criminal action" by "giving oral notice of appeal at trial," and such notice "shall designate the *judgment* or order from which appeal is taken and the court to which appeal is taken[.]" N.C. R. App. P. 4(a)(1), (b) (emphasis added).

¶ 13 Here, defense counsel informed the trial court in open court: "With respect to jury's verdict, we enter a notice of appeal." Defense counsel did not specifically state that Defendant sought to appeal from the trial court's *judgment* entering the jury verdict. Nonetheless, Defense counsel's words were clear enough to convey Defendant's intent to appeal his first-degree murder conviction to this Court. Furthermore, both parties have complied at each stage of the appellate process and the State has not been prejudiced by the imperfect wording of Defendant's appeal. *See State v. Daughtridge*, 248 N.C. App. 707, 712, 789 S.E.2d 667, 670 (2016) (holding the "[d]efendant's oral notice of appeal was sufficient to confer jurisdiction upon this Court" even though defense counsel's language was "not a model of clarity," where the language "manifest[ed] [the d]efendant's intention to enter a notice of appeal" and "the State [did] not contend that it was misled or prejudiced in any way by any defect in [the d]efendant's notice of appeal"). Therefore, we hold that Defendant's oral notice of appeal sufficiently conferred jurisdiction on this Court. We dismiss Defendant's conditional petition for writ of certiorari as moot.

¶ 14 However, Defendant has preserved for review only the trial court's judgment entering the jury's verdict convicting him of first-degree murder. In his brief on appeal, Defendant includes factual and procedural history from a pre-trial hearing regarding Defendant's competency to stand trial. The Record contains no notice of appeal challenging the trial court's decision from the competency hearing. Therefore, we consider only the evidence presented in Defendant's first-degree murder trial in our review.

B. Premeditation and Deliberation

¶ 15 **[2]** Defendant contends the trial court erred by denying his motion to dismiss by arguing "there was insufficient evidence of premeditation and deliberation to support first-degree murder."

¶ 16 We review the trial court's denial of a motion to dismiss to determine whether, in the light most favorable to the State, "there [was] substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). This Court's review is "concerned only about whether the evidence [was] sufficient for jury consideration, not about the weight of the evidence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455–56 (2000) (citation omitted). "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Id.* at 379, 526 S.E.2d at 455 (citation omitted).

¶ 17 "First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Thomas*, 350 N.C. 315, 346, 514 S.E.2d 486, 505 (citation omitted), *cert. denied*, 528 U.S. 1006 (1999). " 'Premeditation means that the act was thought over beforehand for some length of time,' however short." *State v. Leazer*, 353 N.C. 234, 238, 539 S.E.2d 922, 925 (2000) (citation omitted). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by legal provocation or lawful or just cause." *State v. Trull*, 349 N.C. 428, 448, 509 S.E.2d 178, 191 (1998) (citation omitted). "Premeditation and deliberation are mental processes which are ordinarily . . . prove[n] by circumstantial evidence." *State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992). Our Courts have found that the following circumstances can evidence premeditation and deliberation:

> (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

Id. (citation omitted).

¶ 18 Defendant's conduct immediately before, during, and after the altercation with Hunter provides sufficient, substantial evidence of premeditation and deliberation. The State's evidence showed that Defendant went to Hunter's apartment because he believed Hunter possessed

money that rightfully belonged to him, and demanded that Hunter give it to him. Defendant threatened to "beat the [expletive] out of [Hunter]." *See State v. Potter*, 295 N.C. 126, 131, 244 S.E.2d 397, 401 (1978) (holding that "evidence of [the] defendant's earlier threats against deceased [and] his statements made shortly after the killing" allowed "legitimate inferences of premeditation and deliberation to be drawn"). The State's medical examiner also testified that Hunter sustained three stabbing and slashing wounds to his neck, fracturing his spine; blunt force injuries to his head, arms, and legs; and hemorrhaging in his blood vessels, neck muscles, and tongue. *See State v. Robbins*, 319 N.C. 465, 511–12, 356 S.E.2d 279, 306 (1987) ("[T]he nature and number of the victim's wounds is a circumstance from which premeditation and deliberation can be inferred." (citation omitted)). Defendant did not call the police after he fought with Hunter, or otherwise seek medical assistance. Rather, Defendant went home and slept, then disposed of his bloodied jeans and the knife in a dumpster the next day. *See State v. Taylor*, 362 N.C. 514, 532, 669 S.E.2d 239, 257 (2008) ("[The defendant's] attempts to cover up his participation in the murder also support a finding of premeditation and deliberation." (citation omitted)); *State v. Sierra*, 335 N.C. 753, 759, 440 S.E.2d 791, 795 (1994) (considering as evidence of premeditation and deliberation that "[a]fter the shooting, [the] defendant returned home, hid the murder weapon, and went to sleep"). In the light most favorable to the State, there was sufficient evidence of premeditation and deliberation to submit the charge of first-degree murder to the jury.

¶ 19 Defendant contends the evidence that he "blacked out when [Hunter] got that knife in his hand" and that Hunter attacked Defendant with the knife "fatally undermined the State's theory of premeditation and deliberation" because the evidence showed that Defendant fought Hunter "in a state of passion" in response to "sufficient provocation" by Hunter. *See State v. Corn*, 303 N.C. 293, 298, 278 S.E.2d 221, 224 (1981) (holding insufficient evidence of premeditation and deliberation where "*[a]ll* the evidence tend[ed] to show that [the] defendant shot [the victim] after a quarrel, in a state of passion, without aforethought or calm consideration" (emphasis added)); *State v. Huggins*, 338 N.C. 494, 498, 450 S.E.2d 479, 482 (1994) ("[W]ords or conduct not amounting to an assault or a threatened assault *may* be enough to arouse a sudden and sufficient passion in the perpetrator to negate deliberation[.]" (emphasis added) (citations omitted)). However, this was only some of the evidence presented to the jury. There was other substantial evidence, as described above, which was sufficient to submit the issue of premeditation and deliberation to the jury, and it was for the jury to weigh the evidence presented. *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455–56.

¶ 20 The trial court did not err by denying Defendant's motion to dismiss the charge of first-degree murder.

C. Jury Instruction on Defense of Automatism

¶ 21 **[3]** Defendant argues that the trial court "plainly erred in failing to instruct on the complete defense of automatism where that instruction was a substantial feature of the case arising from the evidence." Defendant acknowledges that neither party requested a jury instruction on automatism and, therefore, the issue was not preserved for review by this Court. "[U]npreserved issues related to jury instructions are reviewed under a plain error standard[.]" *State v. Collington*, 375 N.C. 401, 410, 847 S.E.2d 691, 698 (2020). "Defendant is entitled to relief only if the instructions amounted to plain error, which is error so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Gainey*, 355 N.C. 73, 106, 558 S.E.2d 463, 484 (2002) (citation, quotation marks, and internal marks omitted).

¶ 22 The trial court has a duty to instruct the jury on all substantive features of the case, regardless of whether a particular instruction is requested by a party. *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988). "All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *Id.* (citation omitted). However, "the trial court should never give instructions that are not supported by a reasonable view of the evidence." *State v. Clark*, 324 N.C. 146, 162, 377 S.E.2d 54, 64 (1989) (citation omitted); *see id.* ("[E]vidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury." (citation omitted)).

¶ 23 Automatism, or unconsciousness, is a "complete defense to a criminal charge . . . because '[t]he absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.' " *State v. Jerrett*, 309 N.C. 239, 264–65, 307 S.E.2d 339, 353 (1983) (citation omitted). Automatism is, "under the law of this State, . . . an affirmative defense; and [] the burden rests upon the defendant to establish this defense, unless it arises out of the State's own evidence, to the satisfaction of the jury." *State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975). Our Court has stated that if "the evidence of unconsciousness 'arises out of the State's own evidence,' the burden rests on the State to prove the defendant's consciousness beyond a reasonable

doubt." *State v. Tyson*, 195 N.C. App. 327, 331, 672 S.E.2d 700, 704 (2009) (citation omitted).

¶ 24 During its case-in-chief, the State presented recordings of each of Defendant's interviews with law enforcement and the news media. Recordings from Defendant's second interview included multiple instances of Defendant stating that he "blacked out" during his altercation with Hunter. "I didn't know what was going on in my mind[,]" Defendant continued, "I didn't know what I was doing . . . when I go off, I black out like that." "I blacked out when he got that knife in his hand. That's all I remember." However, although Defendant repeatedly stated that he had "blacked out", he was able to describe his fight with Hunter with great detail and told law enforcement that he "knew what was going on." No other evidence presented during either the State's case-in-chief or during Defendant's presentation of evidence tended to show that Defendant was unconscious during his altercation with Hunter, or that Defendant had any history of concerns with unconsciousness.

¶ 25 This evidence did not warrant an instruction on automatism. Defendant's own self-serving statements were insufficient evidence to satisfy a reasonable jury that Defendant lacked consciousness. Our Courts have recognized in a myriad of circumstances that the evidence must include something more than a defendant's self-serving statements to substantively support a jury instruction. *See State v. Thomas*, 350 N.C. 315, 347, 514 S.E.2d 486, 506 (1999) (citation omitted) (holding trial court did not err by not giving jury instruction on second-degree murder where "the only evidence offered by defendant to negate first-degree murder was his own testimony denying his involvement in the crime"); *State v. Smith*, 347 N.C. 453, 464, 496 S.E.2d 357, 363 (1998) (holding the defendant's self-serving statements that he lacked requisite intent were insufficient evidence to rebut elements of the crime charged); *see also State v. Stanton*, 319 N.C. 180, 191, 353 S.E.2d 385, 392 (1987) ("Testimony of a self-serving declaration made by a defendant following an alleged crime is incompetent as substantive evidence." (citation omitted)). Furthermore, our Courts have traditionally held that a jury instruction on automatism was appropriate based on evidence beyond a defendant's own self-serving statements. *Jerrett*, 309 N.C. at 266, 307 S.E.2d at 353 (holding automatism instruction was appropriate where the defendant, his parents, and two psychiatrists all testified to his history of black-outs); *State v. Fields*, 324 N.C. 204, 212, 376 S.E.2d 740, 744–45 (1989) (holding evidence supported automatism instruction where the defendant, his family, and an expert witness testified that defendant had a history of being "in his own world"); *Tyson*, 195 N.C. App.

at 331, 672 S.E.2d at 704 (holding evidence gave rise to jury instruction on automatism where State's witnesses testified to drugging the defendant until he was unresponsive before engaging in sexual acts with him).

¶ 26 This case is similar to *State v. Boyd*, 343 N.C. 699, 473 S.E.2d 327 (1996). In *Boyd*, the defendant argued "that his own uncontradicted testimony was sufficient evidence from which the jury could have found that he was unconscious[.]" *Id.* at 713, 473 S.E.2d at 334. During the trial, the defendant testified that "he could not remember many of his actions on the day of the crimes[.]" *Id.* at 714, 473 S.E.2d at 334. The *Boyd* Court noted that the defendant "pointed only to his own testimony at trial as evidence to support an instruction on unconsciousness" and that, despite his claims of memory loss, the defendant "was able to recall many of the graphic details of the murders as shown by the inculpatory statement he gave to police within hours of committing the murders." *Id.* (citation omitted). Further, although expert witnesses testified for the defendant, "neither of [the] defendant's expert witnesses gave testimony in support of [the] defendant's unconsciousness claim." *Id.* at 715, 473 S.E.2d at 335. The *Boyd* Court held "the trial court did not err by refusing to instruct the jury on unconsciousness" because the defendant "relie[d] only upon his own self-serving testimony at trial that [was] wholly contradicted by the statement he gave to police within hours of committing the murders." *Id.*

¶ 27 In the present case, Defendant points only to his own self-serving statements made in his second interview to law enforcement within forty-eight hours of his altercation with Hunter. The single witness that Defendant presented to the jury did not give testimony supporting Defendant's alleged history of "black[ing] out" and "go[ing] off." Rather, Defendant told law enforcement in the interview that he "blacked out" once Hunter pulled out the knife, that he did not know "what was going on in [his] mind", and assured law enforcement "[t]hat's all I remember." Defendant also stated that he "knew what was going on" and further recounted specific details of the altercation that occurred after Hunter got the knife, including claims that he beat Hunter with his fists, that he choked Hunter, and that Hunter incidentally stabbed himself in the neck with the knife. Defendant's ability to recount the events of the altercation contradicted his claims of memory loss in the same interview.

¶ 28 That this evidence arose from the State's case-in-chief does not change our conclusion. The State had no need to provide additional evidence to satisfy a burden of proof that Defendant was awake because Defendant's self-serving statements were not enough to reasonably

show unconsciousness. *Cf. Tyson*, 195 N.C. App. at 331, 672 S.E.2d at 704 (holding the State had burden to show the defendant was actually conscious where its own witnesses testified that they caused the defendant to be unconscious during the time of the offense). Here, no sufficient evidence of automatism "arose out of the State's own evidence." *Id.* The trial court did not err by not giving an instruction on automatism of its own accord. Defendant's statements in the interview recordings were not evidence from which a reasonable juror could find automatism, and therefore we cannot say an instruction on automatism would have had a probable impact on the outcome of this case.

D. Impermissible Questioning During Voir Dire

¶ 29 **[4]** Defendant asserts that the trial court abused its discretion by not intervening *ex mero motu* during the State's *voir dire* of prospective jurors when the State asked "clearly improper" questions which "exceeded the permissible boundaries of *voir dire*." "The nature and extent of the inquiry made of prospective jurors on *voir dire* ordinarily rests within the sound discretion of the trial court." *State v. Bond*, 345 N.C. 1, 17, 478 S.E.2d 163, 171 (1996) (citation omitted), *cert. denied*, 521 U.S. 1124 (1997). "[D]efendant must show abuse of discretion and prejudice to establish reversible error relating to *voir dire*." *State v. Bishop*, 343 N.C. 518, 535, 472 S.E.2d 842, 850 (1996).

¶ 30 During *voir dire*, counsel's "attempts to 'stake out' a prospective juror in advance regarding what his decision might be under certain specific factual scenarios are improper." *State v. Jaynes*, 353 N.C. 534, 549, 549 S.E.2d 179, 192 (2001) (citation omitted). "Counsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided." *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980). "Jurors should not be asked what kind of verdict they would render under certain named circumstances." *Id.* In *State v. Jaynes*, our Supreme Court held that questions which sought to "pin down the prospective jurors regarding specific mitigating circumstances that would sway them towards a life sentence" did "not amount to proper inquiries into whether the prospective jurors could follow the law or the trial court's instructions." *Jaynes*, 353 N.C. at 550, 549 S.E.2d at 192. However, the defendant did not challenge questions which asked a juror to explain why she did not believe in the death penalty, and the Court held that the juror was properly excluded when those questions clarified that the juror's "views of the death penalty would have prevented or substantially impaired the performance of her duties." *Id.* at 552, 549 S.E.2d at 194.

¶ 31 Essentially, there is a range of unacceptable to acceptable questions. On one end, unacceptable questions tend to ask a juror, "If the evidence shows a particular set of facts, what would you decide?" or "What facts would you need to hear in order to convict this defendant?" On the other end, acceptable questions ask, "Do you acknowledge or believe in the concepts integral to this case?" The trial court has discretion to decide where an attorney's question falls on this spectrum.

¶ 32 Defendant asserts that the following questions from the State warranted *ex mero motu* intervention by the trial court because they posed hypotheticals that were inappropriately similar to the facts of this case:

> "Does anybody think that a verbal argument justifies the use of physical violence?"
>
> "Does everybody believe if you couldn't retreat, then you think you have the right to defend yourself?"
>
> "Does anyone not believe in the concept of self-defense? In other words, you think – I will use this example: Jesus teaches that you turn the other cheek. Does anyone believe that's the way it ought to be? If somebody punches me in the face, I should just turn and walk away and not defend myself? Anybody really believe that? Again, nothing wrong with that, I am just making sure."
>
> "If you were in fear for your life and had a weapon, would you defend yourself or would you run away?"

¶ 33 The trial court did not abuse its discretion because the State did not ask the jurors to consider specific circumstances and forecast their ultimate verdict. Mere mention of a weapon, a verbal argument, or an inability to retreat did not amount to an inappropriate "stake out" using fact-specific hypotheticals. Instead, the State asked the jurors whether they could agree with the law of self-defense as it exists in North Carolina: a defendant may use lethal force when he reasonably believes such force is necessary to prevent death or bodily harm arising from a fight he did not initiate. *See State v. Greenfield*, 375 N.C. 434, 441, 847 S.E.2d 749, 755 (2020). Each of the State's questions reasonably asked: "Would you be willing to accurately apply the law of self-defense if presented with facts that qualify under the law?" Just as counsel in *Jaynes* permissibly inquired whether the juror could ever agree with the death penalty, the State here acceptably asked the jurors whether they could personally agree with the law of self-defense, a matter integral to the

resolution of this case. The questions asked in this case were proper inquiries as to whether the jurors believed in and would follow the applicable law. *See State v. Robinson*, 339 N.C. 263, 273, 451 S.E.2d 196, 202 (1994).

E. Closing Arguments

¶ 34 **[5]** Lastly, Defendant argues the trial court "reversibly erred by not intervening *ex mero motu* in the State's closing argument when the State claimed . . . that [Defendant], not [Hunter], handled the knife in question, thereby misleading the jury on the central issue at trial: self-defense." Defendant did not object to the State's statements during closing arguments. "The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

¶ 35 "It is well settled that the arguments of counsel are left largely to the control and discretion of the trial judge and that counsel will be granted wide latitude in the argument of hotly contested cases." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986) (citations omitted). Counsel's closing arguments may include both facts presented during trial and any reasonable inferences drawn from those facts in support of their case. *Id.* (citation omitted). Counsel "may not argue to the jury facts not in evidence nor travel outside the record by injecting his personal views and beliefs." *State v. Monk*, 291 N.C. 37, 53, 229 S.E.2d 163, 173 (1976) (citation omitted). "[D]efendant must show that [counsel's] comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) (citation omitted).

¶ 36 Defendant contends that it was impermissible for the trial court to allow the State to assert during closing arguments that "[Hunter] never got a knife"; that cuts on Defendant's hands "didn't come from a knife because [Hunter] never had a knife"; and that Defendant went into Hunter's kitchen, acquired the knife himself, and stabbed Hunter. Contrary to Defendant's assertion that "the evidence only pointed in one direction: that [Hunter] handled the knife, not [Defendant]", the State's closing statement was supported by evidence presented at trial. The uncontradicted evidence at trial was that neither Hunter nor Defendant had the knife when they first began arguing. One of them acquired the knife at some point during their altercation. The evidence showed that three drawers were left open in Hunter's kitchen, Hunter was ultimately

stabbed multiple times with a kitchen knife, and Defendant took the knife with him when he left Hunter's apartment. DNA analysis conclusively found Hunter's DNA on the knife, but also found a separate, inconclusive DNA profile on the knife. Even though Defendant admitted that he possessed the knife after the altercation and threw it in the dumpster, the DNA analysis did not reveal "whether [Defendant] did or did not handle the handle of the knife."

¶ 37 The State argued to the jury that, at some point during their altercation, Defendant rummaged through Hunter's kitchen drawers, found a knife, left the drawers open, and then used the knife to stab Hunter. This series of events directly contradicted Defendant's theory of self-defense, but did not contradict the evidence presented at trial or rely on evidence outside of the trial record. Rather, the State's closing arguments drew reasonable inferences from the evidence presented. *Williams*, 317 N.C. at 481, 346 S.E.2d at 410. The trial court did not commit error, much less reversible error, by failing to intervene *ex mero motu* in the State's closing argument. *Jones*, 355 N.C. at 133, 558 S.E.2d at 107.

III. Conclusion

¶ 38 We hold that Defendant received a fair trial, free from error.

NO ERROR.

Judge JACKSON concurs.

Judge MURPHY concurs in result only.

STATE OF NORTH CAROLINA
v.
DAVID McKOY

No. COA20-805

Filed 1 February 2022

Evidence—motion in limine—manslaughter trial—exclusion of contents of victim's cell phone—no unfair prejudice

In a prosecution arising from defendant's fatal shooting of an acquaintance, defendant could not demonstrate that he was prejudiced by the exclusion of text messages and photographs from the victim's cell phone referencing gangs and guns. Where the jury convicted defendant of voluntary manslaughter based on an instruction of imperfect self-defense (the lowest level offense of four possible verdicts presented to the jury), there was no reasonable possibility that a different outcome would have resulted if the excluded evidence had been admitted because the evidence supported defendant's theory of self-defense—including that the victim had a violent reputation and that defendant was in fear for his life at the time of the shooting—but also the State's position that the amount of force defendant used was unreasonable.

Judge TYSON dissenting.

Appeal by defendant from judgment entered 22 March 2019 by Judge John M. Dunlow in Durham County Superior Court. Heard in the Court of Appeals 3 November 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Lynne Weaver, for the State.

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

ZACHARY, Judge.

¶ 1 Defendant David McKoy appeals from a judgment entered upon a jury's verdict finding him guilty of voluntary manslaughter. On appeal, Defendant challenges the trial court's exclusion of evidence found on the cell phone of the victim, Augustus Brandon. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error.

Background

¶ 2 The testimony offered at Defendant's trial revealed that Defendant and Augustus Brandon had an acrimonious relationship. They had known each other since they were in sixth grade, and they had many mutual acquaintances. However, Defendant "tried to avoid" Mr. Brandon because Defendant "knew [Mr. Brandon and his friends] to rob people" and "to gang bang and to tote guns[.]" After one of Mr. Brandon's friends "robbed [Defendant's friend] at gunpoint for [a] fake chain," Defendant purchased a semi-automatic rifle for the purposes of self-defense. Defendant kept this firearm in the back seat of his car because his mother would not allow him to keep it in the house.

¶ 3 Defendant testified that on the morning of 9 December 2016, he was waiting to turn left onto Hamlin Road when he saw Mr. Brandon drive past him. According to Defendant, as Mr. Brandon drove by, he "turn[ed] his head . . . like he had spotted [Defendant]."

¶ 4 Defendant turned onto Hamlin Road behind Mr. Brandon, who pulled off the road and then merged back onto it so that he was following Defendant. Defendant tried unsuccessfully to lose Mr. Brandon by turning onto Old Oxford Road. Mr. Brandon then passed Defendant, maneuvered his vehicle in front of Defendant's, and abruptly came to a complete stop in the roadway. When Mr. Brandon exited his car and started approaching Defendant's car, Defendant put his car in reverse and accidentally backed into a side ditch, where his vehicle got stuck. Mr. Brandon then turned his car around, drove nearer to Defendant's car, got back out of the car, and began approaching Defendant.

¶ 5 Defendant explained that at the time he "was terrified" because he believed that Mr. Brandon was going to shoot him; he stated, "I just panicked. I just panicked." Although he did not see Mr. Brandon brandish a gun, Defendant "was in fear for [his] life[,]" so he fired his semi-automatic rifle. Defendant believed that Mr. Brandon had returned fire, so he continued shooting. Defendant fired his weapon three times, hitting Mr. Brandon once in the middle of the back and once in the back of the head. The head wound was fatal.

¶ 6 By the time law enforcement officers arrived at the scene, Mr. Brandon was dead. He was unarmed.

¶ 7 That day, law enforcement officers arrested Defendant for the murder of Mr. Brandon. On 17 January 2017, a Durham County grand jury returned an indictment formally charging Defendant with the murder of Augustus Brandon. From the outset, Defendant consistently maintained that he acted in self-defense against Mr. Brandon.

¶ 8 This matter came on for trial in Durham County Superior Court on 11 March 2019. Three eyewitnesses to the shooting testified on behalf of the State. Two of the witnesses reported that they had heard approximately three gunshots on 9 December 2016, while the third stated that he heard six to seven shots. One witness testified that Mr. Brandon was running away when Defendant shot him, with the force of the shots "launch[ing]" his body into the roadside ditch.

¶ 9 Mr. Brandon's mother, Angela Clark, also testified for the State. She said that a few days before the shooting, Mr. Brandon admitted to her that he had previously been in possession of a gun, but he had recently been robbed and the gun was taken from him. "He just kept asking" Mrs. Clark if she could help him get another, telling her, "I need it for protection, because they're going to kill me."

¶ 10 During the jury charge, the trial court delivered instructions on first-degree murder, second-degree murder, and voluntary manslaughter. With regard to voluntary manslaughter, the court instructed the jury, in relevant part:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally wounded the victim with a deadly weapon and thereby proximately caused the victim's death and that the defendant used excessive force, it would be your duty to find the defendant guilty of voluntary manslaughter, even if the [S]tate has failed to prove that the defendant did not act in self-defense.

¶ 11 On 22 March 2019, the jury returned its verdict finding Defendant guilty of voluntary manslaughter. The trial court entered judgment upon the jury's verdict and sentenced Defendant to a term of 64 to 89 months in the custody of the North Carolina Division of Adult Correction. Defendant gave notice of appeal in open court.

Discussion

I. Exclusion of Evidence

¶ 12 During trial, the State filed a motion in limine to suppress Defendant's anticipated introduction of (1) text messages on Mr. Brandon's cell phone in which he arranged to commit violent acts and discussed owning and using guns, and (2) photographs on Mr. Brandon's cell phone of him and others holding guns. The State asserted that such evidence would be more prejudicial than probative because specific acts of conduct are impermissible to prove a victim's propensity for violence, and

because such evidence could suggest that Mr. Brandon "had a violent character." The State also argued that the evidence was inadmissible because Defendant did not know about the texts or photographs at the time of the shooting. Defense counsel argued that although Defendant did not learn of the texts and photographs until discovery, Mr. Brandon's "parents . . . [w]ere going to talk about their son," and therefore the cell-phone evidence was necessary "to paint the whole picture." The defense further argued that the State "opened the door" to challenges to Mr. Brandon's character because his parents testified that he "was always a happy guy."

¶ 13 In addition, defense counsel conducted a voir dire examination of Darius Clark, Mr. Brandon's father, during which Mr. Clark denied knowing anything about his son owning or using guns. To impeach Mr. Clark's testimony, Defendant's counsel sought to question him about a recorded interaction between the Clarks and the lead detective, Christin Reimann, in which they reviewed together the contents of Mr. Brandon's cell phone.

¶ 14 The trial court granted the State's motion in limine, explaining, "This is [the S]tate's case in chief, . . . so any question relative to the contents of that phone and text messages that may or may not have been contained on that phone is not allowed." The trial court permitted Defendant "to ask questions relating to whether [Mr. Clark] knew that the victim had a gun" because he "had previously testified that [Mr. Brandon] did not have a gun, [and] there were no guns allowed in his house"; the court also allowed defense counsel to question Mr. Clark about the fact of his encounter with Detective Reimann, during which she showed Mr. Clark and his wife the contents of Mr. Brandon's cell phone. However, the trial court instructed Defendant that he could not ask Mr. Clark "specific questions about th[e] contents" of the cell phone for the purposes of impeachment. The court later sustained the State's objections when Defendant asked Mr. Clark and Detective Reimann about the contents of Mr. Brandon's cell phone.

II. Standard of Review

¶ 15 On appeal, Defendant argues that the trial court erred in excluding the specific content discovered on Mr. Brandon's cell phone. Specifically, Defendant contends that the issue is whether the State "opened the door" to admission of the cell-phone evidence to refute the portrayal of Mr. Brandon in his parents' testimony, and to impeach Mr. Clark's testimony that he did not previously know that his son had once possessed

a gun or been robbed. Defendant asserts that this is a question of law, reviewable de novo on appeal.[1]

¶ 16 However, the record indicates otherwise. The State argued that the cell-phone evidence would impermissibly suggest—through specific acts of which Defendant only learned after the fact—that Mr. Brandon possessed "a violent character." Based on this argument, the trial court decided that Defendant could ask Mr. Clark general "[q]uestion[s] about whether or not [Detective] Reimann showed him and his wife the contents of Mr. Brandon's cell phone, but not specific questions about those

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1. Defendant contends that "[w]hether a party opened the door to the admission of particular evidence by the opposing party is a question of law," which is reviewable de novo on appeal. For support, Defendant cites *State v. Jefferies*, 333 N.C. 501, 511, 428 S.E.2d 150, 155 (1993); however, such reliance on *Jefferies* is misplaced. First, although the standard of review in *Jefferies* was not explicitly stated, nowhere in the opinion did our Supreme Court suggest de novo review. *See id.* Indeed, among the cases cited in *Jefferies* is *State v. Brown*, in which our Supreme Court affirmed this Court's application of the abuse of discretion standard when determining whether the trial court erred in concluding that the defendant had "opened the door" to evidence of his prior bad acts. 310 N.C. 563, 571–73, 313 S.E.2d 585, 590–91 (1984).

Defendant's reliance on *Jefferies* is further unwarranted because the facts here are not analogous to those in *Jefferies*. In *Jefferies*, the defendant sought to question a detective on cross-examination specifically about the detective's testimony for the State that charges had also been filed against the defendant's alleged co-conspirator. 333 N.C. at 511, 428 S.E.2d at 155. The State offered the detective's testimony to support its theory that the men had acted in concert; accordingly, on cross-examination, the defendant hoped to rebut this evidence by eliciting testimony that the charges against his co-conspirator had been dismissed. *Id.* However, the trial court did not allow the defendant to question the detective regarding the dismissed charges, and it excluded from evidence documents showing that the charges had been dismissed. *Id.* On appeal, our Supreme Court stated the well-established rule that "[w]hen a party introduces evidence favorable to its case, the other party has the right to introduce evidence to explain or rebut such evidence, although the latter evidence would be inadmissible had it been offered initially." *Id.* The Court explained that "[a]ssuming the evidence which the defendant attempted to introduce would have been inadmissible if offered originally, it became admissible when the State's witness testified on this subject. It was error to exclude this evidence." *Id.* The Court nonetheless concluded that the error was harmless, reasoning that there was no "reasonable possibility" that a different result would have been reached at trial even if the error had not occurred. *Id.* at 511–12, 428 S.E.2d at 155–56.

Here, Defendant attempted to introduce the evidence on Mr. Brandon's cell phone to rebut Mr. Clark's claimed ignorance about his son's use of guns and his statement that Mr. Brandon "was always a happy guy." Unlike in *Jefferies*—where the defendant's proffered evidence regarding the dismissed charges would have provided relevant context to help "explain or rebut" the State's potentially unfavorable evidence concerning a co-conspirator, *id.* at 511, 428 S.E.2d at 155—here, Mr. Clark's knowledge of his son's prior possession of guns and his characterization of Mr. Brandon's overall demeanor are not directly related to Mr. Brandon's alleged propensity for violence.

Accordingly, Defendant's contention that *Jefferies* mandates de novo review of this issue lacks merit.

contents[.]" In doing so, the court engaged in the evidentiary balancing test prescribed by Rule 403 of the North Carolina Rules of Evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2021) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .").

¶ 17 Accordingly, the ultimate question on appeal is whether the trial court abused its discretion by excluding the cell-phone evidence, not whether the State "opened the door" to evidence of Mr. Brandon's allegedly violent character.

¶ 18 A motion in limine "can be made in order to prevent the jury from ever hearing the potentially prejudicial evidence thus obviating the necessity for an instruction during trial to disregard that evidence if it comes in and is prejudicial." *State v. Tate*, 300 N.C. 180, 182, 265 S.E.2d 223, 225 (1980). "The decision of whether to grant [a motion in limine] rests in the sound discretion of the trial judge." *State v. Hightower*, 340 N.C. 735, 746–47, 459 S.E.2d 739, 745 (1995). Additionally, "[w]e review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

¶ 19 "An abuse of discretion results when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 809 (2015) (citation and internal quotation marks omitted). "In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *Id.* (citation and internal quotation marks omitted).

¶ 20 "[E]videntiary error does not necessitate a new trial unless the erroneous admission was prejudicial. The same rule applies to exclusion of evidence." *State v. Jacobs*, 363 N.C. 815, 825, 689 S.E.2d 859, 865 (2010) (citations and internal quotation marks omitted). A defendant is prejudiced by evidentiary error "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Id.* (quoting N.C. Gen. Stat. § 15A-1443(a)). "Defendant bears the burden of showing prejudice." *Id.* at 825, 689 S.E.2d at 866.

III. Analysis

¶ 21 Here, Defendant contends that "[i]t was error for the trial court to bar any evidence of what [Mr. Brandon] kept on his cell phone to rebut the misleading picture presented to the jury by the State." Defendant

further asserts that he was prejudiced by the exclusion of this evidence because:

> [i]f the jury had been allowed to hear that [Mr.] Brandon was not a person who only briefly had access to a gun and, instead, was a person who had possession of guns on multiple occasions when under no threat of harm, it would have been reasonable for the jury to conclude that the State had failed to prove beyond a reasonable doubt that [Defendant] used more force [than] reasonably necessary to repel [Mr.] Brandon's lethal attack on him.

¶ 22 Assuming, *arguendo*, that the cell-phone evidence was excluded in error, such error was not sufficiently prejudicial to warrant a new trial. Defendant has not shown "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Id.* at 825, 689 S.E.2d at 865.

¶ 23 In the instant case, the trial court admitted substantial evidence supporting Defendant's theory of self-defense. Defendant testified that Mr. Brandon and his friends had a reputation for "rob[bing] people," "gang bang[ing,] and . . . tot[ing] guns"; that Mr. Brandon had once "randomly showed [Defendant] a video of [Mr. Brandon] shooting a gun[,]" an experience that made Defendant feel "confused and uncomfortable"; that Defendant "was terrified" and "in fear for [his] life" at the time of the shooting; and that he thought he heard more than three gunshots, as one of the eyewitnesses also testified. Additionally, Mrs. Clark testified that a few days before the shooting, her son had admitted that he had previously had a gun, but it had been stolen, and he needed assistance obtaining another. A challenge to Mr. Clark's credibility with the texts and photographs on Mr. Brandon's cell phone, therefore, would not have meaningfully bolstered Defendant's self-defense claim.

¶ 24 Furthermore, the evidence tended to show that Defendant was honestly in fear for his life, but that the degree of force he used was unreasonable, as Mr. Brandon was unarmed and running away from Defendant when he was killed. The trial court's instruction on voluntary manslaughter allowed the jury to convict Defendant upon a finding of imperfect self-defense. As Defendant concedes, the guilty verdict suggests "that the jury concluded that [Defendant] had a reasonable fear that he was facing an imminent threat of death or great bodily injury from [Mr.] Brandon at the time of the shooting, but that the

State had proven beyond a reasonable doubt that he used more force than necessary."

¶ 25 Moreover, as Defendant acknowledges, he testified at trial that he never saw Mr. Brandon holding or handling a gun on 9 December 2016; nevertheless, he contends that, had the trial court not erroneously excluded the evidence discovered on Mr. Brandon's cell phone, "there is more than a reasonable possibility that the jury would have reached a verdict other than guilty of voluntary manslaughter." Defendant's argument is unavailing.

¶ 26 The only additional evidence Defendant proffers in support of his argument on appeal is his own testimony that "he heard gunshots in addition to the three he fired and believed [Mr.] Brandon had fired at him." However, as noted above, the jury heard and considered this testimony, as well as that of an eyewitness who similarly recalled hearing more than the three gunshots reported by two other testifying eyewitnesses. The jury, as fact-finder in this matter, weighed all of the evidence and, presented with four possible verdicts, found Defendant guilty of the lowest-level offense. Even assuming, *arguendo*, that the relevant evidence was erroneously excluded, we are not persuaded that the challenged evidentiary ruling affected the outcome at trial. Accordingly, Defendant has not shown "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Id.*

¶ 27 For these reasons, we conclude that Defendant received a fair trial, free from prejudicial error.

NO PREJUDICIAL ERROR.

Judge ARROWOOD concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

¶ 28 David McKoy ("Defendant") appeals from a judgment entered upon a jury's verdict finding him guilty of voluntary manslaughter. Defendant challenges the trial court's limitation on his cross-examination of the State's witnesses and the exclusion of evidence and images found on the cell phone of the deceased, Augustus Brandon ("Brandon"). Defendant is entitled to a new trial. I respectfully dissent.

¶ 29 The jury concluded the State had failed to carry its burden to show premeditation and deliberation, and acquitted Defendant of both first-degree and second-degree murder. The jury also rejected Defendant acted with malice and accepted Defendant's evidence of self-defense to rebut the presumption of malice arising from his use of deadly force. *See State v. Reynolds*, 307 N.C. 184, 192, 297 S.E.2d 532, 537 (1982) ("In the instant case the state offered evidence sufficient to permit a jury to find beyond a reasonable doubt that defendant intentionally used a deadly weapon, a pistol, to cause the death of the deceased. There is no evidence of mitigation which might reduce the crime to manslaughter nor is there any evidence which would justify or excuse the killing. Under these circumstances the state has proved murder in the second degree because malice and unlawfulness are implied in law.").

I. Reasonable Use of Force

¶ 30 The sole issue remaining for the jury was whether Defendant's use of deadly force in self-defense was reasonable. The burden of proof rests upon the State and the evidence is reviewed in the light most favorable to Defendant, as it appeared to him at the time of the incident. *See State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) ("When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense . . . , courts must consider the evidence in the light most favorable to [the] defendant.") (citations omitted).

A. Opening the Door

¶ 31 Defendant asserts prejudicial error in the exclusion of evidence favorable to him and argues the State "opened the door" to the admission of the photos and texts after the detective's and Brandon's parents' testimonies on direct examination. " 'Opening the door' is the principle where one party introduces evidence of a particular fact and the opposing party may introduce evidence to explain or rebut it, even though the rebuttal evidence would be incompetent or irrelevant, if offered initially." *State v. Thaggard*, 168 N.C. App. 263, 273, 608 S.E.2d 774, 782 (2005) (citation omitted).

¶ 32 Defendant asserts he is entitled to introduce evidence to explain or rebut evidence or assertions presented by the State. *See State v. Jefferies*, 333 N.C. 501, 511, 428 S.E.2d 150, 155 (1993) ("When a party introduces evidence favorable to its case, the other party has the right to introduce evidence to explain or rebut such evidence, although the latter evidence would be inadmissible had it been offered initially."); *see State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981) ("Under such circumstances, the law wisely permits evidence

not otherwise admissible to be offered to explain or rebut evidence elicited by the [opposing party]. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, *even though such latter evidence would be incompetent or irrelevant had it been offered initially*.") (emphasis supplied) (citation omitted).

¶ 33 The State opened the door through the detective's and Brandon's parents' testimonies that asserted Brandon's (1) lack of possession and use of guns; (2) no involvement in gang activities; (3) reputation for peacefulness; and, (4) being characterized as "always a happy guy."

B. Right to Present a Defense

¶ 34 Defendant further argues the trial court's denial of cross-examination and inability to introduce evidence is a constitutional violation and impacts his due process right to present a defense:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as *an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony*, he has the right to present his own witnesses to establish a defense. *This right is a fundamental element of due process of law*.

Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 1023 (1967) (emphasis supplied).

¶ 35 When a defendant asserts the defense of self-defense, he is entitled for the trial court and jury to view the evidence "in the light most favorable to the defendant." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010). In the light most favorable to Defendant, the evidence tended to show Defendant had been bullied and threatened by Brandon prior to the shooting. Defendant was followed and cornered by Brandon on a roadway. Brandon got out of the car and approached Defendant. Defendant testified he thought he was being threatened and ducked down, while backing his car away from Brandon and into a ditch. Defendant testified Brandon had been shooting at him and he had heard gun shots. This evidence was corroborated by other witnesses.

¶ 36 Defendant testified he was afraid when Brandon went back towards his car. Brandon pulled his car over to Defendant and Defendant shot at Brandon through his own car window. Defendant crouched behind his car and fired additional shots. Defendant himself called 911 and surrendered to police. Defendant has no prior criminal record.

¶ 37 Defendant attempted to introduce evidence of Brandon's reputation for violence, as corroborated by violent and graphic gang and gun images of Brandon that he had stored on his cell phone. Defendant also sought to cross-examine and use the phone images to rebut Brandon's parents, Mr. and Mrs. Clark's, claimed ignorance about their son's possession and use of guns, his gang activity, and their assertion of Brandon's reputation for peacefulness and that he "was always a happy guy."

¶ 38 The State objected. On the next day of court, the State filed motion *in limine* to prevent use of these texts and images citing *State v. Bass*, 371 N.C. 535, 819 S.E.2d 322 (2018). After a *voir dire* hearing, the trial court granted the State's motion. The trial court sustained the State's objections when defense counsel attempted to cross-examine Brandon's father about a photo showing Brandon holding firearms, after the father had denied his son had ever possessed a gun.

¶ 39 Later, Detective Riemann testified for the State and mentioned she had gone through the contents of Brandon's phone. Detective Riemann testified she did not recall all the photos she may have looked at on the phone. Defense counsel attempted to cross-examine the detective regarding images and the phone's contents. The trial court sustained the State's objection.

¶ 40 While North Carolina's courts recognize and protect the right to wide-ranging cross examination, "the defendant's right to cross-examination is not absolute. The testimony which defendant sought to elicit must be relevant to some defense or relevant to impeach the witness." *State v. Guthrie*, 110 N.C. App. 91, 93, 428 S.E.2d 853, 854 (citation omitted), *rev. denied*, 333 N.C. 793, 431 S.E.2d 28 (1993).

¶ 41 The State never addresses the issue on appeal of whether it opened the door to admit this testimony, does not address the constitutional implications of Defendant's right to present a defense or his knowledge Brandon was violent and known to carry a gun. Even though the State relied upon *State v. Bass* at the trial court for the basis of its motion *in limine*, the State does not cite *Bass* to support its arguments on appeal.

C. State v. Bass

¶ 42 Our Supreme Court's holding in *Bass* does not control the outcome this case. In *Bass*, the court found no error where the defendant was denied the opportunity to offer witnesses testifying to past violent acts of the victim. *Bass*, 371 N.C. at 545, 819 S.E.2d at 328. Here, Defendant argues the State opened the door regarding the contents and images stored on Brandon's phone and by the State's witnesses affirmatively asserting Brandon's good character. Defendant asserts the denial of his right to cross-examine and present evidence to support the reasonableness of his actions denied him his due process right to present a defense. *Bass* does not address specific acts or corroborating evidence offered to impeach the State's witnesses' testimony about a victim's character for violence.

¶ 43 Here, the jury had already acquitted Defendant on first and second-degree murder. Defendant's evidence rebutted the presumption of malice arising from the use of a deadly weapon. *Reynolds*, 307 N.C. at 192, 297 S.E.2d at 537.

¶ 44 The sole remaining question for the jury was whether the Defendant's use of deadly force was reasonable, as reviewed in the light most favorable to Defendant under the facts as appeared to him at the time. The burden rested upon the State to show it was not.

¶ 45 Defendant's apprehension and belief at the time of the incident determines the degree of force necessary to use for self-defense. *See State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982). The evidence is certainly relevant and corroborative of Brandon's reputation for violence, gang involvement use of guns, and as impeachment of Brandon's father's testimony asserting Brandon's peaceful character.

¶ 46 Defendant had testified he was followed and cornered by Brandon, who abruptly pulled in front of his vehicle and came to a dead stop in the roadway. Defendant testified he heard gun shots and believed Brandon had been shooting at him. Brandon got out of the car and approached Defendant, who felt threatened and backed up his vehicle into a ditch. Brandon pulled his car over to Defendant and got out. Defendant shot at Brandon from inside his own car window. Defendant testified he was afraid and believed Brandon went back towards his car to further arm himself.

II. Conclusion

¶ 47 Defendant was convicted of voluntary manslaughter for imperfect self-defense because the jury found his degree of force was unreasonable.

The impeachment evidence goes towards Defendant's state of mind and reasonableness of fear during the incident. There is a reasonable possibility if this evidence and testimony had not been excluded, and this error not been committed at trial, a different result may have been reached by the jury, in light of their acquittals on the murder charges and rejection of presumed malice. *See* N.C. Gen. Stat. § 15A-1443(a) (2021).

¶ 48 The trial court's limitations on cross-examination and exclusion of corroborating evidence, after the State had opened the door, unlawfully eased the State's burdens of proof and to overcome self-defense. Defendant was prejudiced in his defense and is entitled to a new trial. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
LYDIA ROBINSON

No. COA21-137

Filed 1 February 2022

Contempt—criminal—summary proceedings—notice and opportunity to be heard

The trial court erred by concluding that a magistrate judge appropriately held defendant in direct criminal contempt through summary proceedings where the magistrate did not provide defendant with adequate notice or an opportunity to be heard. While the magistrate did tell the argumentative defendant to take her cell phone out of the courtroom and did threaten her once with contempt, he afterward said nothing for several minutes while defendant continued reiterating her belief that she had received a death threat on her cell phone, and then he closed the blinds separating the magistrate's portion of the facility from the public courtroom—only issuing the contempt order after defendant had left the building, when summary proceedings were no longer appropriate.

Appeal by Defendant from Order entered 23 September 2020 by Judge Jesse B. Caldwell, III, in Gaston County Superior Court. Heard in the Court of Appeals 30 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind K. Dongre, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Lydia Robinson (Defendant) appeals from an Order finding Defendant in direct criminal contempt through summary proceedings and ordering Defendant to serve a forty-eight-hour term of incarceration. The Record, including evidence adduced at trial, reflects the following:

¶ 2 Defendant entered the Gaston County District Court magistrate's office on 2 August 2020 seeking a probable cause determination related to alleged death threats Defendant received. After a several-minute exchange, and after Defendant left the magistrate's office, Magistrate Mark Oakes (Magistrate) entered an Order finding Defendant in direct, criminal contempt through summary proceedings and sentenced Defendant to thirty days incarceration. On 4 August 2020, Defendant filed written Notice of Appeal to the Gaston County Superior Court pursuant to N.C. Gen. Stat. § 5A-17. On 23 September 2020, Defendant's case came on for de novo review in Gaston County Superior Court.

¶ 3 The Magistrate testified as the State's only witness. According to the Magistrate, Defendant entered the magistrate's office on the afternoon of 2 August 2020. The Magistrate was "helping other members of the public," and Defendant waited "at the back of the courtroom" until the Magistrate finished helping the other people; there were no other people in the courtroom when Defendant "came to the window." The Magistrate testified he knew of Defendant from an earlier locally-publicized incident which occurred at "Tony's Ice Cream" and that he paid attention to Defendant's Facebook posts.

¶ 4 Defendant attempted to show the Magistrate a "death threat" Defendant had received on her cell phone. The Magistrate informed Defendant that the Magistrate would not look at Defendant's cell phone "because cell phones were not permitted in the courtroom." Defendant replied, "but I have to show it to you, it's on my phone." The Magistrate testified that it was policy to have complainants bring in affidavits for probable cause determinations, but the Magistrate did not explain this policy to Defendant because "[w]e never got to that point."

¶ 5 Defendant read the alleged threat from her cell phone to the Magistrate, but the Magistrate told Defendant, "according to the general statute it wasn't a direct threat." According to the Magistrate, Defendant

"didn't like" that determination and became "argumentative" but not "angry." At some point, the Magistrate told Defendant "that she needed to leave and take the cell phone out or I would hold her in contempt." Defendant then "tried to repeat it and repeat it and repeat it" for "two to three minutes." The Magistrate did not say anything to Defendant during the two- to three-minute period because the Magistrate "was waiting for [Defendant] to leave the courtroom." Defendant held her cell phone up in a manner that led the Magistrate to believe Defendant was recording the interaction. Eventually, the Magistrate "shut the blinds . . . and said, we're finished." The Magistrate then turned to his colleagues and said, "[Defendant] was the instigator of the Tony's Ice Cream." Defendant "started yelling . . . what do you mean, instigator."

¶ 6 Defendant eventually left the courtroom and made it to her car. The Magistrate informed the sheriff's office the Magistrate was "holding [Defendant] in contempt," and Defendant returned to the courtroom in the custody of the sheriff's office. The Magistrate did not conduct any additional proceedings, but "passed the contempt order through and . . . gave it to [Defendant]."

¶ 7 Defendant did not present any evidence; however, Defendant moved to dismiss the charge "pursuant to North Carolina General Statute 5A-14, subsection (b)" because the Magistrate had not provided adequate summary notice or an opportunity to be heard before the Magistrate issued its Order. The trial court denied the Motion. On 23 August 2020, the trial court entered its Direct Criminal Contempt/Summary Proceedings/Findings and Order. The trial court sentenced Defendant to forty-eight hours incarceration and gave Defendant credit for forty-eight hours already served. Defendant gave oral Notice of Appeal in open court.

¶ 8 On, 22 October 2020, the trial court entered written Findings of Fact and Conclusions of Law supporting the Order. The trial court made the following pertinent Findings of Fact:

> 14. That Magistrate Judge Oakes told the defendant that she was going to have to leave the courtroom and stop arguing with him, or he would hold her in contempt of court.
>
> 15. That after being told she would have to leave the courtroom or be held in contempt of court, and after she had earlier been reminded of the posted notice against cell phones in court, and told by Magistrate Judge Oakes to put her cell phone away, the defendant raised her cell phone up in the direction of the

magistrate judge to apparently videotape the conversation between the two of them. That Magistrate Judge Oakes again told her she was going to need to stop what she was doing and leave the courtroom, or he was going to hold her in contempt of court. That Magistrate Judge Oakes thus placed her on notice for a second time that if she did not leave she would be held in contempt of court.

16. That the defendant remained in the courtroom for some two to three minutes after being told she would be held in contempt of court if she did not leave the courtroom . . . . That . . . she continued to argue with him, freely expressing herself and being heard in response to being given notice she would be held in contempt of court if she did not leave . . . .

17. That Magistrate Judge Oakes closed the blinds separating the magistrate's po[r]tion of the facility with the public courtroom, turned to his colleagues and made the statement, "That is the instigator of the Tony's incident". That the defendant was still in the public area of the magistrate's courtroom because Magistrate Judge Oakes heard her begin yelling in the direction of [the Magistrate], including shouting, "What do you mean [']instigator[']?"

. . . .

19. That Magistrate Judge Oakes testified that he then prepared a written order . . . finding the defendant in contempt of court, which appears in the record of the court file. That the imposition of measures in response to the contempt was a sentence of 30 days in the Gaston County Jail. That this order, among other things, states that the magistrate gave defendant a clear warning that the conduct was improper and gave her summary notice of the charges and a summary opportunity to respond

20. That [the Magistrate] testified he then alerted the sheriff's office that he had found the defendant to be in summary criminal direct contempt of court, and asked them to be bring the defendant, who by this time had left the courtroom, back to the magistrate's

courtroom. That he testified that the sheriff's deputies located the defendant at her automobile, and escorted her back into the courtroom.

21. That [the Magistrate] testified that at no time did the defendant give an explanation or defense as to why she had her cell phone in the courtroom, in violation of posted court rules, his repeated directives to put it away, or why she appeared to be videotaping her interaction with him.

22. That the defendant was served by the sheriff in the magistrate's courtroom with the written order of contempt sentencing the defendant to jail for 30 days . . . and was taken away into custody.

23. That [the Magistrate] testified that he never saw any portion of any video, any livestream, or any pictures from any video made of the interaction . . . .

¶ 9 Based on these Findings, the trial court concluded:

3. That before finding the defendant in summary direct contempt of court, the presiding judicial official in this case twice gave the defendant summary notice of the charge of summary direct contempt of court, and the conduct she was committing which would constitute such contempt, and subsequently made findings of fact supporting such notice and summary imposition of the measures in response to the contempt. That he found the facts were established beyond a reasonable doubt.

4. That the Court concludes as a matter of law that before imposing measures for direct summary contempt, the magistrate judge did in fact give the defendant a summary opportunity to respond to the contempt by allowing her to talk and argue for two to three minutes after he twice gave her summary notice of the direct summary contempt . . . . That in arguing with the Court during that two to three minute period after twice being given summary notice of the contempt charge, . . . and then arguing with him, "What do you mean, instigator?", the defendant exercised her summary opportunity to respond to the contempt. . . .

. . . .

> 8. That the Court concludes as a matter of law beyond a reasonable doubt that during the aforesaid proceedings the defendant willfully behaved in a contemptuous manner, and the said conduct was direct contemptuous [] conduct, appropriately giving rise to the summary direct contempt finding, and conclusion by the magistrate judge.
>
> . . . .
>
> 10. That by the magistrate judge giving the defendant summary notice of the charge, affording her an opportunity to respond by arguing with him for two to three minutes . . . and arguing with him, "What do you mean, instigator?", were substantially contemporaneous with the aforesaid conduct that constitutes contempt. That under existing North Carolina law, the defendant was therefore not entitled to counsel as a constitutional or statutory right at the direct summary criminal contempt hearing.

Issue

¶ 10 The dispositive issue on appeal is whether the trial court erred in concluding the Magistrate appropriately held Defendant in direct, criminal contempt through summary proceedings.

Analysis

¶ 11 Defendant argues the trial court erred in concluding the Magistrate appropriately held her in direct criminal contempt through summary proceedings because the Magistrate did not provide Defendant adequate summary notice or an opportunity to be heard before the Magistrate held Defendant in contempt and Defendant did not exercise any right to be heard in response. "In general, 'our standard of review for contempt cases is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *State v. Wendorf*, 274 N.C. App. 480, 483, 852 S.E.2d 898, 902 (2020) (quoting *State v. Phair*, 193 N.C. App. 591, 593, 668 S.E.2d 110, 111 (2008)). "Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *Id.* (citation omitted). Our standard of review applies to the superior court's review which is conducted "as if the case had been brought [in the superior court] originally" and with "[the magistrate]

testifying as a witness with knowledge[.]" *Id.* at 488, 852 S.E.2d at 905. We review a trial court's compliance with the contempt statutes de novo, considering the matter anew and freely substituting our judgment for the lower court's judgment. *State v. Perkinson*, 271 N.C. App. 557, 559, 844 S.E.2d 336, 337 (2020).

¶ 12 Magistrates have the authority to "punish for direct criminal contempt subject to the limitations contained in Chapter 5A of the General Statutes of North Carolina." N.C. Gen. Stat. § 7A-292(a)(2) (2019).

> Criminal contempt is direct criminal contempt when the act:
>
> (1) Is committed within the sight or hearing of a presiding judicial official; and
>
> (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and
>
> (3) Is likely to interrupt or interfere with matters then before the court.
>
> The presiding judicial official may punish summarily for direct criminal contempt according to the requirements of G.S. 5A-14 or may defer adjudication and sentencing as provided in G.S. 5A-15. If proceedings for direct criminal contempt are deferred, the judicial official must, immediately following the conduct, inform the person of his intention to institute contempt proceedings.
>
> (b) Any criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by G.S. 5A-15.

N.C. Gen. Stat. § 5A-13(a-b) (2019).

¶ 13 A judicial official may "summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt." N.C. Gen. Stat. § 5A-14(a) (2019). However, "[b]efore imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of

measures in response to contempt. The facts must be established beyond a reasonable doubt." N.C. Gen. Stat. § 5A-14(b) (2019). "In cases where a court does not act immediately to punish acts constituting direct contempt or where the contempt is indirect, notice and a hearing is required." *O'Briant v. O'Briant*, 313 N.C. 432, 436, 329 S.E.2d 370, 373 (1985). However: "Notice and a formal hearing are not required when the trial court promptly punishes acts of contempt in its presence." *In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 595 (1998), *aff'd*, 350 N.C. 656, 517 S.E.2d 605 (1999).

¶ 14 Defendant challenges the trial court's Findings 14, 15, 16 and 19 as not supported by the evidence.[1] In Finding 14, the trial court found the Magistrate "told [Defendant] she was going to have to leave the courtroom and stop arguing with him, or he would hold her in contempt of court." While the evidence does support the Finding the Magistrate told Defendant to leave the courtroom and threatened Defendant with contempt, it does not support the Finding the Magistrate told Defendant to stop arguing with him. Rather the evidence—consisting solely of the Magistrate's own testimony—reflects the Magistrate told Defendant to leave the courtroom to take the cell phone out of the courtroom. The testimony further reflects the Magistrate did not say anything at all when Defendant attempted to continue to press her point, instead the Magistrate testified he sat there silently for two to three minutes before closing the blinds.

¶ 15 In Finding 15, in relevant part, the trial court found after the two to three minutes, the Magistrate "again told [Defendant] she was going to need to stop what she was doing and leave the courtroom or he was going to hold her in contempt of court. That [the Magistrate] thus placed [Defendant] on notice for a second time that if she did not leave she would be held in contempt of court." This portion of Finding 15 is not supported by the Record. Again, as noted above, while it is true the Magistrate told Defendant to leave the courtroom once, there is no evidence the Magistrate provided any second warning—instead, testifying he said nothing for two to three minutes before closing the blinds.

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1. Defendant acknowledges Finding 19—which recites testimony that the Magistrate entered a form order which included certain findings—is facially supported by the evidence, but contends the trial court's finding suggests the trial court may have "embrace[d]" the preprinted Findings on the Magistrate's Order. However, the trial court's Finding only re-states the Magistrate's testimony and that the Magistrate's Findings were contained in the Magistrate's Order. The trial court did not seem to adopt those Findings, without its own analysis, in its own Order. Therefore, Finding 19—albeit as with many of the trial court's evidentiary Findings, really a mere recitation of evidence than an actual finding—is supported by the evidence.

¶ 16 In Finding 16, the trial court found, "[t]hat the defendant remained in the court room for some two to three minutes" after the Magistrate warned Defendant the Magistrate would hold her in contempt, and "[Defendant] continued to argue with [the Magistrate], freely expressing herself and being heard in response to being given notice she would be held in contempt[.]" Defendant contends this Finding is not supported because to the extent Defendant was "arguing" she was not doing so in response to the contempt charge—but simply reiterating her position she had received a death threat. We agree. The Magistrate testified Defendant "tried to repeat" her claim over and over for "two to three minutes," and the Magistrate did not say anything to Defendant during the two- to three-minute period because the Magistrate "was waiting for [Defendant] to leave the courtroom."

¶ 17 The trial court's Finding Defendant argued with the Magistrate in response to being forewarned of contempt is thus not supported by the evidence. Nothing in the Record indicates Defendant argued about whether or not the Magistrate should hold her in contempt or was even asked or provided the opportunity to respond as to why she should not be held in contempt.[2]

¶ 18 Defendant next argues the trial court's remaining Findings of Fact and the Record evidence do not support its Conclusions of Law Defendant was "twice" given summary notice of the criminal contempt charge and an opportunity to respond to the charge. We agree. First, it is clear from the Record that Defendant was not "twice" given notice of possible contempt charges. Rather, the Magistrate's own testimony showed he told her once that if she did not remove the cell phone from the courtroom he would hold her in contempt. Moreover, it is also evident from the Record that to the extent contempt was imposed for continuing to argue about the alleged death threat, the Magistrate never provided prior notice of that charge, instead sitting quietly and then closing the blinds. Indeed, the exact basis (or bases) upon which Defendant was held in contempt is unclear from this Record. Neither the Magistrate's Order nor the trial court's Order reflect a clear statement of specifically why Defendant was held in contempt (the cell phone, arguing, or both) or, ultimately, reflect on what basis Defendant was put on notice she was facing a contempt charge. Indeed, even after Defendant was detained and brought back

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2. For its part, the State contends even if these Findings are not supported by the evidence, Findings 18 and 21, which are not directly challenged on appeal, support the trial court's conclusions. Again, however, these Findings constitute nothing more than recitations of the Magistrate's testimony and not true findings of fact. As such, we disregard them as mere recitations of testimony.

before the Magistrate, there is no indication on this Record Defendant was informed of the charges against her even then before the Magistrate ordered her jailed.

¶ 19 Moreover, and in turn, the trial court's supported Findings—to the extent they constitute Findings rather than recitations of testimony—and the Record evidence do not support the trial court's Conclusion: "as a matter of law that before imposing . . . direct summary contempt, the magistrate judge did in fact give the defendant a summary opportunity to respond . . . by allowing her to talk and argue for two to three minutes" after the Magistrate gave Defendant notice of summary contempt.

¶ 20 Here, as noted above, the trial court's Finding Defendant argued with the Magistrate "in response to being given notice she would be held in contempt" is not supported by the evidence. To the contrary, there is no evidence Defendant was given the opportunity to respond to the charge of contempt itself or presented any argument as to why she should not be held in contempt in response to notice of a contempt charge against her. Thus, this Finding does not support the trial court's Conclusion.

¶ 21 In fact, we have previously held, albeit in an unpublished decision, that a magistrate did not afford the defendant summary opportunity to be heard on similar facts. *See In re Foster*, 227 N.C. App. 454, 744 S.E.2d 496 (COA 12-865) (unpublished) (slip op. at *18), *writ denied*, *rev. denied*, 367 N.C. 222, 747 S.E.2d 533, 534 (2013). In *Foster*, the defendant—a lawyer—came into the magistrate's office "cuss[ing]." *Id.* at *8-9. The magistrate reminded the defendant that the office was a courtroom and "she should watch her language." *Id.* at *9. After the defendant continued to use foul language, the magistrate asked the defendant to leave and warned her that the magistrate would hold the defendant in contempt. *Id.* The defendant "continued to cuss" but walked toward the exit. *Id.* As the defendant was walking out of the exit, the magistrate told her to "come back to the window" because the magistrate "had already informed her that I was going to hold her in contempt." *Id.* at *9-10. The magistrate "ordered officers" to seize the defendant, and officers brought the defendant back before the magistrate who "did an initial appearance" to inform the defendant the magistrate was holding her in contempt and to give the defendant "a copy of the contempt form that [the magistrate] had filled out." *Id.* at *10. The State argued the defendant had the opportunity to explain herself but "chose instead to continue to use profane language[.]" *Id.* at *17. We reasoned, although the magistrate informed the defendant the magistrate was going to hold her

in contempt, the magistrate's warnings "did not constitute evidence that defendant failed to seize an opportunity to respond[.]" *Id.*

¶ 22 Similarly, here, evidence the Magistrate sat silently for two to three minutes, closed the blinds, made an out-of-court remark about Defendant—unrelated to the business of the court—to his colleagues, and then let Defendant leave before preparing a contempt order and ordering Defendant detained does not constitute evidence Defendant failed to seize an opportunity to respond to charges of contempt. To the contrary, the evidence reflects during the initial encounter the Magistrate never informed Defendant he was, in fact, holding her in contempt and rather than give her an opportunity to respond to charges of contempt sat silently before closing the blinds to the courtroom, thus providing Defendant no opportunity to respond before filling out the form contempt Order and ordering her detained. Further, again, after Defendant was detained there is no indication Defendant was afforded any notice or opportunity to be heard on the charges against her before being jailed. Thus, the trial court's Conclusion of Law Defendant received summary notice and an opportunity to respond to the contempt charge is not supported by the Findings of Fact or the evidence of Record.

¶ 23 Moreover, although this case was before the trial court on de novo review as if the case had been originally brought before the trial court, it appears evident the trial court based its Conclusions and the decretal portion of its Order, at least in significant part, on the validity of the proceedings leading up to the Magistrate's Order. Indeed, the trial court specifically concluded: "the defendant willfully behaved in a contemptuous manner, and the said conduct was direct contemptuous [] conduct, appropriately giving rise to the summary direct contempt finding, and conclusion by the magistrate judge." Nevertheless, even absent this Conclusion and for the reasons stated above, the evidence does not support the relevant Findings made by the trial court and which, in turn, do not support the relevant Conclusions Defendant received summary notice and opportunity to be heard to support a direct criminal contempt adjudication by summary proceedings.

¶ 24 In fact, under these circumstances, the Record tends to suggest summary contempt proceedings by the Magistrate here were not appropriate. Judicial officials may only impose summary contempt proceedings "when the measures are imposed substantially contemporaneously with the contempt." N.C. Gen. Stat. § 5A-14(a) (2019). Otherwise, judicial officials must use plenary proceedings for contempt when the official "may not proceed summarily," and only after the defendant receives an order to show cause and a hearing. N.C. Gen. Stat. § 5A-15 (2019). Regarding

whether the judicial official acted immediately to punish acts of contempt: " 'substantially contemporaneously with the contempt' in G.S. 5A-14(a) is construed in light of its legislative purpose of meeting due process safeguards . . . and clearly does not require that the contempt proceedings immediately follow the misconduct. *State v. Johnson*, 52 N.C. App. 592, 596, 279 S.E.2d 77, 79 (1981). "Factors bearing on the time lapse should include the contemnor's notice or knowledge of the charged misconduct, the nature of the misconduct, and other circumstances that may have some bearing upon the defendant's right to a fair and timely hearing." *Id.* (holding the trial court properly imposed direct criminal contempt through summary proceedings at the end of a hearing and well after the contemptuous behavior occurred where the contemptuous conduct occurred during a "relatively short" bond hearing, "the court was adjudicating, and the defendant was put on notice, that the defendant's conduct was so disruptive and contemptuous," and imposing confinement during the hearing "could well have antagonized the already infuriated defendant and resulted in further disruption and delay of the hearing").

¶ 25 Here, the Record indicates the Magistrate closed the blinds to the window where the public accesses magistrate services in the courtroom and then made out-of-court statements about Defendant unrelated to the business of the court. Moreover, the Magistrate did not hold Defendant in summary contempt until after he had closed the courtroom and Defendant had left the courtroom for her car at which time she was not delaying or disrupting the business of the court. Thus, unlike in *Johnson*, the Magistrate was not conducting a hearing where multiple parties were arguing and the dignity and order of the courtroom was paramount to those proceedings. Defendant was the only person in the Magistrate's courtroom at the time, and she was not delaying or disrupting her own case by remaining. Indeed, the Magistrate effectively closed the courtroom when the Magistrate closed the blinds. Even though Defendant did not immediately leave after the Magistrate closed the courtroom, the proceedings at issue effectively stopped. Although a judicial official may allow time to lapse between the contemptuous conduct and imposing summary contempt under N.C. Gen. Stat. § 5A-14, the circumstances here did not necessitate any such delay. The Magistrate could have placed Defendant on notice of the contempt charges, provided an opportunity for her to respond to the specific charges, and told the sheriff's office to seize Defendant and, further, could have drafted and served Defendant with the contempt Order before she left the courtroom and made it to her car. Thus, at the point the Magistrate closed the blinds and let Defendant leave, summary proceedings were

no longer appropriate. Therefore, the trial court erred in concluding the Magistrate appropriately held Defendant in direct, summary contempt.

Conclusion

¶ 26 Accordingly, for the foregoing reasons, we reverse the trial court's Direct Criminal Contempt/Summary Proceedings/Findings and Order.

REVERSED.

Chief Judge STROUD and Judge GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 FEBRUARY 2022)

ALMASON v. SOUTHGATE ON FAIRVIEW CONDO. ASS'N, INC. 2022-NCCOA-62 No. 21-57	Mecklenburg (19CVS829)	Affirmed
ASSOC. MD, LLC v. METABOLIC MED., LLC 2022-NCCOA-63 No. 21-146	Mecklenburg (18CVD12267)	Affirmed
BEST CHOICE PRODS. v. HENDRICK, BRYANT, NERHOOD, SANDERS & OTIS, LLP 2022-NCCOA-64 No. 21-163	Forsyth (20CVS3124)	Reversed and Remanded
BOSSIAN v. CHICA 2022-NCCOA-65 No. 21-381	Wake (20CVD8897)	Dismissed
CHALILEH v. JENKINS 2022-NCCOA-66 No. 21-327	Wake (20CVS3548)	Affirmed
EVANS v. MYERS 2022-NCCOA-67 No. 20-52	Rowan (17CVD1308)	Vacated and Remanded
IN RE D.A. 2022-NCCOA-68 No. 21-312	Wilson (20JB49)	No prejudicial error in part; Remanded in part.
IN RE FORECLOSURE OF NOORI 2022-NCCOA-69 No. 20-728	Johnston (19SP499)	Dismissed
JENKINS v. WELLS FARGO BANK, NA 2022-NCCOA-70 No. 21-336	N.C. Industrial Commission (18-028218) (18-028219)	Affirmed
N.C. FARM BUREAU MUT. INS. CO., INC. v. KERBY 2022-NCCOA-71 No. 20-883	Wake (16CVS630)	Affirmed

STATE v. ADAMS 2022-NCCOA-72 No. 20-865	Forsyth (17CRS59353) (17CRS59355)	Affirmed
STATE v. DENNY 2022-NCCOA-74 No. 21-384	Forsyth (18CRS58385-87)	Affirmed
STATE v. FAULK 2022-NCCOA-75 No. 21-55	Columbus (10CRS53880) (11CRS1223)	No Error
STATE v. GLASSON 2022-NCCOA-76 No. 20-15	Union (17CRS53084-85)	No Error and No Plain Error
STATE v. LARGEN 2022-NCCOA-78 No. 21-164	Rockingham (17CRS1643) (17CRS52174)	Dismissed
STATE v. LEWIS 2022-NCCOA-79 No. 21-301	Buncombe (08CRS55533)	No Error
STATE v. McCAULEY 2022-NCCOA-80 No. 21-266	Stanly (17CRS51000)	Affirmed.
STATE v. NOUGIER 2022-NCCOA-81 No. 21-63	Randolph (16CRS54746) (16CRS54748)	No Error
STATE v. PARKER 2022-NCCOA-82 No. 21-474	Beaufort (18CRS51687-88) (19CRS50917)	APPEAL DISMISSED
STATE v. POSS 2022-NCCOA-83 No. 21-365	Guilford (19CRS71843)	No Error
STATE v. SANFORD 2022-NCCOA-84 No. 20-607	McDowell (18CRS50648-50)	No Error
STATE v. TORRES 2022-NCCOA-85 No. 21-69	Buncombe (17CRS490)	No Error
STATE v. VIERS 2022-NCCOA-86 No. 20-806	Johnston (18CRS54462-63) (18CRS54548-52)	NO PREJUDICIAL ERROR

TUEL v. TUEL 2022-NCCOA-87 No. 21-187	Johnston (17CVD1533)	Reversed and Remanded
WATTLEY v. WORTHAM-THOMAS 2022-NCCOA-88 No. 20-804	Mecklenburg (19CVS3233)	Dismissed

BRYANT v. WAKE FOREST UNIV. BAPTIST MED. CTR.

[281 N.C. App. 630, 2022-NCCOA-89]

KIMBERLY D. BRYANT, PLAINTIFF
v.
WAKE FOREST UNIVERSITY BAPTIST MEDICAL CENTER, NORTH CAROLINA BAPTIST HOSPITAL, WAKE FOREST UNIVERSITY HEALTH SCIENCES, & MEHMET TAMER YALCINKAYA, M.D., DEFENDANTS

No. COA21-138

Filed 15 February 2022

1. Fraud—fraudulent concealment—actual fraud—surgical implant—information given to patient

In plaintiff's suit asserting that an adhesion barrier implant placed during a prior surgery caused her infertility, defendants were entitled to summary judgment on plaintiff's fraudulent concealment claim based on actual fraud where plaintiff failed to present evidence that the surgeon concealed: (1) that he placed the implant, since the device was noted in his operative note and post-operative record; (2) that the implant should be removed after eight weeks, since it was his intention that it be left in place permanently; or (3) that plaintiff would need additional treatments in order to conceive a child, where his notes indicated his guarded prognosis with regard to her fertility, and where plaintiff voluntarily discontinued treatment with him.

2. Fraud—fraudulent concealment—breach of fiduciary duty—constructive fraud—surgical implant—benefit to surgeon

In plaintiff's suit asserting that an adhesion barrier implant placed during a prior surgery caused her infertility, defendants were entitled to summary judgment on plaintiff's fraudulent concealment claim based on breach of fiduciary duty—which would be time-barred in this case unless the alleged breach rose to the level of constructive fraud—where plaintiff failed to present evidence that the surgeon obtained any benefit from his alleged breach of duty.

3. Negligence—res ipsa loquitur—effect of surgical implant—expert testimony required

In plaintiff's suit asserting that an adhesion barrier implant placed during a prior surgery caused her infertility, defendants were entitled to summary judgment on plaintiff's claim that the jury could infer defendants' negligence from the facts under the doctrine of res ipsa loquitur. Since the procedure and the proper use of the implant were outside the common knowledge, experience, and sense of a layperson, expert testimony would be needed in order to establish the standard of care and its breach.

4. Statutes of Limitation and Repose—medical malpractice—surgical implant—therapeutic purpose or effect—four-year statute of limitation applied

In plaintiff's suit asserting that an adhesion barrier implant placed during a prior surgery caused her infertility, defendants were entitled to summary judgment on plaintiff's medical malpractice claim where there was no genuine issue of material fact that the implant, which was purposefully placed, had either a therapeutic purpose or therapeutic effect at the time it was placed in plaintiff's body, since, pursuant to the use of the disjunctive "or" in N.C.G.S. § 1-15(c), if the device satisfied either purpose "or" effect, it was not a "foreign object" and the four-year, not the ten-year, statute of limitations applied. Although plaintiff argued that the implant no longer served a purpose because it should have been removed after a limited period of time, the experts from both sides agreed it had an initial therapeutic purpose, of preventing adhesion formation at the surgical incision site.

5. Damages and Remedies—punitive—medical malpractice action—summary judgment granted to defendants on all claims

In plaintiff's suit asserting that an adhesion barrier implant placed during a prior surgery caused her infertility, where defendants were entitled to summary judgment on all of plaintiff's claims, plaintiff had no independent basis for seeking punitive damages.

Appeal by Plaintiff from order granting Defendants' motion for summary judgment entered 23 October 2020 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 16 November 2021.

Kennedy, Kennedy, Kennedy, & Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, for Plaintiff-Appellant.

Coffey Law PLLC, by Tamura D. Coffey, Elizabeth G. Horton, and Peyton M. Pawlik, for Defendant-Appellee Mehmet Tamer Yalcinkaya, M.D.

Shumaker, Loop & Kendrick, LLP, by Scott M. Stevenson, John D. Kocher, and Christopher T. Hood, for Defendant-Appellees Wake Forest University Baptist Medical Center, North Carolina Baptist Hospital, and Wake Forest University Health Sciences.

JACKSON, Judge.

¶ 1 Kimberly D. Bryant ("Plaintiff") appeals from an order granting Mehmet Tamer Yalcinkaya, M.D., Wake Forest University Baptist Medical Center, North Carolina Baptist Hospital, and Wake Forest University Health Sciences' (collectively "Defendants") motion for summary judgment. Plaintiff argues that the trial court erred because a genuine issue of material fact existed for her fraudulent concealment, res ipsa loquitur, medical malpractice, and punitive damages claims. We affirm the trial court's grant of summary judgment for each of Plaintiff's claims.

I. Background

¶ 2 In 2007, Plaintiff was referred to Mehmet Tamer Yalcinkaya, M.D. ("Defendant Yalcinkaya"), a reproductive endocrinologist, due to pelvic pain caused by a large uterine myoma, also known as a uterine fibroid. At that time, Defendant Yalcinkaya was an attending physician, associate professor, and the Reproductive Endocrinology and Infertility ("REI") Section Head at Wake Forest University Baptist Medical Center in Winston-Salem. Defendant Yalcinkaya was a physician licensed in North Carolina and board-certified in both Obstetrics and Gynecology ("OB-GYN") and REI.

¶ 3 After examining Plaintiff, Defendant Yalcinkaya confirmed her uterine myoma diagnosis and recommended an exploratory laparotomy (abdominal surgery) and myomectomy (surgical removal of uterine fibroids). After Plaintiff consented to the surgical course of treatment, Defendant Yalcinkaya performed the surgery on 5 October 2007. During the procedure, Defendant Yalcinkaya determined that Plaintiff had Stage IV endometriosis, an advanced form of a disorder that results in abnormal endometrial tissue growth outside the uterus, which had affected Plaintiff's uterus, fallopian tubes, ovaries, and uterine cul-de-sac—meaning that Plaintiff's pelvis was largely covered with adhesions and scar tissue. Defendant Yalcinkaya removed Plaintiff's large uterine fibroid and many of the endometrial adhesions. After the surgery, Defendant Yalcinkaya documented and diagrammed the extent of Plaintiff's endometriosis, and noted in her chart that her prognosis regarding fertility was guarded even with removal of the fibroid and the assistance of in vitro fertilization ("IVF"). Plaintiff alleged that Defendant Yalcinkaya told her and her husband after the surgery "to rest for three months, and after that there was no reason she couldn't get pregnant and have a child."

¶ 4 Near the end of the surgery, Defendant Yalcinkaya implanted a prelude peritoneal membrane, also known as a Gore-Tex adhesion barrier,

to prevent adhesions from forming at the surgical incision site where the fibroid was removed. Defendant Yalcinkaya used non-absorbable sutures when implanting the Gore-Tex barrier, in order to keep it in place permanently. The use of the Gore-Tex barrier was documented in Defendant Yalcinkaya's operative note for the procedure, as well as in the perioperative record of the procedure. The Gore-Tex barrier was specifically listed under the "Implants" section of the operative note, with the serial number, lot number, and model number of the barrier listed along with other information. This type of surgical membrane was routinely used in 2007 to prevent pelvic adhesion formation. Defendant Yalcinkaya testified that he used the implant to prevent adhesion formation at the incision site and increase Plaintiff's fertility and chance of carrying a child to term.

¶ 5 After the procedure, Plaintiff saw Defendant Yalcinkaya for post-operative treatment. Defendant Yalcinkaya recommended and noted in her chart that Plaintiff undergo drug therapy to inhibit uterine fibroid growth as well as a second procedure to evaluate her endometriosis and remove additional fibroids and endometrial adhesions. Defendant Yalcinkaya says he told Plaintiff this during an office visit on 9 October 2007 and another visit on 18 December 2007, but Plaintiff asserts this was never communicated to her. Plaintiff did not complete drug therapy or undergo a second surgery, and her last office visit with Defendant Yalcinkaya was 5 March 2008. At this last appointment, Plaintiff indicated that she did not know when she might want to become pregnant and discontinued her treatment with Defendant Yalcinkaya.

¶ 6 In December 2016, Plaintiff returned to the Wake Forest gynecology clinic for treatment of a large pelvic mass. On 21 February 2017, Plaintiff presented for surgery to E. Johnston-MacAnanny, M.D. ("Dr. Johnston"), who performed an exploratory laparotomy with adhesiolysis, evaluating and draining Plaintiff's pelvic mass. During this procedure, Dr. Johnston found and removed the Gore-Tex implant that had been placed by Defendant Yalcinkaya almost ten years prior. At the time, Dr. Johnston did not know what the object was, and initially thought it could be a sheet of plastic. After lab analysis, it was later discovered to be the Gore-Tex implant.

¶ 7 On 21 September 2017, Plaintiff filed suit against Wake Forest University Baptist Medical Center, North Carolina Baptist Hospital, Wake Forest University Health Sciences, and Defendant Yalcinkaya (collectively "Defendants") alleging that the Gore-Tex barrier implanted by Defendant Yalcinkaya caused her infertility. On 16 February 2018,

Plaintiff voluntarily dismissed the suit without prejudice, and filed a new complaint on 25 October 2018, naming the same defendants.

¶ 8 On 12 March 2020, Plaintiff's standard of care expert, Steven D. McCarus, M.D. ("Dr. McCarus"), was deposed. During his deposition, Dr. McCarus testified in relevant part that

- In 2007, there were three types of FDA-approved implants to prevent post-surgical adhesion formation, one of which was the Gore-Tex barrier used in this case.
- Adhesion barriers have a therapeutic purpose, and in 2006 and 2007, Gore-Tex adhesion barriers had therapeutic purposes.
- At the time of Plaintiff's procedure, there was no medical literature suggesting that any of the adhesion barriers were superior; it was simply the surgeon's preference as to which FDA-approved implant to use.
- If Plaintiff chose not to return to Defendant Yalcinkaya for treatment, Defendant Yalcinkaya had no ability to further treat Plaintiff or continue her course of care.

¶ 9 On 11 April 2020, Plaintiff served an errata sheet that attempted to modify and change some of Dr. McCarus's testimony. In particular, in the errata sheet, Dr. McCarus testified that

- Gore-Tex barriers "can" have a therapeutic purpose "if they are properly used. In the case of Kimberly Bryant, the Gore-Tex adhesion barriers were improperly used because Dr. Yalcinkaya failed to remove them within 2 to 8 weeks after the gynelogic surgery."
- Gore-Tex barriers "could have therapeutic purposes if they were properly used. . . . Per his deposition testimony, [Dr. Yalcinkaya's] intent was to leave the Gore-Tex in Ms. Bryant's body permanently. To leave this in her body more than 8 weeks after surgery would have been for a non-therapeutic purpose."

¶ 10 Defendants moved for summary judgment on the grounds that the pleadings, written discovery, depositions, and affidavits showed no genuine issue of material fact on her fraud, medical malpractice, or res ipsa loquitur claims. Plaintiff opposed the motion and filed another affidavit from Dr. McCarus in response. The affidavit reflected the modifications made in the errata sheet. On 23 October 2020, the trial court entered an order granting Defendants' motion for summary judgment and dismissing Plaintiff's claims with prejudice.

¶ 11 Plaintiff timely filed notice of appeal.

II. Analysis

A. Standard of Review

¶ 12 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(c), Rule 56 (2021). "All facts asserted by the nonmoving party are taken as true and viewed in the light most favorable to that party." *Ussery v. Branch Banking & Trust Co.*, 368 N.C. 325, 334, 777 S.E.2d 272, 278 (2015) (internal marks and citation omitted). "A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]" *Ussery*, 368 N.C. at 335, 777 S.E.2d at 278-79 (internal quotation and citation omitted). On appeal, we review an order granting summary judgment *de novo*. *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014).

B. Fraudulent Concealment: Fraud and Breach of Fiduciary Duty

¶ 13 In support of her claim of fraudulent concealment, Plaintiff makes arguments of actual fraud and constructive fraud. We hold that the evidence fails to support a prima facie case of either actual or constructive fraud, and therefore affirm the trial court's grant of summary judgment dismissing the fraudulent concealment claim.

1. Actual Fraud

¶ 14 **[1]** Plaintiff advances three theories of fraudulent concealment:[1] (1) Defendant Yalcinkaya concealed the fact that he placed the Gore-Tex barrier inside of Plaintiff, (2) Defendant Yalcinkaya concealed that the Gore-Tex barrier needed to be removed after eight weeks, and (3) Defendant Yalcinkaya concealed that Plaintiff needed a second operation and additional drug therapy. We agree with the trial court that there

1. Additionally, Plaintiff argues for the first time on appeal that Defendant Yalcinkaya made an intentionally false statement to Plaintiff by telling her "to rest for three months, and after that there was no reason she couldn't get pregnant and have a child." However, Plaintiff cannot create an issue of material fact for summary judgment by raising it for the first time on appeal, *see Piraino Bros., LLC v. Atl. Fin. Grp., Inc.*, 211 N.C. App. 343, 348, 712 S.E.2d 328, 332 (2011), and therefore we decline to address this argument that was not before the trial court.

is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law on Plaintiff's fraudulent concealment claim.

¶ 15 In order to support a claim of actual fraud, Plaintiff must prove five elements: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Watts v. Cumberland Cnty. Hosp. Sys. Inc.*, 317 N.C. 110, 117, 343 S.E.2d 879, 884 (1986) (internal quotation and citation omitted).

¶ 16 Here, Plaintiff fails to make a prima facie case of actual fraud. First, Plaintiff's evidence does not support her argument that Defendant Yalcinkaya concealed the implantation of the Gore-Tex barrier. Plaintiff claims that Defendant Yalcinkaya did not inform her about the Gore-Tex barrier's implantation in any of her appointments, and Defendant Yalcinkaya claims that he discussed the implantation both before and after Plaintiff's surgery. Defendant Yalcinkaya's operative note reflects that, during Plaintiff's procedure, he placed a Gore-Tex barrier over a uterine incision and sutured said barrier to her "uterine serosa." Moreover, Defendant Yalcinkaya's post-operative record provides the exact serial, lot, and model number of the Gore-Tex barrier that was implanted during Plaintiff's surgery.

¶ 17 Second, Plaintiff's evidence does not support her argument that Defendant Yalcinkaya concealed that the Gore-Tex barrier needed to be removed after eight weeks. Although Plaintiff presented expert testimony that the Gore-Tex barrier needed to be removed after eight weeks, she did not present any evidence tending to show that it was Defendant Yalcinkaya's intention to remove the Gore-Tex barrier after eight weeks, or that he falsely represented or concealed this from Plaintiff with the intent to deceive her. In his sworn testimony, Defendant Yalcinkaya never wavered that he implanted the Gore-Tex barrier in Plaintiff with the intention that it remain in her body permanently.

¶ 18 Third, Plaintiff's evidence does not support her argument that Defendant Yalcinkaya intentionally concealed that Plaintiff needed a second operation and additional drug therapy. Plaintiff claims that Defendant Yalcinkaya never informed her about additional treatments, and in fact, told her "to rest for three months, and after that there was no reason she couldn't get pregnant and have a child." However, Defendant Yalcinkaya specifically noted in Plaintiff's chart that her fertility prognosis was guarded even with the assistance of IVF. Assuming that Defendant Yalcinkaya's statement was a false representation or concealment of a material fact, Plaintiff still has not produced any evidence that

the statement was reasonably calculated to deceive or that Defendant Yalcinkaya made the statement with intent to deceive. Plaintiff alleges that Defendant Yalcinkaya "decided not to provide her further medical treatment because he believed she could not pay him[,]" and this suffices to show Defendant Yalcinkaya's motive and intent to deceive. However, after the completion of her surgery, Plaintiff voluntarily discontinued treatment with Defendant Yalcinkaya. Plaintiff's own expert acknowledged that her decision not to return for treatment thereafter precluded Defendant Yalcinkaya from continuing Plaintiff's postoperative care or engaging in further treatments.

2. Breach of Fiduciary Duty and Constructive Fraud

¶ 19 **[2]** A claim for breach of fiduciary duty is ordinarily subject to a three-year statute of limitations but may be governed by a 10-year statute of limitations when it "rise[s] to the level of constructive fraud." *Ironman Med. Props., LLC v. Chodri*, 268 N.C. App. 502, 512, 836 S.E.2d 682, 690 (2019) (internal quotation and citations omitted). Here, because Plaintiff's suit was not filed until over nine years after Defendant Yalcinkaya's last act, Plaintiff's claim for breach of fiduciary duty is necessarily barred unless it rises to the level of constructive fraud.

¶ 20 In order to prove constructive fraud, Plaintiff must allege and prove: "(1) that the defendant owes the plaintiff a fiduciary duty; (2) that the defendant breached that duty; and (3) that the defendant sought to benefit himself in the transaction." *Ironman*, 268 N.C. App. at 513, 836 S.E.2d at 691 (internal marks and citation omitted). This Court has further emphasized that

> [t]he primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the intent and showing that the defendant benefitted from his breach of duty. This element requires a plaintiff to allege and prove that the defendant took advantage of his position of trust to the hurt of plaintiff and sought his own advantage in the transaction.

Id. (internal quotations and citations omitted).

¶ 21 Here, Plaintiff asserts that *Head v. Gould Killian CPA Grp., P.A.*, 371 N.C. 2, 812 S.E.2d 831 (2018), eliminated the requirement of a benefit to prove constructive fraud. In *Head*, our Supreme Court states the following on constructive fraud:

> Constructive fraud arises where a confidential or fiduciary relationship exists, and its proof is less exacting

> than that required for actual fraud. When a fiduciary relation exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit. To assert a cause of action for constructive fraud, the plaintiff must allege facts and circumstances (1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.

Head, 371 N.C. at 9, 812 S.E.2d at 837 (internal marks and citations omitted). At no point in *Head* does our Supreme Court expressly or impliedly eliminate the benefit requirement as Plaintiff contends. Moreover, after *Head*, this Court has continued to require a showing of benefit for constructive fraud. *See, e.g.*, *Ironman Med. Props.*, 268 N.C. App. at 513, 836 S.E.2d at 691; *Stitz v. Smith*, 272 N.C. App 415, 422, 846 S.E.2d 771, 775 (2020); *Gen. Fid. Ins. Co. v. WFT, Inc.*, 269 N.C. App. 181, 186, 837 S.E.2d 551, 556 (2020).

¶ 22 Here, Plaintiff's only argument that Defendant Yalcinkaya benefitted from his alleged breach of duty is that Plaintiff "allowed Dr. Yalcinkaya to perform the surgery on her." However, in *Ironman*, we held that the benefit alleged by a plaintiff must be "more than a continued relationship with the plaintiff[,]" 268 N.C. App. at 513, 836 S.E.2d at 691, and, further, Defendant Yalcinkaya testified that there were no factors about Plaintiff's case or procedure that would enhance his reputation or give him any possible benefit.

¶ 23 Because Plaintiff has failed to create a prima facie case of fraudulent concealment, either through actual or constructive fraud, the trial court properly concluded that Defendants are entitled to summary judgment as a matter of law.

C. Res Ipsa Loquitur

¶ 24 **[3]** Plaintiff argues that the trial court erred by concluding that res ipsa loquitur was inapplicable in this case. We disagree and affirm the trial court's conclusion on res ipsa loquitur.

¶ 25 "*Res ipsa loquitur* applies when (1) direct proof of the cause of an injury is unavailable, (2) defendant controlled the instrumentality involved in the accident, and (3) the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission."

Bluitt v. Wake Forest Univ. Baptist Med. Ctr., 259 N.C. App. 1, 4, 814 S.E.2d 477, 480 (2018) (internal quotation and citation omitted). "For the doctrine to apply in a medical malpractice claim, a plaintiff must allege facts from which a layperson could infer negligence by the defendant based on common knowledge and ordinary human experience." *Smith v. Axelbank*, 222 N.C. App. 555, 559, 730 S.E.2d 840, 843 (2012). Therefore, "*res ipsa loquitur* is inappropriate in the usual medical malpractice case, where the question of injury and the facts in evidence are peculiarly in the province of expert opinion." *Bluitt*, 259 N.C. App. at 5, 814 S.E.2d at 480 (internal quotation and citation omitted). *See also Rowell v. Bowling*, 197 N.C. App. 691, 696, 678 S.E.2d 748, 751 (2009) ("Normally, in [medical malpractice] actions, both the standard of care and its breach must be established by expert testimony." (internal quotation omitted)).

¶ 26 Here, the trial court, in holding that res ipsa loquitur was inapplicable, found that

> [q]uestions of if and when the Gore-Tex should have been removed and what damage a failure to remove caused to Plaintiff are questions that a layperson could not resolve with ordinary knowledge and experience. Indeed, both parties have qualified expert[] witnesses precisely because such testimony is necessary to answer those questions.

¶ 27 We agree with the trial court that res ipsa loquitur cannot apply because a layperson, without the assistance of expert testimony, could not infer negligence from the facts of this case based on common knowledge and ordinary human experience. Plaintiff's procedure involved the surgical placement of a Gore-Tex adhesion barrier, the proper use of which is outside the common knowledge, experience, and sense of a layperson. Thus, without expert testimony, a layperson would lack a basis to determine whether Plaintiff's injury was one that would not normally occur in the absence of negligence or was an inherent risk of the procedure and use of this surgical bandage. Therefore, because "both the standard of care and its breach must be established by expert testimony[,]" *Bluitt*, 259 N.C. App. at 6, 814 S.E.2d at 481, we agree that a res ipsa loquitur claim is inappropriate in this case and affirm the trial court's conclusion that there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law on Plaintiff's res ipsa loquitur claim.

D. Medical Malpractice

¶ 28 **[4]** Plaintiff argues that there is a genuine issue of material fact regarding whether the Gore-Tex barrier had a therapeutic purpose or effect at the time it was implanted. We disagree and affirm the trial court's grant of summary judgment.

¶ 29 North Carolina General Statutes § 1-15(c) provides three different time limitations for medical malpractice claims:

> [1] a minimum three-year period from occurrence of the last act;
>
> [2] an additional one-year-from-discovery period for injuries "not readily apparent" subject to a four-year period of repose commencing with defendant's last act giving rise to the cause of action; and
>
> [3] an additional one-year-from-discovery period for foreign objects subject to a ten-year period of repose again commencing with the last act of defendant giving rise to the cause of action.

Black v. Littlejohn, 312 N.C. 626, 634, 325 S.E.2d 469, 475 (1985). Regarding the third option, the statute specifically provides that

> where damages are sought by reason of a foreign object, which has *no therapeutic or diagnostic purpose or effect*, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

N.C. Gen. Stat. § 1-15(c) (2021) (emphasis added).

¶ 30 Here, the crux of the issue is whether the Gore-Tex barrier had a therapeutic purpose or effect, such that it is not considered a "foreign object" which would require application of the 10-year statute of limitations. The trial court found that the four-year statute of limitations applied, but Plaintiffs argue that we should apply the 10-year statute of limitations because the Gore-Tex barrier is a nontherapeutic foreign object. The trial court, however, found that "Plaintiff's and Defendants' experts agree that Gore-Tex can be properly used as an adhesion barrier to prevent pelvic adhesion formation and that such a use is therapeutic."

¶ 31 Plaintiff argues that actually, their experts did not agree that the Gore-Tex barrier serves a therapeutic purpose, pointing to her expert's errata sheet and affidavit. Defendants argue at length that this Court should not consider Plaintiff's expert's errata sheet or affidavit, which they argue impermissibly modify Dr. McCarus's deposition testimony and attempt to create an issue of fact under the sham affidavit doctrine.[2] In his deposition testimony, Dr. McCarus testified unequivocally that adhesion barriers, and specifically the Gore-Tex barrier, have a therapeutic purpose. In the disputed errata sheet, Dr. McCarus slightly modifies this testimony to say that Gore-Tex adhesion barriers "*can* [have a therapeutic purpose] if they are properly used" and "*could* have therapeutic purposes if properly used." In the errata sheet, Dr. McCarus then opines that the Gore-Tex barrier was improperly used in this case because Defendant Yalcinkaya failed to remove it after two to eight weeks, and clarifies that the Gore-Tex barrier could not have a therapeutic purpose here because Defendant Yalcinkaya intended to leave the Gore-Tex barrier in Plaintiff's body permanently, which would be non-therapeutic.

¶ 32 We disagree with Plaintiff and hold that the trial court correctly found no issue of material fact as to whether the Gore-Tex barrier had a therapeutic purpose. Without reaching the sham affidavit doctrine issue introduced by Defendants, even if the errata sheet is admissible testimony, Plaintiff has improperly interpreted statutory language in an attempt to create an issue of fact.

¶ 33 When engaging in statutory interpretation, our Supreme Court has explained

> [t]he primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. The foremost task in statutory interpretation is to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise. Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.

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2. The sham affidavit doctrine provides that conflicts between an expert's deposition and later affidavits create a credibility issue, not a genuine issue of material fact, and therefore it would be improper to consider the conflicting testimony when making a summary judgment determination. *Hawkins v. Emergency Med. Physicians of Craven Cnty., PLLC*, 240 N.C. App. 337, 345, 770 S.E.2d 159, 164-65 (2015).

Carolina Power & Light Co. v. City of Asheville, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (internal marks and citations omitted). Moreover, "a statute should not be interpreted in a manner which would render any of its words superfluous. We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because it is always presumed that the legislature acted with care and deliberation." *State v. Coffey*, 336 N.C. 412, 417-18, 444 S.E.2d 431, 434 (1994) (internal marks and citations omitted).

¶ 34 In giving words their natural and ordinary meaning, this Court has interpreted clauses connected by the "disjunctive 'or' " to mean that

> application of the statute is not limited to cases falling within both clauses but applies to cases falling within either one of them. In its elementary sense the word 'or', as used in a statute, is a disjunctive particle indicating that the various members of the sentence are to be taken separately[.]

Grassy Creek Neighborhood All., Inc. v. City of Winston-Salem, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (internal marks and citations omitted).

¶ 35 Here, the crux of the statutory language in question focuses on the phrase "a foreign object, which has no *therapeutic or diagnostic purpose or effect*, having been left in the body[.]" N.C. Gen. Stat. § 1-15(c) (2021) (emphasis added). There is no case law from North Carolina courts discussing or interpreting the meaning of therapeutic purpose or effect under this statute, and therefore this is an issue of first impression. We hold that the statute's natural and ordinary meaning indicates that an object can have *either* a therapeutic purpose *or* therapeutic effect to be removed from the outer 10-year statute of limitations.

¶ 36 Here, Plaintiff argues that an issue of material fact exists because her expert, Dr. McCarus, claims the Gore-Tex barrier does not have a therapeutic purpose and Defendants' expert claims the Gore-Tex barrier does have a therapeutic purpose. However, this is an oversimplification and mischaracterization of Dr. McCarus's testimony. Even accepting Dr. McCarus's modified testimony that the Gore-Tex "can" or "could" have a therapeutic purpose if left in the body for only two to eight weeks, Plaintiff's expert admits that Gore-Tex barriers serve a therapeutic purpose when properly used—he just disputes Defendant Yalcinkaya's decision to leave the barrier in Plaintiff's body permanently. Assuming that the Gore-Tex barrier should have been removed eight weeks after implantation, the barrier still had a therapeutic purpose on the date it

was implanted: to prevent adhesion formation at the incision site. This therapeutic purpose does not disappear simply because the barrier was not timely removed.

¶ 37 Plaintiff characterizes her argument as one about therapeutic purpose in order to create a factual dispute, but in fact, whether the Gore-Tex barrier was timely removed is a question of whether the Gore-Tex barrier had a therapeutic *effect*, not whether it had a therapeutic *purpose*. Even accepting that the barrier did not have a therapeutic *effect* in this case, the experts still agree that the Gore-Tex barrier at least initially served a therapeutic *purpose*. Because of the disjunctive "or" in the statute which "indicat[es] that the various members of the sentence are to be taken separately[,]" the barrier need only have a therapeutic purpose or a therapeutic effect for the four-year statute of limitations to apply. Because the experts agree as to the therapeutic purpose of the Gore-Tex barrier, the dispute over whether the Gore-Tex barrier had a therapeutic effect after being left in Plaintiff's body for nearly 10 years does not change § 1-15(c)'s application in this case. Therefore, the trial court correctly concluded that the four-year statute of limitations applies as a matter of law.

¶ 38 Moreover, whether Defendant Yalcinkaya negligently failed to remove the barrier after two to eight weeks is a question that goes to the heart of the malpractice claim, but does not need to be resolved to determine whether the Gore-Tex barrier had a therapeutic purpose for determining the correct statute of limitations period. If an object lost its therapeutic *purpose*, as Plaintiff basically argues, because it did not actually have a therapeutic *effect* due to improper use, this would render the inclusion of a therapeutic purpose in the statute superfluous. If our legislature intended the object to both have a therapeutic purpose *and* effect in order to be exempt from applying the 10-year statute of limitations, then the legislature would have included the conjunctive "and" instead of the disjunctive "or" between "purpose" and "effect."

¶ 39 From a public policy and legislative intent perspective, the facts here seem precisely inapposite to what our legislature intended when drafting this 10-year outer limit for certain foreign object malpractice claims. Our Supreme Court, in the res ipsa loquitur context, has previously described "foreign bodies" as instruments "such as sponges, towels, needles, glass, etc., [] introduced into the patient's body during surgical operations and left there." *Mitchell v. Saunders*, 219 N.C. 178, 182, 13 S.E.2d 242, 245 (1941). We believe our legislature had a similar definition in mind when enacting the 10-year statute of limitations for foreign objects.

¶ 40 Previously, the 10-year statute of limitations has been discussed by this Court in a scenario where a surgical instrument, a drain, was accidentally left in the plaintiff's body. *Hensell v. Winslow*, 106 N.C. App. 285, 287, 416 S.E.2d 426, 428 (1992). In *Hensell*, the plaintiff sought damages for the defendant's "failure to remove a nontherapeutic nondiagnostic foreign object (drain) from her body at the close of surgery." *Id.* at 288, 416 S.E.2d at 428. The defendants asserted the statute of limitations as an affirmative defense, because more than four years had passed and the plaintiff did not bring suit within one year of discovering the drain. *Id.*, 416 S.E.2d at 429. This Court discussed in depth what constituted "discovery" for purposes of the statute's qualification that the suit must be brought within one year of discovering the foreign object, and ultimately held that the statute of limitations barred her claim. *Id.* at 288-89, 416 S.E.2d at 429.

¶ 41 However, the 10-year statute of limitations has not been applied in a case such as this one, where a medical implant had been purposefully placed and left in a plaintiff's body during surgery as part of a medical treatment. In fact, only one other North Carolina case grapples with a similar Gore-Tex barrier implant, *Locklear v. Lanuti*, 176 N.C. App. 380, 626 S.E.2d 711 (2006). In *Locklear*, the plaintiff alleged that the defendant doctor was negligent in repairing her hernias with a "Gortex mesh[.]" *Id.* at 386, 626 S.E.2d at 716. The defendant raised the affirmative defense of statute of limitations because the plaintiff filed suit more than three years after the defendant's last act. *Id.* at 384, 626 S.E.2d at 715. The plaintiff argued that the statute of limitations should be tolled under the continuing treatment doctrine, but did not argue that the 10-year exception for foreign objects should apply. *Id.*, 626 S.E.2d at 715. Therefore, this Court did not consider whether the Gore-Tex barrier fell under the 10-year foreign object statute of limitations, but remanded the case for consideration of the continuing course of treatment doctrine. *Id.* at 387, 626 S.E.2d at 716.

¶ 42 Here, the Gore-Tex barrier was purposefully implanted by Defendant Yalcinkaya with the purpose of decreasing post-surgical pelvic adhesions on the surgical incision site. This case is unlike *Hensell* where the defendant accidentally left a surgical drain in the plaintiff's body that was discovered many years later after causing health complications. For statutory construction and public policy reasons, and because Defendant Yalcinkaya implanted the Gore-Tex barrier intending that it be permanently implanted, we decline to hold that a purposeful medical implant that initially serves a therapeutic purpose but potentially later has a non-therapeutic effect requires application of the 10-year statute

of limitations period for foreign objects. To do so would allow any therapeutic device implant, whether a Gore-Tex barrier, cardiac stent, pacemaker, knee replacement, etc., to be subject to the 10-year statute of limitations if an expert testifies that at some point during the 10-year period it became non-therapeutic. We do not believe this is what our legislature intended by enacting § 1-15(c), and therefore affirm the trial court's application of § 1-15(c) and grant of summary judgment on the medical malpractice issue.

E. Punitive Damages

¶ 43 **[5]** North Carolina follows the general rule that "punitive damages do not and cannot exist as an independent cause of action, but are mere incidents of the cause of action." *Iadanza v. Harper*, 169 N.C. App. 776, 783, 611 S.E.2d 217, 223 (2005) (internal marks and citation omitted). *See also Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 425, 775 S.E.2d 1, 8 (2015) ("[A] claim for punitive damages is not a stand-alone claim."). Therefore, because we hold that the trial court properly granted summary judgment on each of Plaintiff's claims above, Plaintiff has no independent basis for punitive damages and this claim necessarily fails.

III. Conclusion

¶ 44 For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of Defendants.

AFFIRMED.

Chief Judge STROUD and Judge ARROWOOD concur.

COUNTY OF MECKLENBURG, A BODY POLITIC AND CORPORATE, PLAINTIFF
v.
HELEN BARBARA RYAN, UNKNOWN SPOUSE OF HELEN BARBARA RYAN, AND CITY OF CHARLOTTE, LIENHOLDER, DEFENDANTS

No. COA21-205

Filed 15 February 2022

1. Process and Service—service by publication—due diligence requirement—email address on file

In a matter involving the foreclosure and sale of a disabled woman's (defendant) home for past-due property taxes, the county failed to exercise due diligence in informing defendant of the tax delinquency and of the subsequent foreclosure where, although the county attempted to serve her personally and by certified mail, it did not attempt to contact her by email—even though it had her email address on file and had prior notice of her preference to be contacted by email due to her disabilities. Therefore, the county's service by publication under Civil Procedure Rule 4 was insufficient, and the trial court erred by denying defendant's motion to set aside the entry of default and the default judgment.

2. Real Property—foreclosure sale—good faith purchaser—reliance on county's representations

In a matter involving the foreclosure and sale of a disabled woman's (defendant) home for past-due property taxes, the person who made the final upset bid to purchase defendant's home after defendant had paid the past-due taxes was a good faith purchaser even though defendant informed him, before he accepted the commissioner's deed, that she had paid the past-due taxes. The purchaser reasonably relied on the county's assertion that the property was being sold due to outstanding taxes and on the certificate of taxes due. Therefore, the trial court did not err by declining to set aside the commissioner's deed to the purchaser.

3. Real Property—foreclosure sale—right of redemption—phone call to county tax office

In a matter involving the foreclosure and sale of a disabled woman's (defendant) home for past-due property taxes, the trial court did not err by finding as fact or concluding as a matter of law that defendant had exercised her right of redemption of the property when she called the county tax office, spoke with an authorized representative about the amount she owed, and paid the amount

from her bank account over the phone four days before the foreclosure sale. The county's argument that defendant could not rely on the oral statements of the tax collector's authorized representative could not be made for the first time on appeal.

4. Damages and Remedies—restitution—foreclosure sale—insufficient service of process—redemption

In a matter involving the foreclosure and sale of a disabled woman's (defendant) home for past-due property taxes, the trial court did not err in concluding that defendant was entitled to restitution pursuant to N.C.G.S. § 1-108 where defendant moved to have the default judgments declared void for insufficient service of process and where she properly redeemed the property before it was sold at a foreclosure sale.

Judge MURPHY concurring in result only.

Appeal by Plaintiff from Order entered 20 October 2020 and cross-appeal by Defendant from order entered 20 October 2020 by Judge Paulina N. Havelka in Mecklenburg County District Court. Heard in the Court of Appeals 30 November 2021.

C. Ashley Lamm, for County of Mecklenburg, Plaintiff.

Lord Law Firm, PLLC, by Harrison A. Lord, for Helen Barbara Ryan, Defendant.

No brief filed on behalf of City of Charlotte, Defendant-Lienholder.

Offit Kurman, P.A., by Amy P. Hunt and Robert McNeill, for Jacob Belk, Third-Party Appellee.

WOOD, Judge.

¶ 1 Plaintiff, County of Mecklenburg, A Body Politic and Corporate ("Mecklenburg County") appeals an order setting aside an entry of default and a default judgment. Defendant Helen Ryan ("Ryan") cross appeals from the order, in which the trial court granted Ryan's motion to set aside a judgment of confirmation, but denied her motion to set aside the commissioners' deed. After careful review of the record and applicable law, we affirm the order of the trial court in part and reverse in part.

I. Factual and Procedural Background

¶ 2 Ryan has been confined to a wheelchair since 1989 and legally blind since 1992. In 2018, Ryan owned and resided at 4810 Drakestone Court, Charlotte, North Carolina ("the Property").[1] On January 8, 2018, Mecklenburg County, through its counsel, Richard Kania of The Kania Law Firm, instituted a civil action to foreclose on the Property for past due real property taxes owed by Ryan for the years 2014, 2015, and 2016. While this action was ongoing, Ryan's 2017 property taxes and interest for 2017 property taxes became delinquent.

¶ 3 On January 8, 2018, a civil summons was issued against Ryan, but was not served. An alias and pluries summons was issued on April 17, 2018. Although Mecklenburg County attempted to serve Ryan personally, it was unsuccessful in doing so. When an officer from the Sheriff's Department attempted to serve Ryan at the Property, he reported the Property "appear[ed] vacant." Thereafter, Mecklenburg County tried serving Ryan via certified mail and by designated delivery service. Service was unsuccessful. Although "Ryan had previously informed [Mecklenburg] County (in a different context) that because of her disabilities, it can be difficult for her to access mail, and that the best way to reach her was via email," Mecklenburg County did not attempt to email Ryan.

¶ 4 Following its failed attempts to serve Ryan by personal service, Mecklenburg County served Ryan by publication, which was completed on May 22, 2018. On August 1, 2018, Mecklenburg County filed an "Affidavit of Jurisdiction and Failure to Plead" and a certificate of taxes due, which contained a statement of the amount of outstanding taxes Ryan allegedly owed. The certificate of taxes due stated that Ryan owed $20,775.33. Mecklenburg County also filed a motion for entry of default and a motion for default judgment on August 1, 2018.[2] Entry of default and a default judgment were entered against Ryan that same day.

¶ 5 Mecklenburg County subsequently filed a notice of sale to foreclose on the Property on September 18, 2019. The notice of sale was published on September 4, 2018, and September 11, 2018. On September 12,

1. Defendant City of Charlotte had a lien on the Property which was later satisfied by the proceeds from the foreclosure sale. The City of Charlotte did not file a notice of appeal and is not presently before this Court.

2. Counsel for Mecklenburg County signed the motion for entry of default on July 24, 2018. However, the file stamp indicates that the motion for entry of default was filed on August 1, 2018. Counsel signed the motion for default judgment on July 2, 2018, but the file stamp indicates that this motion was filed on August 1, 2018.

2018, Ryan "became aware of the foreclosure action and immediately emailed Neal Dixon, the Mecklenburg County Tax Collector/Department Director ("Mr. Dixon") regarding the unpaid taxes." Ryan emailed the Tax Collector approximately three times but did not receive a response. On September 14, 2018, Ryan called the Mecklenburg County Tax Office and was given a payoff amount of $21,438.25.[3] Ryan's affidavit states that she immediately paid this amount over the phone and was provided with confirmation codes confirming the payment. The payoff amount of $21,438.25 was deducted from Ryan's bank account that same day.[4]

¶ 6 According to Deputy Tax Director Frank Wirth, personnel from the Tax Office called Ryan fourteen times between November 10, 2015 and September 11, 2017 to discuss her delinquency. These phone calls went unanswered. In addition to the phone calls, personnel from the Tax Office completed two field visits, posted two delinquency notices, posted seven advertisements of the delinquencies in the Charlotte Observer, posted two notices of delinquency online, and sent five set-off debt submissions to the North Carolina Department of Revenue. The Tax Office never received a response from Ryan during that time. The Deputy Tax Director conceded that Ryan

> attempted to make a payment on her bills in the amount of $21,438.25 by use of the Mecklenburg County Tax Office's 'E-Pay' feature. . . . The use of this service for payment . . . does not provide any person-to-person contact. . . . Furthermore, the E-Pay payment method only provides confirmation of a payment submission; it does not provide either (i) confirmation of acceptance of the payment by the Tax Collector, nor (ii) any indication that the payment represents a payment in full that would update the record and remove the tax lien.

¶ 7 Mecklenburg County conceded at oral argument before this Court that Ryan made a payment of $21,438.25 and that the County did not

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3. Although Ryan's payment of $21,438.25 exceeded the amount stated on the certificate of taxes due, Mecklenburg County argues that this was not the full amount Ryan owed. Ryan's payment also exceeded the amount stated in the default judgment. Mecklenburg County conceded at oral argument before this Court that it was unaware of the exact total Ryan owed at the time she made the payment.

4. Mecklenburg County contends that Ryan did not exercise her right of redemption because there is no evidence in the record that the County "received" or "accepted" her "partial" payment. The County further argues that Ryan did not exercise her right of redemption because the payment was refunded to her.

refund the payment to Ryan until approximately eight to ten weeks later. Although Ryan made the payment, the County proceeded with the foreclosure sale anyway. Mecklenburg County filed a report of foreclosure sale on September 18, 2018; however, there were multiple upset bids. Jacob Belk ("Belk") made the final upset bid on October 15, 2018.

¶ 8 On October 31, 2018, Belk went to the Property and knocked on the door. Ryan did not answer the door, but Belk "stayed at the door and explained he was the new owner of the property and eventually left." "Sometime in early November 2018," Ryan posted a note on the front door of the Property, stating "if this [is] about the taxes, they were paid in full before the sale and the house still belongs to [Ryan]." Ryan also contacted the Kania Law Firm to inform them that she "has paid taxes to the County." On November 28, 2018, an employee of the Kania Law Firm responded to Ryan via email and informed her that her "right of redemption no longer exist[ed]."

¶ 9 On December 4, 2018, Mecklenburg County filed a motion for confirmation of the sale of the Property to Belk. The trial court entered judgment of confirmation of sale on December 6, 2018. Thereafter, Belk received a commissioner's deed on December 14, 2018.[5] Mecklenburg County filed a final report of sale on January 16, 2019, showing the Property sold for $407,925.00. The final report also revealed that $21,728.02 was paid to Mecklenburg County for the 2014 through 2017 delinquent taxes. Ad valorem taxes for 2018 were paid to Mecklenburg County in the amount of $5,308.50.

¶ 10 Upon receiving the deed to the Property, Belk served Ryan with a notice to vacate the Property via first class mail, certified mail, posting a notice on the front door of the Property, and by placing a copy of the notice in the mailbox on the Property. On January 18, 2019, Belk filed an application for writ of possession of the Property. The trial court entered an order for possession of the Property on January 24, 2019.

¶ 11 On February 4, 2019, at approximately 11:00 a.m., the Mecklenburg County Sheriff's Office went to the Property and forcibly removed Ryan from the Property. Ryan was confined to her wheelchair and was undressed when the deputies entered her home. The deputies allowed her to grab a pair of pants that were too small for her and wheeled her onto the porch. Ryan attempted to explain to law enforcement officers that she had paid the outstanding taxes in full prior to the sale. Ryan was extremely upset and uncooperative as she was being forcibly removed from her home.

5. Belk's deed was recorded on December 20, 2018.

¶ 12 Ryan, through counsel, filed a motion to set aside the order and writ of possession on February 22, 2019. On April 9, 2019, the trial court denied Ryan's motion to set aside the order and writ for possession. In December 2019, Ryan moved to set aside the August 1, 2018 default judgment, or, in the alternative, the December 6, 2018 judgment of confirmation of the sale. Ryan also moved to strike the commissioner's deed.

¶ 13 On December 20, 2019, the trial court entered an order continuing the matter and joining Belk as a necessary party. On October 20, 2020, the trial court entered its written order in which it found that Mecklenburg County exercised due diligence under N.C. Gen. Stat. § 1A-1, Rule 4(j); Ryan had the right to rely on the Tax Collector's representative's oral statement as to the total amount of outstanding taxes; Ryan exercised her right of redemption; Belk was a good faith purchaser; and that Ryan was entitled to restitution.[6] Thereafter, the trial court granted Ryan's motion to set aside the December 6, 2018 judgment of confirmation of the sale but did not set aside the commissioner's deed transferring title of the Property to Belk. Mecklenburg County timely filed its written notice of appeal on November 17, 2020. Ryan timely filed her written notice of cross-appeal on November 24, 2020.

II. Discussion

¶ 14 The parties raise several arguments on appeal, each will be addressed in turn.

A. Appellate Jurisdiction

¶ 15 As a preliminary matter, we note that this appeal is interlocutory, as the matter of restitution is still pending before the trial court. "As a matter of course, our Court does not review interlocutory orders." *R.C. Koonts & Sons, Inc. v. First Nat'l Bank*, 266 N.C. App. 76, 79-80, 830 S.E.2d 690, 693 (2019) (citation omitted). "If, however, the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review, we may review the appeal under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1)." *Id.* at 80, 830 S.E.2d at 693 (citation omitted). Appealing parties have the burden to demonstrate appropriate grounds for this Court's acceptance of an interlocutory appeal. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citation omitted). Here, neither party brings forth an argument as to how this appeal affects a substantial right.

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6. The trial court further dismissed Belk as a party "[b]ecause the Belk's interest in the Property cannot be affected by these proceedings." Belk did not file any motion to be included as a party in these proceedings, nor did Belk file a notice of appeal.

¶ 16 However, during oral arguments, Ryan's appellate counsel requested this Court to view the pleadings as a petition for writ of certiorari. In our discretion, we allow the petition for writ of certiorari to reach the merits of this appeal.

B. Ryan's Arguments on Appeal

1. Due Diligence/ Motion to Set Aside Default Judgment

¶ 17 **[1]** Ryan first argues that the trial court erred by denying her motion to set aside both the entry of default and the default judgment because "[Mecklenburg] County failed to exercise due diligence as required under Rule 4," rendering the judgment void. Ryan moved under N.C. Gen. Stat. § 105-377 to set aside the judgment; however, the trial court considered Ryan's motion under N.C. R. Civ. P. 60. "The decision of whether to set aside an entry of default . . . is 'within the sound discretion of the trial court.' " *Swan Beach Corolla, L.L.C. v. County of Currituck*, 255 N.C. App. 837, 841, 805 S.E.2d 743, 746 (2017) (bracket omitted) (quoting *Auto. Equip. Distribs., Inc. v. Petroleum Equip. & Serv., Inc.*, 87 N.C. App. 606, 608, 361 S.E.2d 895, 896 (1997) (citation omitted)). Likewise, our "standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citing *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975)).

¶ 18 "A default judgment may be set aside under Rule 60(b)(6) only upon a showing that: (1) extraordinary circumstances were responsible for the failure to appear, and (2) justice demands that relief." *Advanced Wall Systems, Inc. v. Highlande Builders, LLC*, 167 N.C. App. 630, 634, 605 S.E.2d 728, 731 (2004). A trial court may also "set aside and relieve a defendant from a default judgment if the judgment entered is void." *Dowd v. Johnson*, 235 N.C. App. 6, 9, 760 S.E.2d 79, 82 (2014).

> A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void. If a default judgment is void due to a defect in service of process, the trial court abuses its discretion if it does not grant a defendant's motion to set aside entry of default.

Jones v. Wallis, 211 N.C. App. 353, 356, 712 S.E.2d 180, 183 (2011) (citation omitted) (cleaned up).

¶ 19 The North Carolina Rules of Civil Procedure allows "service of process by publication on a party that cannot, through due diligence, be

otherwise served." *Dowd*, 235 N.C. App. at 9, 760 S.E.2d at 83 (citing *Cotton v. Jones*, 160 N.C. App. 701, 703, 586 S.E.2d 806, 808 (2003)). "In determining whether service of process by publication is proper, this Court first examines whether the defendant was actually subject to service by publication . . . ." *Id.* at 10, 760 S.E.2d at 83 (citing *Jones*, 211 N.C. App. at 357, 712 S.E.2d at 183). "Due diligence dictates that plaintiff use all resources reasonably available to her in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper." *Fountain v. Patrick*, 44 N.C. App. 584, 587, 261 S.E.2d 514, 516 (1980) (citing N.C. Gen. Stat. § 1A-1, Rule 4(j)(9)(c) (1977); *Thomas v. Thomas*, 43 N.C. App. 638, 260 S.E.2d 163 (1979)); *see also Jones*, 211 N.C. App. at 358, 712 S.E.2d at 183 (citation omitted); *Watagua County v. Beal*, 255 N.C. App. 849, 852, 806 S.E.2d 338, 340 (2017) (citations omitted).

¶ 20 There is "no restrictive mandatory checklist for what constitutes due diligence for purposes of service of process by publication . . . ." *Watagua County*, 255 N.C. App. at 852-53, 806 S.E.2d at 340-41 (citation and internal quotation marks omitted). However, a party must use all reasonably available resources to accomplish service of process. *See* N.C. R. Civ. P. 4(j); *see also Fountain*, 44 N.C. App. at 587, 261 S.E.2d at 516 (citations omitted).

¶ 21 Ryan relies on *In Re Foreclosure of Ackah*, 255 N.C. App. 284, 804 S.E.2d 794 (2017), *aff'd per curiam*, 370 N.C. 594, 811 S.E.2d 143 (2018), to argue that Mecklenburg County failed to exercise due diligence in service of process because it did not attempt to serve her via email. In *Ackah*, the homeowner, Ms. Ackah, leased her home while she traveled to Africa. *Id.* at 286, 804 S.E.2d at 796. While Ms. Ackah was in Africa, her homeowners' association ("HOA") attached a lien to her property because of her failure to pay dues. *Id.* The HOA sent certified letters to her residence to inform her of the delinquency prior to commencing foreclosure proceedings against her. *Id.* Thereafter, the HOA sent certified letters addressed to Ms. Ackah at her relatives' residences notifying her of the hearing before the Clerk of Court. *Id.* When those letters were returned "unclaimed," the HOA posted a notice on the door of the residence. *Id.* "Although the HOA had an email address for Ms. Ackah, the HOA did not notify Ms. Ackah by email of the proceeding to enforce its lien." *Id.* On appeal, this Court found the HOA did not exercise due diligence under N.C. R. Civ. P. 4 because "[w]hen the notice letters came back 'unclaimed' Rule 4 due diligence required that the HOA at least attempt to notify Ms. Ackah directly through the email address it had for

her rather than simply resorting to posting a notice on the [p]roperty." *Id.* at 287, 804 S.E.2d at 796. We find Ryan's argument persuasive and supporting precedent binding.

¶ 22 Here, the trial court found that Mecklenburg County exercised due diligence to both inform Ryan of the delinquency and of the subsequent foreclosure. However, it is undisputed that the Mecklenburg County Tax Office had Ryan's email on file. Indeed, the trial court's finding that Mecklenburg County had prior notice of a need to email Ryan due to her disabilities remains unchallenged by Mecklenburg County on appeal. Accordingly, this finding of fact is binding on appeal. *See Matter of Frucella*, 261 N.C. App. 632, 635, 821 S.E.2d 249, 251 (2018) ("Unchallenged findings of fact are presumed correct and binding on appeal." (citation omitted)); *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008). Further, when Kania Law Firm staff members reached out to the County Tax Office, the Tax Office was able to provide Ryan's email address. The record reveals that Ryan informed Mecklenburg County that she was wheelchair bound and legally blind and that the best way to contact her was via email. However, although it had Ryan's email address, Mecklenburg County did not attempt to contact Ryan via email. Accordingly, we hold that Mecklenburg County's service under Rule 4 was insufficient, and the trial court erred by ruling otherwise.

2. Motion to Set Aside Commissioner's Deed

¶ 23 **[2]** Ryan contends the trial court erred in failing to set aside the commissioner's deed to Belk because Belk was not a good faith purchaser. We disagree.

¶ 24 N.C. Gen. Stat. § 1-108 provides,

> If a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a *purchaser in good faith* is not thereby affected.

N.C. Gen. Stat. § 1-108 (2020) (emphasis added). The trial court did not set aside the judgment of confirmation of the sale of the Property to Belk because it found that Belk was a good faith purchaser. Our Supreme Court recently addressed the issue of good faith purchasers in *In re Foreclosure of George*, 377 N.C. 129, 2021-NCSC-35.

¶ 25 In *George*, the George family owned a house in Charlotte, North Carolina, but resided in St. Croix, United States Virgin Islands. *Id.* at ¶ 2-3. The homeowners' association ("HOA") for the Charlotte property attached a lien to the house for unpaid HOA dues in the amount of $204.75. *Id.* at ¶ 4. Although the HOA attempted to inform the Georges that it would proceed with foreclosure proceedings if the dues remained outstanding, the Georges did not make any payments. *Id.* The HOA was unable to effectuate service of process but proceeded to foreclose on the property in December 2016. *Id.* at ¶ 5-7. The Georges subsequently filed a civil suit, arguing the foreclosure sale was null and void due to insufficient service of process and a lack of notice of the foreclosure proceeding. *Id.* at ¶ 9. The trial court granted relief, but the purchasers of the Charlotte home filed a Rule 60(b) motion, asserting that they were good faith purchaser for value. *Id.* at ¶ 11-12. Upon consideration of their Rule 60(b) motion, the trial court found that the purchasers were not good faith purchasers and denied their motion. *Id.* at ¶ 12. On appeal, this Court "expressed agreement with the trial court's determination that the trustee had failed to properly serve the notice of foreclosure as required by . . . Rule 4." *Id.* at ¶ 13. However, this Court vacated the trial court's order, concluding that the purchasers were good faith purchasers. *Id.* at ¶ 16.

¶ 26 Our Supreme Court reversed, however, finding that the trial court had not abused its discretion in concluding the purchasers were not good faith purchasers. *Id.* at ¶ 32. In so doing, the court noted,

> A purchaser in good faith or an innocent purchaser is a person who purchases without notice, actual or constructive, of any infirmity, and pays valuable consideration and acts in good faith. An innocent purchaser lacks notice of any infirmity or defect in the underlying sale when (a) he has no actual knowledge of the defects; (b) he is not on reasonable notice from the recorded instruments; and (c) the defects are not such that a person attending the sale exercising reasonable care would have been aware of the defects.

Id. at ¶ 24 (cleaned up).

¶ 27 Here, the trial court made a conclusion of law that "Belk's status as a good faith purchaser is determined as of the time he made his bid and obligated himself to purchase the Property, and not as of the time he accepted the deed." While it is true that the record is devoid of evidence that Belk knew of a defect in the foreclosure sale at the time he made the

final upset bid, it is also true that Belk had knowledge of Ryan's claim that the outstanding taxes had been paid prior to accepting the commissioner's deed.

¶ 28 Indeed, the record indicates that Belk went to the Property, stood outside the door, and informed Ryan that he was the purchaser. Specifically, the trial court found in fact number twenty-one, "Ryan informed Belk of the paid property taxes when Belk came to the property after making the bid." "The bid is but a proposition to buy, and, until accepted and sanctioned by the court, confers no right whatsoever upon the purchaser." *Beaufort Cnty. v. Bishop*, 216 N.C. 211, 4 S.E.2d 252, 527 (1939) (quotation marks and citation omitted). We decline to hold, however, that Belk was not permitted to rely on Mecklenburg County's assertion that the Property was to be sold due to the outstanding taxes. Belk reasonably relied on the County's assertion and the certificate of taxes due when he purchased the Property. *See Matter of George*, at ¶ 24 (recognizing that a purchaser is a good faith purchaser if "the defects are not such that a person attending the sale exercising reasonable care would have been aware of the defects" (brackets omitted)); *see also Miller v. Lemon Tree Inn, Inc.*, 39 N.C. App. 133, 141, 249 S.E.2d 836, 841 (1978). Accordingly, we hold the trial court did not err by concluding that Belk was a good faith purchaser.

C. Mecklenburg County's Arguments on Appeal

1. Right of Redemption

¶ 29 **[3]** Mecklenburg County first argues the trial court erred by including in both its findings of fact and conclusions of law that Ryan exercised her right of redemption.

¶ 30 "It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Elliot v. Muehlbach*, 173 N.C. App. 709, 711, 620 S.E.2d 266, 269 (2005) (citations omitted); *see also Hilliard v. Hilliard*, 146 N.C. App. 709, 711, 554 S.E.2d 374, 376 (2001) (citations omitted).

> While in a mortgage or deed of trust to secure a debt the legal title to the mortgaged premises passes to the mortgagee or trustee, as the case may be, the mortgagor or trustor is looked upon as the equitable owner of the land- with the right to redeem at any time prior

> to foreclosure. This right, after the maturity of the debt, is designated "his equity of redemption."

Riddick v. Davis, 220 N.C. 120, 125, 16 S.E.2d 662, 666 (1941). Put more plainly, "[t]he right of redemption may arise in any typical foreclosure proceeding; it is a statutorily created right to terminate a power of sale." *Lynn v. Federal Nat. Mortg. Ass'n*, 235 N.C. App. 77, 82, 760 S.E.2d 372, 376 (2014) (citation omitted).

¶ 31 An owner of real property

> has the right to redeem his land from the lien of unpaid taxes by paying the taxes with accrued interest, penalties and costs, and the court costs at any time before the entry of a valid judgment in a tax foreclosure action confirming the judicial sale of the land for the satisfaction of the lien.

Chappell v. Stallings, 237 N.C. 213, 216, 74 S.E.2d 624, 627 (1953).

¶ 32 Where a debtor deposits "sufficient money to redeem and for the purpose of redeeming the land from the tax lien" and the foreclosure sale "ha[s] not then been confirmed," the debtor should be "permitted to redeem the land." *Bishop*, 216 N.C. at 215, 4 S.E.2d at 527; *see also Beck v. Meroney*, 135 N.C. 532, 534, 47 S.E. 613, 613 (1904).

¶ 33 Here, the trial court found that Ryan called the Mecklenburg County Tax Office, inquired about the amount owed, and made a payment of $21,438.25. This amount was deducted from Ryan's bank account on September 14, 2018. It is undisputed that Ryan made this payment after being told by an authorized representative of the Mecklenburg County Tax Office that the outstanding balance was $21,438.25. We are not persuaded by Mecklenburg County's assertion that, because Ryan's payment was refunded to her, she did not redeem the property. Put plainly, Ryan called the lienholder, inquired as to the debt owed, and paid the outstanding debt four days prior to the foreclosure sale. Ryan and the Deputy Tax Director both submitted affidavits averring that Ryan made a payment for the outstanding taxes prior to the foreclosure sale. Thus, there was competent evidence to support the trial court's finding of fact that Ryan redeemed the property.

¶ 34 Moreover, Ryan's payment exceeded the amount due Mecklenburg County under the terms of the default judgment and was more than the amount listed on Mecklenburg County's certificate of taxes due. Accordingly, we hold the trial court did not err in either finding as fact or

concluding as a matter of law that Ryan exercised her right of redemption to the property.

2. Reliance on Tax Collector's Oral Statement

¶ 35 Mecklenburg County further contends that the trial court erred by including in its conclusions of law that "Ryan had the right to rely on the Mecklenburg County Office of the Tax Collector's Representative's Statement as to the amount due." We disagree.

¶ 36 N.C. Gen. Stat. § 105-361 provides the statutory framework for an individual to inquire as to any outstanding taxes. *See* N.C. Gen. Stat. § 105-361(a) (2020). Under subsection (a), the county tax collector must give a written certificate stating the amount of any taxes and special assessments due upon the request of an owner of real property. N.C. Gen. Stat. § 105-361(a)(1). The owner of real property is then permitted to rely on the certificate issued, and "all taxes . . . that have accrued against the property for the period covered by the certificate shall cease to be a lien against the property" upon the payment of "the amount of taxes and assessments stated therein to be a lien on the real property." N.C. Gen. Stat. § 105-361(b)(1).

¶ 37 Subsection (d) of Section 105-361 provides that "[a]n oral statement made by the tax collector as to the amount of taxes, special assessments, penalties, interest, and costs due on any real or personal property shall bind neither the tax collector nor the taxing unit." N.C. Gen. Stat. § 105-361(d).

¶ 38 Here, however, Mecklenburg County did not argue before the trial court that Ryan was not permitted to rely on the oral statements of the tax collector's authorized representative. It is well settled in our State that "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); *see also Burton v. Williams*, 202 N.C. App. 81, 88, 689 S.E.2d 174, 179 (2010) (citations omitted). This "mean[s], of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court." *Burton*, 202 N.C. App. at 88, 689 S.E.2d at 179 (citation omitted).

¶ 39 Conceding this point was not raised before the trial court, Mecklenburg County asks this Court in its reply brief to exercise N.C. R. App. P. 2 to reach the merits of this argument. Rule 2 of our rules of appellate procedure permits this Court to suspend the rules "[t]o prevent manifest injustice to a party, or to expedite decision in the public

interest." N.C. R. App. P. 2. The invocation of Rule 2 is discretionary and should only be done so cautiously and in "exceptional circumstances." *See Dogwood Dev. & Mgmt. Co., LLC. V. White Oak Transp. Co. Inc.*, 362 N.C. 191, 196-97, 657 S.E.2d 361, 364-65 (2008) (citations omitted). After careful review of the record, we discern no "exceptional circumstance" or "manifest injustice," and Mecklenburg County does not point to one that would occur by declining to invoke Rule 2.

D. Restitution

¶ 40 **[4]** Next, Mecklenburg County argues the trial court erred by concluding Ryan is entitled to restitution under N.C. Gen. Stat. § 1-108. We disagree.

¶ 41 As discussed *supra*, N.C. Gen. Stat. § 1-108 provides, "[i]f a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs." N.C. Gen. Stat. § 1-108. While Ryan moved under N.C. Gen. Stat. § 105-377 to set aside the judgment as null and void for Mecklenburg County's failure to exercise due diligence under N.C. R. Civ. P. 4, the trial court concluded "that the motion is in the nature of a Rule 60 motion, such that N.C. Gen. Stat. § 1-108 does apply."

¶ 42 A review of Ryan's motion reveals that she sought to have the judgments in question declared null and void for insufficient service of process. N.C. R. Civ. P. 60(b) permits relief from judgments where the judgments are void. N.C. Gen. Stat. § 1A-1, Rule 60(b). Accordingly, we are not persuaded by Mecklenburg County's assertion that, because the trial court did not specify which subsection of Rule 60 it was relying on in granting Ryan restitution, it was error for the trial court to award such relief. Moreover, where Ryan properly redeemed the Property that was subsequently sold at a foreclosure sale, she is entitled to seek restitution. Therefore, we hold the trial court did not err in concluding Ryan was entitled to restitution.

III. Conclusion

¶ 43 After careful review of the record and applicable law, we hold the trial court erred by finding that Mecklenburg County exercised due diligence in serving Ryan under N.C. R. Civ. P. 4(j). Therefore, we reverse the order of the trial court as proper service of this action was not perfected upon Ryan. We further hold the trial court did not err in concluding Belk was a good faith purchaser or by concluding that Ryan was entitled to

restitution. Accordingly, we reverse the order of the trial court in part, affirm in part, and remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judge DIETZ concurs.

Judge MUPRHY concurs in the result only.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF
v.
BLOOMSBURY ESTATES, LLC; BLOOMSBURY ESTATES CONDOMINIUM HOMEOWNERS ASSOCIATION, INC., DEFENDANTS

No. COA21-323

Filed 15 February 2022

1. Eminent Domain—summary judgment—condemnation—settlement proceeds—apportionment—genuine issues of material fact

In a condemnation matter, where a condominium complex contracted with a developer to construct new buildings, the Department of Transportation (DOT) condemned part of the property reserved for the construction project, and then a consent judgment was entered settling the total amount of just compensation DOT owed to the developer and to the condominium homeowner's association, the trial court erred in granting summary judgment for the developer regarding the apportionment of the settlement proceeds as between the developer and the association. Genuine issues of material fact existed that would affect how much of the proceeds each party would be entitled to, including the developer's right to complete the construction project past its deadline and the valuation of the property before and after the taking.

2. Eminent Domain—condemnation—related declaratory judgment actions—motion to consolidate—denial—no injury or prejudice

In a condemnation matter, where a condominium complex contracted with a developer to construct new buildings, the Department

of Transportation (DOT) filed a condemnation action against the developer and the condominium homeowner's association, and where the developer and the association subsequently filed declaratory judgment actions against each other seeking a determination of the developer's right to complete the construction project, the trial court did not abuse its discretion in denying the association's motion to consolidate the condemnation action with the declaratory judgment actions. The parties had already reached a settlement in the condemnation action as to the total compensation owed for the taking, and the distribution of those funds could be completed without injury or prejudice to the association after the issues in the declaratory judgment actions—which would affect how the funds were apportioned—were fully litigated and resolved.

Appeal by defendant Bloomsbury Estates Condominium Homeowners Association, Inc. from order entered 3 March 2021 by Judge Vinston M. Rozier, Jr. in Wake County Superior Court. Heard in the Court of Appeals 11 January 2022.

Thomas, Ferguson & Beskind, LLP, by Jay H. Ferguson, for defendant-appellee Bloomsbury Estates, LLC.

Law Firm Carolinas, by T. Keith Black and Harmony W. Taylor, for defendant-appellant Bloomsbury Estates Condominium Homeowners Association, Inc.

TYSON, Judge.

¶ 1 Bloomsbury Estates Condominium Homeowners Association, Inc. ("the Association") appeals from an order of the trial court distributing settlement proceeds. We reverse in part, affirm in part, and remand.

I. Background

¶ 2 Bloomsbury Estates is a residential condominium complex located in Raleigh. The Association is the unit owners' association established under N.C. Gen. Stat. § 47C (2021). Bloomsbury, LLC created Bloomsbury Estates by filing a Declaration of Condominium ("Declaration") in the Wake County Registry at book 136211, page 2702 on 13 July 2009.

A. Phased Development Rights

¶ 3 Under the terms of the Declaration, Bloomsbury, LLC planned to develop Bloomsbury Estates in two phases ("Phase I" and "Phase II").

Phase I was constructed with fifty-six units contained within a multi-story building. Phase II was to include the construction of six additional units in the Phase I building and the construction of a new building containing up to eighty-five units. Prior to filing the Declaration, Bloomsbury, LLC had submitted a site plan for the construction of a 110-unit condominium complex consisting of two seven-story buildings. The site plan was approved by the City of Raleigh on 25 July 2006.

¶ 4 Section 8 of the Declaration addressed the right to construct Phase II, providing, *inter alia*: "[Bloomsbury, LLC] reserves the following special declarant rights for the property: (a) To complete, within five years of the recordation of this Declaration of Condominium, any and all improvements indicated on the plats and plans, up to a maximum of 140 units."

¶ 5 Bloomsbury, LLC assigned its declarant rights in a written assignment to Bloomsbury Estates, LLC ("Developer") which was recorded on 25 May 2011 in the Wake County Registry at book 14356, page 2386. Developer amended the Declaration five times. The Fifth Amendment to the Bloomsbury Estates Declaration of Condominium ("Fifth Amendment") was recorded on 8 March 2013, in the Wake County Registry at book 15176, page 1399. The Fifth Amendment extended the time in which Developer could construct Phase II until 13 July 2017.

B. DOT Condemnation

¶ 6 Phase I was completed and all of the individual units had been sold to third parties by 27 July 2015. On that date, the North Carolina Department of Transportation ("DOT") filed a declaration of taking and notice of deposit against the Association, Developer, and Wake County ("DOT Action"). DOT named Wake County as a defendant in the DOT Action because of a purported lien for unpaid *ad valorem* taxes Wake County had asserted upon Bloomsbury Estates' property. DOT sought to acquire a portion of the Association's common area lying outside of the building constructed in Phase I for the construction of Raleigh's Union Station.

¶ 7 The DOT Action sought a fee simple taking of the property. The construction plans for the Raleigh Union Station also required a temporary construction easement over other portions of Bloomsbury Estates' property. The temporary construction easement remained in place until the Raleigh Union Station project was completed around 13 September 2017. The use of the easement purportedly made it impossible for Developer to proceed with construction of Phase II within the Fifth Amendment's deadline of 13 July 2017.

¶ 8 While the DOT Action was pending, Developer filed a civil complaint in Wake County on 7 December 2015, docketed as 15 CVS 16076. On 27 May 2016, Developer filed an amended complaint against the Association and the individual unit owners. Developer asserted a claim for an anticipatory breach of contract based upon the representations the Association was allegedly repudiating Developer's right to develop and construct Phase II until 13 July 2017.

¶ 9 Developer's action also sought a declaratory judgment concluding it had retained the right to develop and construct Phase II. Developer also sought to reform the Declaration to extend the time to develop Phase II by an amount of time *force majeure* equal to the delay caused by the DOT's temporary construction easement.

¶ 10 On 29 July 2016, the Association filed its response in 15 CVS 16076, which contained a motion to strike, motions to dismiss, an answer, affirmative defenses, and counterclaims, asserting:

> (1) the time limit expired within which development rights shall have been exercised pursuant to the Declaration and North Carolina law, and the time limit cannot be extended as a matter of North Carolina law, (2) the [Fifth A]mendment was not consented to by the requisite number of unit owners, (3) the [Fifth A]mendment was not signed by the requisite number of unit owners, (4) the amendment was not consented to by mortgage holders, (5) the Amended Complaint fails to allege a distinct, unequivocal and absolute refusal to perform a whole contract or a covenant going to the whole consideration of a contract, (6) unit owners' property subject at any time to any development rights pursuant to plats and plans has been taken in whole or in part, (7) any development rights in unit owners' property terminated or ceased, (8) the Court cannot reform a void instrument, (9) the Amended Complaint fails to allege mistake, or any proper, affirmative grounds for judicial reformation of a written instrument, (10) a taking of unit owners' property was reasonably foreseeable, (11) the Court cannot make a new amendment or Declaration, (12) the Court cannot make an illegal amendment or Declaration, (13) the New LLC elected the remedy of damages.

¶ 11 While the DOT Action was pending, the Association filed a civil complaint on 31 December 2016, docketed as 16 CVS 15136 against Developer and another entity, Sammie, LLC, alleging twelve causes of action including, *inter alia*, a declaratory judgment action to determine Developer's rights to develop Phase II in Bloomsbury Estates and to quiet title. The Association's claims asserted in 16 CVS 15136 remain pending for trial in Wake County Superior Court.

¶ 12 On 21 June 2017, all parties to the DOT Action entered into a consent judgment which resolved the total amount of just compensation owed by DOT. The consent judgment did not address the apportionment of the just compensation as between Developer and the Association.

¶ 13 Developer filed a motion for partial summary judgment in 15 CVS 16076 on 3 July 2017, invoking the one-year statute of limitations articulated in N.C. Gen. Stat. § 47C-2-117(b) (2021) ("[N]o action to challenge the validity of an amendment adopted by the [condominium] association pursuant to this section or pursuant to G.S. 47C-1-5(a)(8) may be brought more than one year after the amendment is recorded.").

¶ 14 Following a hearing, the trial court entered an order allowing Developer's motion for partial summary judgment by finding the one-year statute of limitations in N.C. Gen. Stat. § 47C-2-117(b) barred the Association from challenging the validity of the Fifth Amendment. The Association filed a notice of appeal in 15 CVS 16076 to this Court on 29 September 2017, and then voluntarily withdrew its appeal on 5 January 2018.

¶ 15 The remaining issues in 15 CVS 16076 are pending trial in Wake County Superior Court. By order entered 4 December 2020, the issues in 15 CVS 16076 and 16 CVS 15136 were consolidated for trial. That consolidation order was not appealed.

¶ 16 Developer filed a motion on 16 January 2018 pursuant to N.C. Gen. Stat. § 136-108 in the DOT Action. *See* N.C. Gen. Stat. § 136-108 (2021) ("After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken."). Developer asserted that the validity of the Fifth Amendment had already been determined by the 29 September 2017 Order in 15 CVS 16076. Developer further asserted the Association was prohibited by the doctrines of issue preclusion and collateral estoppel from re-litigating the validity of the Fifth Amendment.

¶ 17 On 11 April 2018, the trial court entered an order on Developer's 16 January 2018 motion. The order found: "the [Association] is precluded from re-litigating the issue of the validity of the Fifth Amendment and it is further ordered that the Fifth Amendment is valid, and the parties are bound by the rights and obligations contained therein." The Association appealed. This Court dismissed the appeal as interlocutory since the Association did not assert a substantial right, which was affected by the 11 April 2018 order. *See DOT v. Bloomsbury Estates, LLC*, 264 N.C. App. 249, 823 S.E.2d 694, 2019 WL 1040367, at *6. (2019) (unpublished).

¶ 18 Developer and the Association sought appraisals. Developer's appraisal, performed by Integra Realty Resources and M. Scott Smith, MAI dated 24 June 2019 valued the lot before the DOT taking at $3,860,000 and $1,100,000 after the taking. The Association's appraisal, performed by Catherine Edmond, MAI and Hector Ingram, MAI, dated 12 November 2019 valued the lot at $3,350,000 before the taking and $910,000 after the taking. This appraisal also laid out the compensation for both Phase I and Phase II in three scenarios ("Scenario One," "Scenario Two," and "Scenario Three"). The appraisal allocated the compensation for Phase I as $1,510,000 and Phase II as $2,440,000 with total compensation as $3,950,000.

¶ 19 In Scenario One, Developer had lost all rights to develop Phase II and the entire compensation was paid to the Association. In Scenario Two, Developer had the right to develop Phase II, but it lost the right as a result of the temporary construction easement. Developer was allocated $3,350,000 and the Association was allocated $600,000. In Scenario Three, Developer continues to hold the right to develop Phase II, but as "an interest with a diminished value." Developer was allocated $2,440,000, the difference between the value before the taking and after the taking, and the Association was allocated $1,510,000.

¶ 20 The Association filed a motion to consolidate the DOT Action, 15 CVS 16076, and 16 CVS 15136 on 26 November 2019. Developer filed a motion for summary judgment on 13 July 2020.

¶ 21 Following a hearing on 20 July 2020, the trial court entered an order granting summary judgment in favor of the Association and consolidating the DOT Action, 15 CVS 16076, and 16 CVS 15136. The order also granted summary judgment pursuant to Scenario Two in the Association's appraisal. On 26 August 2020, the Association filed a motion to amend the summary judgment order and/or for reconsideration of the motion for summary judgment order pursuant to N.C. Gen. Stat. § 1A-1, Rules 59 and 60 (2021). The trial court entered an order on 4 December 2020

granting the motion to amend in part by only consolidating the actions in 15 CVS 16076 and 16 CVS 15136 and not consolidating the DOT Action.

¶ 22 The trial court entered an order and final judgment on 3 March 2021. In the order, the trial court valued the interest in the property and found Developer was entitled to $3,350,000 and the Association was entitled to $600,000. The trial court further found Developer and the Association had incurred $894,897.75 in attorney's fees. The trial court apportioned the attorney's fees using the same percentage as the valuation and allocated $758,963.91 to Developer and $135,934.97 to the Association. The trial court further found property taxes paid to Wake County on behalf of Developer were $71,466.87.

¶ 23 The trial court apportioned the $779,050 deposit by the DOT using the same percentage as the valuation and attorney's fees and apportioned $660,713.29 to Developer. The trial court determined the sum to calculate the amount of prejudgment interest by deducting Developer's pro-rated portion of the deposit of $660,713.29 from the total damages of 3,350,000 to total $2,689,286.71. The trial court determined the prejudgment interest due Developer totaled $409,655.73.

¶ 24 The trial court further determined the total damages due Developer by adding the interest in the property, $3,350,000, and the prejudgment interest, $409,655.73 to total $3,759,655.73.

¶ 25 The trial court also found N.C. Gen. Stat. 47C-1-107 (2021) required Developer to be fully compensated before distributing to the Association. The trial court deducted from Developer's total damages and prejudgment interest of $3,759,655.73, the prorated portion of Developer's legal fees and expenses of $758,963.91 and the property taxes paid on behalf of Developer of $71,466.87 to award $2,929,224.95 to Developer. The trial court awarded the Association $54,410.43. The trial court ordered the law firm of Cranfill, Sumner & Hartzog LLP to disperse $2,929,224.95 to Developer and $54,410.43 to the Association. The Association appealed.

II. Jurisdiction

¶ 26 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

¶ 27 The Association argues the trial court erred in granting summary judgment and failing to consolidate the DOT Action with 15 CVS 16076 and 16 CVS 15136.

IV. 3 March 2021 Order

A. Standard of Review

¶ 28 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) (2021).

¶ 29 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).

¶ 30 "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).

¶ 31 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. Analysis

¶ 32 **[1]** The Association argues the trial court erred in granting summary judgment and apportioning the DOT's award and asserts genuine issues of material fact exist in Developer's rights to construct Phase II following the expiration of the development period allowed in the Fifth Amendment. The facts surrounding the claims in 15 CVS 16076 and 16 CVS 15136 govern the apportionment of the settlement funds in the DOT Action. These material facts must be resolved before the DOT's

consented-to settlement proceeds can be apportioned and dispersed by Cranfill, Sumner & Hartzog LLP.

¶ 33 The valuations of Developer's and the Association's claims to the settlement proceeds involve opinions of value by appraisers. A jury should be allowed to determine the credibility of each appraiser and examine their opinions of value. *See Thompson v. Bradley*, 142 N.C. App. 636, 642, 544 S.E.2d 258, 262 (2001) (holding jury should be allowed to consider the credibility of accident reconstruction expert).

¶ 34 We reverse the trial court's entry of summary judgment and remand for further proceedings. Because we reverse the judgment and remand, we need not reach the Association's other issues raised on appeal concerning the calculation and distribution of DOT settlement funds.

V. The Association's Motion to Consolidate

A. Standard of Review

¶ 35 North Carolina Rule of Civil Procedure 42 provides:

> When actions involving a common question of law or fact are pending in one division of the court, the judge may order a joint hearing or trial of any or all the matters in issue in the actions; he may order all the actions consolidated; and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

N.C. Gen. Stat. § 1A-1, Rule 42(a) (2021).

¶ 36 "Whether or not consolidation of cases for trial, where permissible, will be ordered is in the discretion of the court." *Phelps v. McCotter*, 252 N.C. 66, 66, 112 S.E.2d 736, 737 (1960) (per curiam) (citations omitted). An appellant "must not only show a clear abuse of discretion by the trial court in denying its motion, but must also show injury or prejudice arising therefrom." *Barrier Geotechnical Contractors, Inc. v. Radford Quarries of Boone, Inc.*, 184 N.C. App. 741, 744, 646 S.E.2d 840, 841 (2007) (citations and internal quotation marks omitted).

B. Analysis

¶ 37 **[2]** The DOT Action, and the issues in 15 CVS 16076 and 16 CVS 15136 share a common nucleus of basic facts. These three cases share common legal issues. The claims asserted in 15 CVS 16076 and 16 CVS 15136 were consolidated. The issues asserted in 15 CVS 16076 and 16 CVS 15136 can be fully litigated and resolved, while the distribution of the

consented-to funds from the DOT Action can be completed following final judgments in the combined cases. *See Kanoy v. Hinshaw*, 273 N.C. 418, 424, 160 S.E.2d 296, 301 (1968) ("[I]t is the rule in this jurisdiction that when cases are consolidated for trial, although it becomes necessary to make only one record, the cases remain separate suits and retain their distinctiveness throughout the trial and appellate proceedings.") (citations omitted); *see also Pack v. Newman*, 232 N.C. 397, 400-01, 61 S.E.2d 90, 92 (1950) (consolidated suits "did not become one action. They remained separate suits.")(citation omitted).

¶ 38 The Association cannot show "injury or prejudice" arising out of the trial court's denial of their motion to consolidate the DOT Action, 15 CVS 16076, and 16 CVS 15136. The trial court did not abuse it discretion in denying the motion to consolidate the DOT action with the other two previously consolidated actions. This portion of the trial court's order is affirmed.

VI. Conclusion

¶ 39 Viewed in the light most favorable to the Association and giving it the benefit of any disputed inferences, Developer was not entitled to summary judgment and the allocation of funds based upon disputed facts in the appraisals. These genuine issues of material fact preclude and survive Developer's motion for summary judgment.

¶ 40 The trial court did not abuse its discretion in denying the Association's motion to consolidate the DOT action with the remaining actions. The property taken and valuation of the takings issues in the DOT action have been resolved and reduced to a sum certain by stipulation and consent of the parties. This amount is subject to the adjudication and allocation of the Developer's and the Association's rights in the remaining consolidated actions.

¶ 41 The trial court's amended orders are reversed in part on summary judgment for Developer and allocation of funds, affirmed in part on consolidation, and remanded for further proceedings or trial.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

Chief Judge STROUD and Judge GORE concur.

DOW-REIN v. SARLE

[281 N.C. App. 670, 2022-NCCOA-92]

TARA DOW-REIN, PLAINTIFF
v.
MELISSA JONES SARLE; PARAMOUNT SHOW STABLES INC.; WILLIAM HAROLD SCHAUB; W. H. SCHAUB STABLES, INC. D/B/A OVER THE HILL FARM; ALLYSON JACOBY COLUCCIO; HIDDEN RIDGE INTERNATIONAL, INC.; EVAN COLUCCIO, EMC FARMS, INC. A/K/A EMC INTERNATIONAL, INC. D/B/A EMC INTERNATIONAL STABLES OR EMC INTERNATIONAL SALES; ANDREW KOCHER; AND ANDY KOCHER LLC, DEFENDANTS

No. COA21-267

Filed 15 February 2022

Jurisdiction—personal—specific—purposeful availment—horses purchased from another state

In an action brought against an out-of-state horse stable and its owner (defendants) for claims including fraud and breach of contract in relation to the purchase of two horses, where plaintiff initiated contact with defendants and conducted the transactions out of state, defendants were not subject to personal jurisdiction because they did not purposefully avail themselves of the privileges of conducting activities in North Carolina. Although the trial court found the existence of an "ongoing business relationship" between plaintiff and defendants, the conduct referred to was the provision of boarding services in Florida for another of plaintiff's horses and was unrelated to these transactions.

Appeal by defendants from order entered 25 November 2020 by Judge Keith Gregory in Wake County Superior Court. Heard in the Court of Appeals 6 October 2021.

Ragsdale Liggett PLLC, by Amie C. Sivon, Dorothy Bass Burch, John W. ("Bo") Walker, and Sandra Mitterling Schilder, for plaintiff-appellee.

Young Moore and Henderson, P.A., by David W. Earley and Walter E. Brock, Jr., for defendants-appellants William Harold Schaub and W. H. Schaub Stables, Inc. d/b/a Over the Hill Farm.

DIETZ, Judge.

¶ 1 Plaintiff Tara Dow-Rein brought this action after buying two horses for her daughter, both of which Dow-Rein found unfit for their intended

purpose. Dow-Rein asserted fraud, breach-of-contract, and other related claims against a number of defendants, including Defendants William Schaub and W. H. Schaub Stables, Inc. (the Schaub Defendants), who sold her one of the horses and facilitated the purchase of the other.

¶ 2 The Schaub Defendants moved to dismiss for lack of personal jurisdiction. After the trial court denied the motion to dismiss, the Schaub Defendants appealed and we remanded the case for additional fact findings. The trial court entered a new order with additional findings that again denied the motion to dismiss. This appeal followed.

¶ 3 As explained below, we reverse the trial court's order. The trial court found that Dow-Rein initiated contact with the Schaub Defendants; traveled to the Schaub Defendants' farm in Florida to view the first horse, Season; negotiated the sale of Season in Florida; and then picked up Season in Florida to bring back to North Carolina. The court also found that the Schaub Defendants arranged for a second horse, Fred, to be transported from Virginia to Maryland to be shown to Dow-Rein.

¶ 4 The Schaub Defendants' only contact with North Carolina concerning these horse sales was when Dow-Rein sent the executed contract for Season from North Carolina to the Schaub Defendants in Florida, and later sent the payment from North Carolina to Florida.

¶ 5 These contacts are insufficient to show that the Schaub Defendants purposefully availed themselves of the privilege of conducting activities in North Carolina. We therefore reverse the trial court's order and remand for entry of an order dismissing the claims against the Schaub Defendants for lack of personal jurisdiction.

Facts and Procedural History

¶ 6 In 2015, Plaintiff Tara Dow-Rein hired her North Carolina riding trainer, Defendant Melissa Sarle, to assist her in locating and purchasing a horse for Dow-Rein's 11-year-old daughter. With Sarle's assistance, Dow-Rein traveled to Florida to meet Defendant William Schaub, who showed Dow-Rein a horse named Season at his Florida stable.

¶ 7 Dow-Rein purchased Season from Schaub and his corporate entity, W. H. Schaub Stables, Inc. Schaub signed a bill of sale for Season in Florida and sent it to Dow-Rein, who signed it and emailed it back. Dow-Rein then wired the $132,000 purchase price for Season from her North Carolina bank account to the Schaub Defendants in Florida. Dow-Rein took possession of Season in Florida and arranged to ship the horse to North Carolina.

¶ 8 In 2016, the Schaub Defendants provided horse boarding services for Beau, another horse owned by Dow-Rein. In connection with these services, the Schaub Defendants sent invoices to Dow-Rein's home address in North Carolina and kept Dow-Rein's credit card information on file. Those services are unrelated to the legal claims at issue in this case.

¶ 9 After Season arrived in North Carolina, the horse was diagnosed with chronic lameness that made him unsuitable for Dow-Rein's intended use. Dow-Rein began looking for another horse. In October 2016, Sarle again contacted Schaub on behalf of Dow-Rein, and Schaub arranged for a second horse, Fred, to be brought from Virginia to Maryland to show to Dow-Rein. Schaub then referred Dow-Rein to the brokers for Fred, who are Virginia residents. The Schaub Defendants had no further involvement in the sale of Fred. As with Season, Dow-Rein later determined that Fred was unsuitable for Dow-Rein's intended use.

¶ 10 On 30 July 2018, Dow-Rein filed an unverified complaint asserting claims for fraud, negligence, unfair and deceptive trade practices, and breach of contract related to the sales of Season and Fred. In her complaint, Dow-Rein alleged that the Schaub Defendants knew about the lameness issue with Season, that all defendants knew of Fred's behavior issues, and that the defendants concealed that information from her to sell Season and Fred for higher prices. Dow-Rein later amended the complaint. As alleged in the amended complaint, Schaub is a resident of Florida, his corporate entity is a Florida corporation, and his business operations are located in Florida.

¶ 11 The Schaub Defendants moved to dismiss the claims against them for lack of personal jurisdiction and improper venue. In support of their motion to dismiss, the Schaub Defendants filed affidavits from Schaub along with discovery responses and document production. Dow-Rein filed a single affidavit from a paralegal at her counsel's firm, stating that a review of online records indicated that Schaub owned horses that competed in North Carolina horse shows in 2015 and 2016.

¶ 12 The trial court heard Defendants' motions to dismiss and entered an order denying the motions. Defendants appealed. On 7 July 2020, this Court filed an opinion in that first appeal, vacating the trial court's order and remanding the matter for the trial court to make necessary jurisdictional findings of fact "based on the appropriate evidence in the record"—specifically, the parties' competing affidavits, the discovery responses, and any undisputed allegations from the unverified complaint. *Dow-Rein v. Sarle*, 272 N.C. App. 446, 843 S.E.2d 731, 2020 WL 3708309, at *3 (2020) (unpublished).

¶ 13 On 28 October 2020, the trial court held a new hearing on the Schaub Defendants' motion to dismiss. The parties sought to introduce additional evidence at the new hearing that was not before the court at the first hearing. The trial court ruled that it would not consider any additional evidence because this Court's mandate instructed the trial court to make additional findings on remand based on the "evidence in the record."

¶ 14 On 25 November 2020, the trial court entered a written order denying the Schaub Defendants' motion to dismiss. The Schaub Defendants appealed.[1]

Analysis

¶ 15 The Schaub Defendants challenge the trial court's denial of their motion to dismiss for lack of personal jurisdiction.

¶ 16 In civil proceedings, the plaintiff "bears the burden of proving, by a preponderance of the evidence, grounds for exercising personal jurisdiction over a defendant." *Bauer v. Douglas Aquatics, Inc.*, 207 N.C. App. 65, 68, 698 S.E.2d 757, 761 (2010). As we noted in the first appeal in this case, this personal jurisdiction issue involves fact disputes addressed through competing affidavits of the parties. *Dow-Rein v. Sarle*, 272 N.C. App. 446, 843 S.E.2d 731, 2020 WL 3708309, at *2–3 (2020) (unpublished). In this circumstance, "the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005). We are bound by the trial court's determination of the "credibility or weight" of the facts presented in the competing affidavits. *Id.* at 695, 611 S.E.2d at 183.

¶ 17 In a case like this one, involving what is known as "specific jurisdiction," courts examine whether the defendants had "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, so that they may structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[2] *Mucha v. Wagner*, 378 N.C. 167, 2021-NCSC-82, ¶ 10. The acts necessary to provide this fair warning often are described as "purposeful availment" because courts examine whether the defendants

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1. The trial court also entered a written order granting a motion to dismiss filed by other defendants in this action. That order is the subject of a separate, related appeal in this matter. *See Dow-Rein v. Sarle*, No. COA21-262.

2. There is no dispute concerning the application of North Carolina's long-arm statute and no argument that the Schaub Defendants have sufficient contacts with North Carolina to subject them to general jurisdiction.

purposefully availed themselves of the privilege of conducting activities in North Carolina. *Id.* ¶ 11. Identifying which party initiates the contact with the forum state is "a critical factor in assessing whether a nonresident defendant has made 'purposeful availment.' " *CFA Medical, Inc. v. Burkhalter*, 95 N.C. App. 391, 395, 383 S.E.2d 214, 216 (1989). To satisfy the test, the defendant "must expressly aim his or her conduct at that state" or "must have targeted the forum state specifically." *Mucha*, ¶¶ 16, 20.

¶ 18 This Court has decided two cases involving the sale of horses by an out-of-state seller to a North Carolina buyer, and these cases illustrate how to assess purposeful availment in this context. First, in *Watson v. Graf Bae Farm, Inc.*, this Court held that the out-of-state seller's contacts were sufficient to show purposeful availment because the seller advertised horses for sale in North Carolina, the contract for the sale of the horse required the horse be examined by a North Carolina veterinarian, the seller delivered the horse to North Carolina as part of the contract, and the final act of the contract (a veterinarian exam) occurred in North Carolina. 99 N.C. App. 210, 213, 392 S.E.2d 651, 653 (1990).

¶ 19 By contrast, in *Hiwassee Stables, Inc. v. Cunningham*, this Court held that the seller's contacts were not sufficient to show purposeful availment because the North Carolina buyers "made the initial contact" with the seller in Florida and the seller performed all key aspects of the sale in Florida. 135 N.C. App. 24, 29, 519 S.E.2d 317, 321 (1999). We observed that the defendants' contacts with North Carolina consisted solely of returning the buyers' phone call, entering into a contract with them, sending billing statements to the buyers in North Carolina, and receiving a payment sent from North Carolina. *Id.* Citing Supreme Court precedent, we held that entering into a contract with a North Carolina resident "may be a sufficient basis for the exercise of in personam jurisdiction," but only if the contract "has a substantial connection to this state." *Id.* The Court held that the connections in *Hiwassee Stables* were not substantial enough to find purposeful availment because "none of the alleged acts" giving rise to the claims occurred in North Carolina and the seller "never shipped anything to this state beyond the one billing statement." *Id.*

¶ 20 The trial court recognized that this case is more closely analogous to *Hiwassee Stables* than to *Watson*, but distinguished *Hiwassee Stables* by concluding that the Schaub Defendants "were engaged in an ongoing business relationship" with Dow-Rein.

¶ 21 The trial court's discussion of this "ongoing business relationship" likely derives from our Supreme Court's recent decision in *Beem USA*

Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC, 373 N.C. 297, 306, 838 S.E.2d 158, 164 (2020), although the trial court did not cite *Beem* in its order. In *Beem*, the Supreme Court held that a defendant purposefully availed itself of the privilege of conducting activities in North Carolina when a representative of the defendant "came to North Carolina to open a bank account," "traveled to this state on three separate occasions to discuss" the subject matter of the lawsuit, and contacted the North Carolina resident about the matter at issue in the lawsuit "numerous times each month for approximately a year." *Id.* The Supreme Court held that this conduct "established an ongoing relationship with persons and entities located within this state such that it could reasonably anticipate being called into court here." *Id.*

¶ 22 The trial court's findings in this case are far removed from the contacts described in *Beem*. Dow-Rein initiated contact with the Schaub Defendants—they did not reach out to her. The Schaub Defendants did not travel to North Carolina nor did they make calls to North Carolina. The negotiations for the sale of Season took place in Florida. The Schaub Defendants delivered Season to Dow-Rein in Florida. The Schaub Defendants' only contact with North Carolina during the entire transaction was receiving the executed bill of sale and payment that Dow-Rein sent from North Carolina to the Schaub Defendants in Florida.

¶ 23 The trial court, in concluding that there was an "ongoing business relationship" between the parties, referenced "multiple documents" that the Schaub Defendants sent to North Carolina for their boarding services for another of Dow-Rein's horses, Beau. But those boarding services are unrelated to the claims in this case; they were invoices for boarding Beau at the Schaub Defendants' farm in Florida and have no connection to the sale of Season and, later, Fred for potential use by Dow-Rein's daughter in North Carolina. Similarly, with respect to Fred, the Schaub Defendants' only conduct was arranging for Fred to be transported from Virginia to Maryland so that Dow-Rein could see Fred when she traveled to Maryland. This conduct had no connection to North Carolina at all.

¶ 24 Simply put, the Schaub Defendants' contacts with North Carolina are insufficient to show that they purposefully availed themselves of the privilege of conducting activities in North Carolina. This dispute involves a buyer who traveled to Florida, negotiated to buy a horse in Florida, and then took possession of the horse in Florida before bringing it to North Carolina. The sellers later arranged for another horse to be transported from Virginia to Maryland so that the buyer could travel there and view the animal. The sellers, who are Florida residents and who did not reach out to our State in these business dealings,

could not reasonably have anticipated being haled into court in North Carolina over claims concerning either of these horses. We therefore reverse the trial court's order and remand this case for the trial court to dismiss Dow-Rein's claims against the Schaub Defendants for lack of personal jurisdiction.

Conclusion

¶ 25 We reverse the trial court's order and remand for entry of an order dismissing the claims against Defendants-Appellants for lack of personal jurisdiction.

REVERSED AND REMANDED.

Judges MURPHY and ARROWOOD concur.

DENNIS D. MAHONE, JR., EMPLOYEE, PLAINTIFF
v.
HOME FIX CUSTOM REMODELING, EMPLOYER,
SELECTIVE INSURANCE, CARRIER, DEFENDANTS

No. COA21-292

Filed 15 February 2022

1. Workers' Compensation—compensability of injury—legal standard—causation—expert opinion evidence

The Industrial Commission erred in denying plaintiff's workers' compensation claim by applying the incorrect legal standard when determining whether his traumatic brain injury (TBI) was compensable. Specifically, the Commission required plaintiff to present expert testimony indicating that a work-related accident likely caused his TBI, but the correct standard allows plaintiffs in workers' compensation cases to present any form of expert opinion evidence—including documentary evidence, which plaintiff did present to the Commission—to establish causation.

2. Workers' Compensation—attendant care services—reimbursement valuation—further proceedings permitted

In a workers' compensation case where—despite finding that plaintiff required attendant care for his work-related injury—the Industrial Commission declined to award compensation for attendant care services plaintiff was receiving from his wife (due to a

lack of evidence regarding the reimbursement rate plaintiff's wife would be entitled to), the Commission did not abuse its discretion by allowing plaintiff to request a new hearing on the matter under Workers' Compensation Rule 614. Rule 614 would allow further discovery on the reimbursement issue if plaintiff's wife filed a motion to intervene and if the motion were granted; thus, there was no merit to defendants' argument that plaintiff had missed his opportunity to present evidence on the issue.

3. Workers' Compensation—sanctions—noncompliance with order compelling discovery

The Industrial Commission did not abuse its discretion in a workers' compensation case by imposing sanctions against plaintiff's employer and the employer's insurance carrier (defendants) under Workers' Compensation Rule 605(9), where defendants failed to comply with the deputy commissioner's order granting plaintiff's motion to compel discovery. Specifically, defendants gave incomplete answers to plaintiff's interrogatories regarding the training courses and subsequent evaluations the employer had provided to plaintiff and, in response to plaintiff's requests for production, defendants failed to produce over ten hours' worth of audio recordings from plaintiff's two-week training course with the employer.

Appeals by plaintiff and defendants from Opinion and Award entered 26 January 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 January 2022.

Lennon, Camak & Bertics, PLLC, by S. Neal Camak and Michael W. Bertics, for plaintiff.

Cranfill Sumner LLP, by Steven A. Bader and Jerri Simmons, for defendants.

ARROWOOD, Judge.

¶ 1 Dennis D. Mahone, Jr., ("plaintiff") and Home Fix Custom Remodeling ("Home Fix") appeal from separate portions of the same order of the North Carolina Industrial Commission ("Commission"). Plaintiff contends the Commission applied the incorrect legal standard in determining whether plaintiff's traumatic brain injury ("TBI") was compensable. Home Fix and its insurance carrier, Selective Insurance (collectively, "defendants") contend the Commission erred in allowing plaintiff to seek a new hearing on his claim for retroactive attendant

care benefits, and abused its discretion by entering discovery sanctions. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

I. Background

¶ 2 Home Fix is a home remodeling company that employs "Territory Sales Representatives" to canvas neighborhoods and engage with customers. Plaintiff was hired by Home Fix as a Territory Sales Representative on 6 July 2018. On 24 July 2018, during his second sales call, plaintiff climbed into the attic of a potential customer to take measurements for an insulation estimate and the floor beneath him collapsed. Plaintiff fell at least twenty feet and landed in the staircase area of the lower level of the home. EMS responded and found plaintiff unconscious and "slumped over a broken wooden [banister]." Plaintiff regained consciousness en route to the hospital.

¶ 3 When plaintiff arrived at the hospital, he complained of pain throughout his entire back, as well as numbness and tingling in his extremities. Dr. Matthew Alleman ("Dr. Alleman") observed that plaintiff had weakness in his extremities during the initial examination. An MRI indicated that plaintiff suffered significant injuries to his cervical and thoracic spine, including laminar fractures of vertebrae at C4, C5, C6, C7, T1, T2, T3, and T5, interspinous ligamentous tearing from C2 to T4, and "severe stenosis at C4-5, C5-6, and C6-7 as well as edema within the spinal cord from C5-C7." Plaintiff also had two posterior rib fractures on his left side. A CT scan of plaintiff's head taken at the same time indicated "[n]o evidence of intracranial hemorrhage, mass effect or acute cortical stroke[,]" and a "[s]oft tissue hematoma overlying the superior left parietal bone."

¶ 4 After the initial examination and imaging, Dr. Conor Regan ("Dr. Regan") performed surgery on plaintiff. The surgery "included treatment of the C4 fracture, treatment and reduction of the C5 and C6 laminar fractures, treatment and reduction of the T2-T3 ligamentous injury, fusion of the vertebrae from C3 to T3, application of instrumentation from C3 to T3, laminectomies at C4, C5, C6 and C7," and an iliac crest bone graft. Dr. Regan conducted a follow-up appointment on 11 September 2018, where plaintiff reported "stiffness in his neck but no pain radiating into his arms." Dr. Regan recommended that plaintiff begin outpatient physical therapy.

¶ 5 Following surgery, Dr. Scott Moore ("Dr. Moore") conducted a cognitive screening and mental assessment on 27 July 2018 to evaluate plaintiff for a possible TBI. Dr. Moore noted that plaintiff had difficulty

with "mental flexibility and verbal memory" and displayed "reduced processing speed/delayed response time in addition to variable attention at times[,]" as well as a depressed affect. Dr. Moore also observed that plaintiff reported high levels of pain during the evaluation, which may have "negatively impacted current cognitive abilities to an unclear extent." Dr. Moore provided plaintiff with "[b]rief verbal and written information regarding mild TBI," but concluded that additional acute, inpatient neuropsychological services did "not appear warranted at [that] time."

¶ 6 Plaintiff was admitted to WakeMed Rehabilitation on 13 August 2018, where he underwent inpatient rehabilitation until his discharge on 31 August 2018. On 15 August 2018, Dr. Rochelle Lynn O'Neil ("Dr. O'Neil") performed a neurobehavioral assessment of plaintiff, observing that plaintiff had "reduced working memory abilities[,]" but otherwise "the majority of other cognitive abilities . . . were within normal limits." Dr. O'Neil noted that plaintiff "demonstrated improvements within language abilities, processing speed, and aspects of memory" since the 27 July 2018 screening.

¶ 7 On 30 July 2018, plaintiff completed and filed a Form 18 providing notice of the accident. Defendants denied plaintiff's claim, alleging there was no employee/employer relationship. On 8 August 2018, plaintiff filed a Form 33 request for an expedited hearing. On 13 September 2018, Defendants filed a Form 33R in response, again denying compensability. On 24 September 2018, Deputy Commissioner Ashley M. Moore ("Deputy Commissioner Moore") entered an order requiring defendants to fully respond to plaintiff's discovery requests.

¶ 8 The case was heard before Deputy Commissioner Moore on 1 October 2018. The issues presented included whether plaintiff was permanently and totally disabled, to what attendant care compensation plaintiff was entitled, plaintiff's average weekly wage and compensation rate, whether defendants should be subject to a statutory penalty, and whether defendants should be assessed sanctions or attorney's fees. At the hearing, plaintiff testified from a wheelchair and needed to take multiple breaks during the hearing due to pain. Plaintiff testified that "he had trouble using the restroom, feeding himself, and administering his medication, and he had to rely upon his wife to assist him with those activities." Although plaintiff provided testimony regarding the assistance his wife provided, his wife did not testify at the hearing and was not deposed.

¶ 9 Following the hearing and subsequent mediation, defendants filed a Form 60 on 14 November 2018, admitting that plaintiff was an employee

who had suffered a compensable accident, specifically admitting injuries to plaintiff's "spine, fractures to the second and third left-sided ribs, and hematoma on the parietal bone." Deputy Commissioner Moore held the record open for submissions through 30 January 2019.

¶ 10 Dr. Regan was deposed on 17 October 2018. Dr. Regan testified that plaintiff demonstrated "diminished sensation in his upper extremities[,]" with "remarkably decreased strength in the right upper and nothing in the right lower" extremities and "spared strength to some degree in the left upper, and more so in the left lower" extremities. These observations were consistent with a central spinal cord injury. Dr. Regan explained that plaintiff's right side was weaker than the left side because of the "laminar fracture squeezing down on the right side of the spinal cord[.]" This was compounded by plaintiff's ligamentous injury where "he basically ripped through the ligaments that connect the back of the bones together," which created floating spinal masses that further compressed the spinal cord. Dr. Regan stated that plaintiff had regained some motor function and could use a walker to traverse short distances, but also acknowledged that plaintiff was in a wheelchair at a recent hearing and that plaintiff could not "walk very far."

¶ 11 On 2 November 2018, Dr. Lance L. Goetz ("Dr. Goetz") wrote a letter stating that plaintiff was hospitalized and under Dr. Goetz's care at the Richmond VA Spinal Cord Injury and Disorders Service. In the letter, Dr. Goetz indicated that plaintiff required, and continued to require, "aid and attendance from a trained caregiver . . . for the foreseeable future[,]" including "supervision, assistance with ADLs [activities of daily living], transfers, transportation, and ongoing medical care and monitoring." Dr. Goetz also stated in his letter that plaintiff had "incurred a traumatic brain injury with loss of consciousness and approximately [two] days of post-traumatic amnesia." Dr. Goetz was not deposed as part of this case.

¶ 12 On 4 June 2019, Deputy Commissioner Moore entered an Opinion and Award. Deputy Commissioner Moore found that plaintiff had failed to present evidence "as to how many hours per day he requires attendant care[,]" or "of the appropriate compensation rate" for plaintiff's wife as an attendant care provider. Deputy Commissioner Moore also found that "while it is clear Plaintiff needs attendant care due to his compensable injuries," plaintiff had "presented no competent evidence to support such an award." Regarding plaintiff's claims for sanctions, Deputy Commissioner Moore found that plaintiff "failed to prove Defendants did not fully respond to Plaintiff's discovery requests" and declined to impose sanctions.

¶ 13 Deputy Commissioner Moore concluded that although plaintiff "is currently totally disabled from competitive employment, he is not yet at maximum medical improvement and thus it is not yet possible to determine whether Plaintiff meets the requirements for permanent and total disability . . . ." Deputy Commissioner Moore further concluded that plaintiff had failed to present evidence regarding the number of hours of attendant care plaintiff needed in the past and would need in the future, or regarding the rate at which plaintiff's wife should be compensated for attendant care. Regarding compensation, Deputy Commissioner Moore concluded that plaintiff's "average weekly wage [was] $1,692.31 which yields the maximum weekly benefit of $992.00" pursuant to N.C. Gen. Stat. § 97-29. Finally, Deputy Commissioner Moore concluded that plaintiff had failed to present evidence that defendants did not comply with the 24 September 2018 order and denied plaintiff's request for sanctions.

¶ 14 On 5 June 2019, plaintiff filed a Motion for Reconsideration requesting various amendments and clarifications. On 22 July 2019, Deputy Commissioner Moore filed an amended Opinion and Award. Therein, Deputy Commissioner Moore concluded that defendants "shall provide medical treatment for Plaintiff's compensable injuries, namely, those listed on the Form 60 filed by Defendants: Plaintiff's spine, fractures to his second and third left-sided ribs, and hematoma on the parietal bone." Deputy Commissioner Moore also ordered that "Defendants shall pay medical expenses incurred, or to be incurred, as a result of Plaintiff's compensable injuries as may reasonably be required to effect a cure, provide relief, or lessen the period of disability." The remainder of the amended Opinion and Award was unchanged from the original 4 June 2019 Opinion and Award.

¶ 15 Plaintiff filed an appeal to the Full Industrial Commission on 6 August 2019. Plaintiff filed a corresponding Form 44 on 24 October 2019.

¶ 16 The Full Commission reviewed the matter on 10 December 2019 and entered an Opinion and Award on 26 January 2021. The Commission made findings summarizing the medical evidence presented at the hearing and subsequently received in discovery. The Commission found that "[a]lthough the medical records in this case indicate that Plaintiff was diagnosed with a mild TBI following the 24 July 2018 incident, the Full Commission finds Plaintiff presented no expert medical opinion evidence causally linking the 24 July 2018 incident with Plaintiff's traumatic brain injury." The Commission noted that "Dr. Regan was the only medical expert deposed in this matter, and he was neither asked for, nor independently offered any opinion as to the causation of Plaintiff's TBI." Additionally, the Commission found that, "[w]hile Dr. Goetz wrote

a letter to the Commission indicating that the TBI was related to the 24 July 2018 incident, he did not offer an opinion to a reasonable degree of medical certainty, and was not deposed by the parties." Accordingly, the Commission found that plaintiff was not entitled to ongoing medical compensation for his TBI.

¶ 17 Regarding attendant care benefits, the Commission found that plaintiff "requires attendant care to effect a cure, give relief, or lessen the period of his disability[,]" but that plaintiff "failed to present evidence as to how many hours per day he requires attendant care, or the appropriate compensation rate for [his wife] as the attendant care provider." The Commission found that there was "insufficient evidence upon which to base an award for either prospective or retroactive attendant care . . . ." Regarding compensation and plaintiff's average weekly wage, the Commission applied the same method for calculation as in Deputy Commissioner Moore's Opinion, finding that plaintiff's average weekly wage was $1,692.31, yielding a maximum weekly benefit of $992.00.

¶ 18 With respect to plaintiff's claim for discovery sanctions, the Commission found that on 20 August 2018, plaintiff served a series of requests for discovery, including forty-eight interrogatories and twenty-one requests for production of documents. On 21 September 2018, plaintiff filed a Motion to Compel, which Deputy Commissioner Moore granted on 24 September 2018, requiring defendants to "answer and fully respond to Plaintiff's 20 August 2018 discovery requests by 5:00 p.m. on Wednesday, 26 September 2018." The Commission found that plaintiff filed a second Motion to Compel on 27 September 2018, arguing that defendants "failed to make a full response" with respect to several interrogatories and requests for production. The Commission noted that plaintiff's brief drew "attention to Defendants' failure to provide full answers to Interrogatories 8(d) and (e), which request detail regarding training courses and ratings or evaluations provided to Plaintiff." Specifically, "[w]hile Defendants provided Plaintiff with the sales manual introduced as part of Stipulated Exhibit 2, they did not produce the audio recordings later introduced as Plaintiff's Exhibit 2, which were largely provided to Plaintiff" during his initial training. The Commission found that the recordings, "which last over ten hours, contain detailed instructions given by [Home Fix's branch manager] to [plaintiff] and other trainees on sales techniques and procedures, and show Plaintiff was routinely given homework and was subject to evaluation during his two-week training course." Based upon a preponderance of the evidence, the Commission found that Home Fix "did not fully respond to Plaintiff's discovery requests and in doing so failed to comply

with Deputy Commissioner Moore's 24 September 2018 Order[,]" and that this failure "was not based on an inability to comply[.]"

¶ 19 Based on the aforementioned findings of fact, the Commission concluded that plaintiff was "entitled to medical treatment for his compensable injuries, namely, those listed on the Form 60 filed by Defendants." The Commission further concluded that based on plaintiff's evidence, including "his own testimony, his medical records, and Dr. Goetz's letter, . . . he is in need of attendant care, [and] the Full Commission concludes attendant care is reasonably necessary to effect a cure, provide relief, or lessen the period of Plaintiff's disability." Despite concluding that attendant care was reasonably necessary, the Commission concluded that it was "unable to award compensation for retroactive or prospective attendant care" due to the lack of evidence as to the number of hours of attendant care needed and the rate at which plaintiff's wife should be compensated.

¶ 20 In the Award, the Commission denied plaintiff's claim for permanent and total disability benefits and his claim for benefits for his TBI. The Commission ordered defendants to "pay ongoing temporary total disability benefits to Plaintiff at a rate of $992.00 per week beginning 24 July 2018 and continuing until further order of the Commission, less any amounts already paid by Defendants." The Commission also ordered defendants to "pay medical expenses incurred, or to be incurred, as a result of Plaintiff's compensable injuries as may reasonably be required to effect a cure, provide relief, or lessen the period of disability." Plaintiff's claim for attendant care benefits was denied, with the Award providing that "[i]f the parties are unable to agree to the number of hours and the rate of reimbursement for [plaintiff's wife's] provision of attendant care to Plaintiff, the parties may request further hearing before the Industrial Commission pursuant to Rule 614 of the Workers' Compensation Rules." The Commission granted plaintiff's claim for discovery sanctions.

¶ 21 On 23 February 2021, plaintiff filed notice of appeal, limiting the appeal to the issue of denial of the compensability of plaintiff's TBI. On 1 March 2021, defendants cross-appealed.

II. Discussion

¶ 22 Both parties have appealed the Commission's order, with each appeal addressing separate issues. Plaintiff contends the Commission applied the incorrect legal standard in denying that plaintiff's TBI was compensable. Defendants contend the Commission erred in allowing plaintiff to seek a new hearing on his claim for retroactive care benefits

and abused its discretion by entering discovery sanctions. We address each issue in turn.

A. Standard of Review

¶ 23 "[O]n appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted). "This court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* (citation and quotation marks omitted). "Even where there is evidence to support contrary findings, the Commission's findings of fact are conclusive on appeal if supported by any competent evidence." *Snead v. Carolina Pre-Cast Concrete, Inc.*, 129 N.C. App. 331, 335, 499 S.E.2d 470, 472 (1998) (citation omitted). If the Commission's findings "are predicated on an erroneous view of the law or a misapplication of the law, they are not conclusive on appeal." *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106 (1992) (citation omitted).

¶ 24 "The Commission's conclusions of law, however, are reviewable *de novo*." *Snead*, 129 N.C. App. at 335, 499 S.E.2d at 472 (citation omitted). The Commission's designation of various points as a "Finding of Fact" or "Conclusion of Law" are not conclusive; "[w]hether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law." *Brown v. Charlotte-Mecklenburg Bd. of Ed.*, 269 N.C. 667, 670, 153 S.E.2d 335, 338 (1967) (citation and quotation marks omitted).

¶ 25 "The decision to receive additional evidence is within the sound discretion of the Commission, and will not be reversed on appeal unless the Commission manifestly abuses its discretion." *Pittman v. Int'l Paper Co.*, 132 N.C. App. 151, 155, 510 S.E.2d 705, 708 (citation omitted), *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999).

¶ 26 Our Supreme Court "has repeatedly held that our Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow, and strict construction." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quotation marks omitted) (quoting *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968)).

B. Compensability of Injury

¶ 27 **[1]** Plaintiff argues the Commission erred in denying that he was entitled to compensation for his TBI. We agree.

¶ 28 N.C. Gen. Stat. § 97-82(b) provides that "[a]n employee may request a hearing pursuant to G.S. 97-84 to prove that an injury or condition is causally related to the compensable injury." N.C. Gen. Stat. § 97-82(b) (2021). "Under the North Carolina Workers' Compensation Act, an employee seeking benefits 'bears the burden of proving every element of compensability.' " *Rogers v. Smoky Mountain Petroleum Co.*, 172 N.C. App. 521, 524, 617 S.E.2d 292, 295 (2005) (citation omitted). "The degree of proof required of a claimant is the 'greater weight' or the preponderance of the evidence." *Id.* (citation omitted).

¶ 29 If a case concerns "complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (citation and quotation marks omitted). "However, when such expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion. As such, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). The evidence must "take the case out of the realm of conjecture and remote possibility," which requires "sufficient competent evidence tending to show a proximate causal relation." *Holley*, 357 N.C. at 232, 581 S.E.2d at 753 (citation omitted).

¶ 30 Expert testimony "as to the possible cause of a medical condition is admissible if helpful to the jury," but it may be insufficient to prove causation, particularly "when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation[.]" *Id.* at 233, 581 S.E.2d at 753 (citations and quotation marks omitted). "[I]t appears that our Supreme Court has created a spectrum by which to determine whether expert testimony is sufficient to establish causation in worker's compensation cases." *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 264, 614 S.E.2d 440, 446 (2005). While expert testimony that a work-related injury "could" or "might" have caused further injury is insufficient to prove causation, expert testimony establishing that a work-related injury "likely" caused further injury is "competent evidence" to support a finding of causation. *Id.*, 614 S.E.2d at 446-47 (citations omitted).

¶ 31 "This court has repeatedly held that a doctor is not required to testify to a reasonable degree of medical certainty." *Erickson v. Siegler*, 195 N.C. App. 513, 524, 672 S.E.2d 772, 780 (2009) (citations omitted). "All that is required is that it is 'likely' that the workplace accident caused plaintiff's injury." *Id.* (citations omitted).

¶ 32 In *Rawls v. Yellow Roadway Corp.*, the defendants challenged the Commission's finding with respect to a doctor's diagnosis of the plaintiff's injuries. *Rawls v. Yellow Roadway Corp.*, 219 N.C. App. 191, 197, 723 S.E.2d 573, 578 (2012). This Court disagreed, holding that the doctor's opinion, as stated in his report, was sufficient evidence to support the Commission's finding. *Id.* ("[T]he language of the Commission's finding of fact 36 closely mirrors the language of Dr. Tegeler's report. Accordingly, we conclude that finding of fact 36 was supported by sufficient evidence.").

¶ 33 In this case, the Commission determined that plaintiff "presented no expert medical opinion evidence causally linking the 24 July 2018 incident with Plaintiff's traumatic brain injury." The Commission found that Dr. Regan was the only medical expert deposed "and he was neither asked for, nor independently offered any opinion as to the causation of Plaintiff's TBI," and that "[w]hile Dr. Goetz wrote a letter to the Commission indicating that the TBI was related to the 24 July 2018 incident, he did not offer an opinion to a reasonable degree of medical certainty, and was not deposed by the parties."

¶ 34 Based on these findings, it appears the Commission required plaintiff to present expert *testimony*, either at a hearing or deposition, to a reasonable degree of medical certainty, that his TBI was causally related to the accident. This is not the standard required by this Court. In order to establish causation, plaintiff was required to present expert *opinion evidence*, not necessarily in the form of testimony, that it was likely that the accident caused plaintiff's injury. As this Court held in *Rawls*, documentary evidence may be sufficient to support the Commission's finding with respect to causation. Although Dr. Goetz was not deposed and did not testify, his letter stated that plaintiff "has incomplete . . . tetraplegia due to a 25 foot fall through an attic . . . . He has also incurred a traumatic brain injury with loss of consciousness and approximately 2 days of post-traumatic amnesia." Dr. Goetz's letter was not speculative or guesswork, and constituted sufficient evidence to establish causation by a preponderance of the evidence. Notably, although the Commission determined that Dr. Goetz's letter was insufficient to causally link plaintiff's accident to his TBI, the Commission did consider

Dr. Goetz's letter as evidence, citing the letter to support the conclusion that plaintiff was in need of attendant care.

¶ 35 We hold the Commission erred in denying plaintiff compensation for his TBI. Accordingly, we reverse the Commission's Opinion and Award with respect to the compensability of plaintiff's TBI and remand to the Commission to make findings and conclusions applying the correct standards of proof.

C. New Hearing on Claim for Attendant Care Benefits

¶ 36 **[2]** Defendants contend the Commission abused its discretion in allowing plaintiff to request another hearing under Workers' Compensation Rule 614. Defendants describe this not as a fee dispute, but as a missed opportunity by plaintiff to present evidence of attendant care valuation. Plaintiff, however, contends the Commission resolved the compensability question in plaintiff's favor and ordered the parties to attempt to reach an agreement on the reimbursement rate issue.

¶ 37 Under the Workers' Compensation Act, medical compensation may include "attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission" to the extent that the services are reasonably necessary to effect a cure, provide relief, or lessen the period of disability. N.C. Gen. Stat. § 97-2(19) (2021). "The term 'health care provider' means physician, hospital, pharmacy, chiropractor, nurse, dentist, podiatrist, physical therapist, rehabilitation specialist, psychologist, and *any other person providing medical care* pursuant to this Article." N.C. Gen. Stat. § 97-2(20) (emphasis added).

¶ 38 Our Courts have "authorized payment to family members for attendant care provided to an injured family member." *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 480, 525 S.E.2d 203, 208 (2000) (citing *Godwin v. Swift & Co.*, 270 N.C. 690, 155 S.E.2d 157 (1967)). When determining the appropriate rate for attendant care provider fees, the Commission must consider factors including the provider's expertise, the type of services rendered, and actual wages earned by an equivalent attendant care provider. *See Levens v. Guilford Cty. Schs.*, 152 N.C. App. 390, 399, 567 S.E.2d 767, 773 (2002) (considering evidence of attendant care services provided by plaintiff's family members).

¶ 39 Pursuant to Workers' Compensation Rule 614, if a health care provider fee dispute cannot be resolved, the health care provider "shall file a motion to intervene with the Commission." 11 N.C. Admin. Code 23A.0614(f). In accordance with N.C. Gen. Stat. § 97-90.1, "when a health care provider is allowed to intervene by the Commission, the intervention

is limited to the medical fee dispute." 11 N.C. Admin. Code 23A.0614(k). "Discovery by a health care provider shall be allowed following a Commission order allowing intervention but is limited to matters related to the medical fee dispute." 11 N.C. Admin. Code 23A.0614(m).

¶ 40 In this case, the Commission received competent evidence that plaintiff required attendant care and made findings of fact and conclusions of law based on that evidence. The issue of the rate of compensation, however, was not resolved and remained in dispute. Accordingly, pursuant to Workers' Compensation Rule 614, plaintiff's wife was permitted to file a motion to intervene with the Commission. Rule 614 further provides that if the Commission grants a motion to intervene, discovery shall be allowed, limited to matters related to the medical fee dispute.

¶ 41 Defendants' contentions that the Commission erred in allowing plaintiff to seek a new hearing are founded in a misapprehension of the Workers' Compensation Rules and a misunderstanding of the Commission's Opinion and Award. Although it does not appear from our review of the record that plaintiff's wife has yet filed a motion to intervene, the Workers' Compensation Rules provide for further discovery and proceedings in these circumstances. We hold that the Commission did not abuse its discretion in permitting the parties to request further hearing pursuant to Rule 614.

D. Discovery Sanctions

¶ 42 **[3]** Defendants argue the Commission erred in imposing sanctions for failing to produce audio recordings in discovery. We disagree.

¶ 43 Workers' Compensation Rule 605 permits litigants to conduct written discovery. 11 N.C. Admin. Code 23A.0605. The Workers' Compensation discovery rules "should be liberally construed in order to accomplish the important goal" of facilitating pre-trial disclosure "of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial." *Williams v. N.C. Dep't of Correction*, 120 N.C. App. 356, 359, 462 S.E.2d 545, 547 (1995) (citation and quotation marks omitted). "The administration of these rules, in particular the imposition of sanctions, is within the broad discretion" of the Commission, and the Commission's decision "regarding sanctions will only be overturned on appeal upon showing an abuse of that discretion." *Id.* (citations omitted).

¶ 44 Rule 605(9) provides that sanctions "shall be imposed under this Rule for failure to comply with a Commission order compelling discovery

unless the Commission excuses the failure based on an inability to comply with the order." 11 N.C. Admin. Code 23A.0605(9).

¶ 45 Defendants argue the Commission erred in entering sanctions against them because plaintiff "did not need to use the rules of discovery" because he already had the recordings at issue in his possession; defendants also describe plaintiff's argument as "textbook gamesmanship." Defendants acknowledge that they did not produce the recordings, instead arguing they were not required to produce them. Defendants' argument, however, completely ignores the Workers' Compensation Rules and procedural history of this case.

¶ 46 When Deputy Commissioner Moore granted plaintiff's Motion to Compel, the corresponding order required defendants to fully respond to plaintiff's discovery requests. The Commission noted that plaintiff's Interrogatories 8(d) and 8(e) requested "detail regarding training courses and ratings or evaluations" provided to plaintiff. The order was clear about what defendants were required to produce, and pursuant to Rule 605(9), sanctions "shall be imposed . . . for failure to comply with a Commission order compelling discovery." Defendants failed to comply with Deputy Commissioner Moore's order, and accordingly the Commission did not err in sanctioning defendants.

III. Conclusion

¶ 47 For the foregoing reasons, we hold that the Commission applied the wrong legal standard in reviewing the medical evidence presented related to plaintiff's TBI and therefore erred in determining that plaintiff's TBI was not compensable. Thus, we reverse and remand with respect to that portion of the Commission's Opinion and Award. We affirm the Commission with respect to attendant care benefits and the imposition of discovery sanctions.

REVERSED AND REMANDED IN PART, AFFIRMED IN PART.

Judges HAMPSON and CARPENTER concur.

MEDINA v. MEDINA

[281 N.C. App. 690, 2022-NCCOA-94]

GABRIEL MEDINA, PLAINTIFF
v.
BRANDY INGRAM DE MEDINA, DEFENDANT

No. COA21-157

Filed 15 February 2022

1. Appeal and Error—petition for writ of certiorari—not filed with appellate clerk of court—dismissed

In a child custody matter, plaintiff-father's request that the Court of Appeals treat his brief as a petition for a writ of certiorari to review the trial court's Rule 60(b)(1) order was dismissed where a petition for a writ of certiorari should have been filed with the Court of Appeals' clerk of court pursuant to Appellate Rule 21(b). The court declined to exercise its discretionary authority to grant the petition.

2. Child Custody and Support—parenting coordinator appointment—modification of order—for failure to specify authority of coordinator

In a high-conflict child custody matter, the trial court did not abuse its discretion by issuing an amended order appointing a parenting coordinator where the original order failed to comply with the statutory requirement to specify the authority of the coordinator (N.C.G.S. § 50-92(a)) and failed to provide any guidance as to process and terms, such that the parties and the coordinator were unable to make any progress in resolving the parties' disputes.

Appeal by Plaintiff from Orders entered 6 March 2020 by Judge Tracy H. Hewett in Mecklenburg County District Court. Heard in the Court of Appeals 22 September 2021.

Fleet Law, PLLC, by Jennifer L. Fleet, for Plaintiff-Appellant.

No brief filed on behalf of Brandy Ingram de Medina, Defendant-Appellee.

WOOD, Judge.

¶ 1 Gabriel Medina ("Plaintiff") appeals from an Amended Order Appointing a Parenting Coordinator (the "Amended PC Order"). Plaintiff also asks this Court to treat his brief as a petition for writ of certiorari

to review an order issued *sua sponte* by the trial court pursuant to Rule 60(b)(1). In our discretion, we decline to treat Plaintiff's brief as a petition for a writ of certiorari and dismiss his argument concerning the trial court's Rule 60(b)(1) order. After careful review of the record and applicable law, we affirm the trial court's Amended PC Order.

I. Factual and Procedural Background

¶ 2 The parties were married on December 17, 1999, and three children were born of their marriage. The parties subsequently separated on November 27, 2014 and signed a separation agreement the next day. While separated, the parties began a contentious litigation over matters concerning their three minor children, with Plaintiff filing four separate motions following his original complaint, and Brandy Medina ("Defendant") filing three separate motions following her answer and counterclaims.

¶ 3 The parties divorced on March 14, 2016, but the contentious litigation continued. From March 4, 2016, to May 4, 2017, Plaintiff filed nine additional motions and Defendant filed two new motions. During the course of litigation, Plaintiff acquired a new counsel, Attorney Faith Fox, on January 25, 2017. On behalf of Plaintiff, Fox specifically filed a motion for contempt; a motion for continuance; a motion for ex-parte emergency child custody; a motion for protective order, to quash, for sanctions, and for attorney fees; a motion to compel discovery, for sanctions, and for attorney fees; motions in limine; and a motion to compel testimony, for sanctions, and for attorney fees.

¶ 4 On May 4, 2017, the parties entered into a Memorandum of Judgment/Order (the "MOJ") to resolve their respective claims. Per the MOJ, the parties were granted joint legal and physical custody of the minor children. Accordingly, the parties agreed that the minor children would live with Plaintiff and Defendant on alternating weeks. Plaintiff was granted final decision-making power over the health and education of the minor children and agreed to pay Defendant $1,200.00 per month in child support.

¶ 5 Defendant was granted final decision-making power over the religion and extra-curricular activities of the children, and she agreed to sign over the deed to the Parties' marital home. Pursuant to the terms of the MOJ, both parties voluntarily dismissed their claims for full custody, breach of contract, attorney fees, and child support. If the parties disagreed on a matter concerning the children, they were obligated under the MOJ to agree to the appointment of a parenting coordinator. The MOJ was formalized and signed by the trial court judge the following day.

¶ 6 From July through September 2018, the parties continued to engage in heated litigation. Defendant filed a motion for contempt, asserting Plaintiff would "not respond to any requests to decide on a parent coordinator." Plaintiff, additionally, moved out of the county where both parties had previously resided and moved the minor children into the school system in the county where he now resided. Thus, Defendant also filed a motion for modification of custody requesting that final decision-making authority over the education of the children be removed from Plaintiff. Defendant further filed a motion for a temporary parenting arrangement in order to return the children to the Mecklenburg County school system per the Parties' separation agreement's requirement.

¶ 7 In response, Plaintiff filed a motion for contempt and attorney fees, claiming Defendant refused to appoint a parenting coordinator. Plaintiff also filed a motion for a prefiling injunction and a gatekeeper order, alleging Defendant had filed numerous "frivolous and groundless, often nonsensical" documents with the court. Plaintiff further asserted he had authority under the MOJ to relocate the children to a different school system and filed a motion to dismiss the temporary parenting arrangement, for sanctions, and for attorney fees.

¶ 8 Additionally, Plaintiff filed a motion to dismiss, for sanctions, and for costs on November 1, 2018, arguing Defendant had "filed multiple different motions on these claims in order to cause Father harm and harass him." In the motion, Plaintiff asserted that the trial court "lack[ed] jurisdiction to hear this matter as it is a contract to be heard under Specific Performance pursuant to their Agreement." On January 8, 2019, Plaintiff filed another motion for a prefiling injunction / gatekeeper order, contending Defendant had made "numerous filings" and "blatant lies to the [c]ourt."

¶ 9 The case proceeded to a hearing on the Parties' respective motions on November 1, 2018. During the hearing, Fox argued the family court lacked jurisdiction to hear Defendant's motion for contempt, motion for a temporary parenting arrangement, and motion to modify custody. Relying on Fox's representations of fact and law, the court granted Plaintiff's request for dismissals on all of Defendant's motions. That same day, Fox submitted a proposed order based on the November 1 hearing. Defendant promptly objected, citing many errors in the proposed order. In response, the trial court scheduled a hearing for April 12, 2019, to reconcile the proposed order.

¶ 10 On November 2, 2018, the trial court granted Plaintiff's motion to appoint a parenting coordinator and entered an order appointing a

parenting coordinator (the "Original PC Order"). The Original PC Order only made two decrees: "1. Father's Motion to Appoint a Parenting Coordinator, is GRANTED[;] [and] 2. This Order is enforceable by the contempt powers of the state[.]" The court did not state what issues between the Parties were to be addressed by the parenting coordinator nor the extent of the parenting coordinator's authority. As a result, various issues arose between the Parties concerning who possessed certain decision-making authority.

¶ 11 On April 12, 2019, the trial court conducted the hearing to reconcile the proposed order granting Plaintiff's motion for dismissal of Defendant's motions. Once more, Plaintiff reiterated his argument that the trial court lacked jurisdiction and requested the trial court to sign an order granting his motion to dismiss Defendant's motions. Plaintiff additionally requested the trial court issue a gatekeeper order to estop Defendant "from filing motions without prior court approval." The trial court signed the order proposed by Plaintiff's attorney granting Plaintiff's motion to dismiss Defendant's motions and orally granted the gatekeeper order.

¶ 12 After the trial court signed the April 2019 order granting Plaintiff's motion to dismiss, the trial court conducted an independent review of the case file. The trial court discovered the order granting Plaintiff's motion to dismiss Defendant's motions possessed multiple misstatements of fact. The trial court's review of the file showed Defendant had not "filed any more motions than []father," and Defendant did not file any motions related to "contract matters." The trial court's independent review further revealed the file did "not contain, or reference, any prior dismissals based on Family Court's lack of jurisdiction." As such, the trial court found the April 2019 order prepared by Plaintiff's attorney had multiple misstatements under the findings of facts portion, namely:

> Family Court []does not have jurisdiction over these matters, as it relates to these Parties and the Separation and Marital Settlement Agreement.
>
> Defendant/Mother is aware they are to seek the guidance of a Parent Coordinator, as outlined in the MOJ, and subsequent Order Appointing Parent Coordinator, prior to the filings of any subsequent motions.
>
> Defendant/Mother is aware that issues addressed in the Separation and Marriage Settlement Agreement, are not handled in Family Court.

. . .

> Defendant/Mother knows that Family Court does not have jurisdiction over these matters.

¶ 13 The trial court's independent review further revealed that in addition to the factual misstatements in the April 2019 Order, the gatekeeper order requested by Plaintiff's attorney included another factual misstatement: "Defendant is fully aware that contractual disputes are improper before this Court, as the parties were before the appropriate court May 4, 2017, and entered into a Consent Order as it relates to the Separation Agreement on May 5, 2017." Moreover, the trial court discovered it had relied on the requested gatekeeper order during the April 2019 hearing. The requested gatekeeper order also contained another additional factual misstatement, "per the MOJ, the parties were to consult with the Parenting Coordinator prior to any court filings." However, this directive to consult with a parenting coordinator prior to any court filings was not in the MOJ nor in the Original PC Order. Thus, the trial court had reiterated a factually incorrect statement during the April 2019 hearing due to its reliance on the gatekeeper order requested by Plaintiff's attorney.

¶ 14 In November 2019, the trial court notified the parties of the errors found as a result of its independent review. In the e-mail, the trial court alerted the parties of its intention to file a *sua sponte* Rule 60(b)(1) order to amend the factual and legal errors and attached an informal order for their review. Plaintiff, in response, disagreed that the trial court could issue a *sua sponte* Rule 60(b)(1) order and submitted a brief supporting his contention.

¶ 15 Thereafter, on February 6, 2020, Plaintiff and Defendant came before the trial court for a hearing on the trial court's intention to issue a Rule 60(b)(1) order. During the hearing, the trial court noted that a statement within the procedural history of Plaintiff's memorandum of law was the "polar opposite" of a clause within the parties' November 2014 separation agreement: The procedural history in the memorandum of law stated "[t]he parties entered into a marital separation agreement which specifically states that the parties did not want the agreement incorporated into any subsequent divorce which is clearly reflected in the subsequent divorce judgment." However, in actuality, the separation agreement provided "[t]he parties further agree that this Agreement shall be incorporated, by reference or otherwise, in the final judgment of divorce . . . ."

¶ 16 After the hearing, the trial court entered a "Sua Sponte Rule 60(b)(1) Order Reversing an Order to Dismiss Defendant's Motions for Contempt;

Temporary Parenting Arrangement; and Motion to Modify Child Custody" on March 6, 2020 (the "Rule 60(b)(1) Order"). Under the Rule 60(b)(1) Order, Plaintiff's motion for a gatekeeper order was denied.

¶ 17 Pursuant to the Rule 60(b)(1) Order, the April 2019 order which dismissed Defendant's motions for contempt, motion for modification of custody, and motion for a temporary parenting arrangement was reversed and the issues were once more before the trial court. Any previous order requiring Defendant to pay attorney fees to Plaintiff also was reversed. Per the Rule 60(b)(1) Order, Defendant was permitted to request the family court to reset her previously dismissed motions for hearing. On the same day, the trial court entered an Amended PC Order, establishing in more detail the method of payment for, the scope of, and the parenting coordinator's authority under the PC Order.

¶ 18 Plaintiff filed a timely written notice of appeal of the Amended PC Order on April 8, 2020. Additionally, Plaintiff requests this court to treat his brief as a petition for a writ of certiorari for review of the *sua sponte* Rule 60(b)(1) Order.

II. Discussion

¶ 19 Plaintiff raises several arguments on appeal; each will be addressed in turn.

A. Petition for Writ of Certiorari

¶ 20 **[1]** Plaintiff asks this Court to treat her brief as a petition for a writ of certiorari to review the Rule 60(b)(1) Order. To apply for a writ of certiorari, an applicant must "file a petition . . . with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought." N.C. R. App. P. 21(b). This Court does have the authority pursuant to our Rules of Appellate Procedure to treat a purported appeal as a petition for writ of certiorari, and we may grant the petition in our discretion. *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008). Here, Plaintiff failed to file a petition for writ of certiorari with our clerk of court; and, in our discretion, we decline to treat Plaintiff's brief as a petition for writ of certiorari as it does not meet the requirements set forth by our Appellate Rules for such consideration. *See* N.C. R. App. P. 21(c). Plaintiff's petition for writ of certiorari is not properly before us, and we dismiss his argument concerning the Rule 60(b)(1) Order.

B. The Amended Parenting Coordinator Order

1. Standard of Review

¶ 21 Plaintiff first contends the trial court lacked authority to issue the Amended PC Order, arguing the Amended PC Order was, in effect, an order modifying the MOJ, and thus urges this Court to adopt a *de novo* standard of review. We disagree. Here, the Amended PC Order's findings of fact acknowledged the Parties had entered into the MOJ on May 5, 2017, which "decreed that if the parties, after a good faith effort, vehemently disagree as to what is in the best interest of the children, they will agree to the appointment of a Parenting Coordinator (PC)." In other words, the MOJ did not establish the terms of a parenting coordinator but only bound the Parties to acquire a parenting coordinator should a disagreement arise. Additionally, the Original PC Order was signed eighteen months after the MOJ was issued, and the Original PC Order did not reference the MOJ.

¶ 22 Thus, the Amended PC Order was neither a part of, nor a modification to the MOJ, but rather an amendment to the Original PC Order. Therefore, because "[t]he trial court is vested with broad discretion in child custody cases," the question before this court is whether the trial court abused its discretion by issuing the Amended PC Order. *Nguyen v. Heller-Nguyen*, 248 N.C. App. 228, 238, 788 S.E.2d 601, 607 (2016) (quoting *Dixon v. Gordon*, 223 N.C. App. 365, 371, 734 S.E.2d 299, 304 (2012)); *see Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998).

2. Analysis

¶ 23 **[2]** Turning now to Plaintiff's argument that the trial court erred, or in the alternative abused its discretion, by issuing the Amended PC Order, we are guided by N.C. Gen. Stat. § 50-99 which states, "[f]or good cause shown, the court may terminate or modify the parenting coordinator appointment upon motion of any party, upon the agreement of the parties, or by the court on its own motion." N.C. Gen. Stat. § 50-99(a) (2021). *See* N.C. Gen. Stat. § 50-91(a) (2021) ("The court may appoint or reappoint a parenting coordinator at any time in a child custody action involving minor children brought under Article 1 of this Chapter on or after the entry of a custody order . . . [u]pon the court's own motion."); *see also Nguyen*, 248 N.C. App. at 240, 788 S.E.2d at 608. "Good cause" includes, but is not limited to, "lack of reasonable progress[,]" or a "determination that the parties no longer need the assistance of a parenting coordinator[,]" or an "[i]mpairment on the part of a party that significantly interferes with the party's participation in the process[,]" or an "inability or unwillingness

of the parenting coordinator to continue to serve." N.C. Gen. Stat. § 50-99(c) (2021).

¶ 24 In accordance with Section 50-99, a trial court may *sua sponte* modify the parenting coordinator appointment if good cause is shown. Therefore, our inquiry now turns to whether good cause existed to warrant the trial court to issue the Amended PC Order. We pause to note in the case *sub judice* that Plaintiff did not challenge any findings of fact in the Amended PC Order, and thus these facts are presumed to be supported by competent evidence and are deemed binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (first citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962); then citing *Williams v. Williams*, 97 N.C. App. 118, 121, 387 S.E.2d 217, 219, (1990)).

¶ 25 Here, the trial court found the following facts in the Amended PC Order,

> 7. The May 5, 2017 Consent Order further decreed that if the parties, after a good faith effort, vehemently disagree as to what is in the best interests of the children, they will agree to the appointment of a Parenting Coordinator (PC).
>
> . . .
>
> 10. The Nov. 2, 2018 Order is a bare bones order which does not set out the issues to be addressed, nor the authority of the Parenting Coordinator as per . . . [N.C. Gen. Stat. §] 50-92.
>
> 11. Particular issues in dispute are final decision making, specifically, how to consult with each other in good faith, school assignment, providing after school care, and other parenting and communication issues.
>
> 12. The Court finds from prior hearings and filings that this is a high conflict case, as defined by . . . [N.C. Gen. Stat. §] 50-90, and that the [appointment of a] Parenting Coordinator is in the best interest of the children.

The Amended PC Order's findings of fact illustrate the Parties were significantly impaired due to the minimal guidance in the Original PC Order such that they could not participate in the parenting coordinator process. Additionally, the Original PC Order's lack of guidance halted

reasonable progress between the Parties and the parenting coordinator as issues concerning the final decision-making power could not be resolved.

¶ 26 Furthermore, an examination of the Original PC Order shows it failed to comply with N.C. Gen. Stat. § 50-92 as it did not set out the "issues to be addressed nor the authority of the Parenting Coordinator . . . ." N.C. Gen. Stat. § 50-92(a) provides the

> authority of a parenting coordinator shall be specified in the court order appointing the parenting coordinator and shall be limited to matters that will aid the parties in complying with the court's custody order, resolving disputes regarding issues that were not specifically addressed in the custody order, or ambiguous or conflicting terms in the custody order.

N.C. Gen. Stat. § 50-92(a) (2021). However, the Original PC Order only states, "1. Father's Motion to Appoint a Parenting Coordinator, is GRANTED[;] [and] 2. This Order is enforceable by the contempt powers of the state[.]" By so ordering, the Original PC Order does not specify the parenting coordinator's authority as required by Section 50-92(a). Indeed, the Original PC Order's absence of guidance for the parenting coordinator was further illustrated when the Parties met with a parenting coordinator, but both the Parties and the parenting coordinator had "questions regarding the process and terms of the Parenting Coordinator agreement."

¶ 27 Accordingly, we hold the Original PC Order's non-compliance with Section 50-92(a), paired with the trial court's findings of fact in the Amended PC Order, sufficiently establishes good cause existed to warrant the entry of an Amended PC Order. Thus, the trial court did not abuse its discretion by issuing the Amended PC Order.

III. Conclusion

¶ 28 After a careful review of the record and applicable law, we hold the trial court did not abuse its discretion by issuing the Amended PC Order and affirm the order of the trial court.

AFFIRMED.

Judges DILLON and COLLINS concur.

STATE v. GREEN

[281 N.C. App. 699, 2022-NCCOA-95]

STATE OF NORTH CAROLINA
v.
MITCHELL GREEN

No. COA21-151

Filed 15 February 2022

1. Criminal Law—defenses—voluntary intoxication—jury instructions

Defendant was not entitled to a jury instruction on voluntary intoxication in his first-degree murder trial because there was no substantial evidence that defendant could not control himself or that he was incapable of forming the specific intent, based on premeditation and deliberation, to kill the victim when he shot him. Although there was evidence that defendant had been drinking for about six hours prior to the incident and had acted recklessly some hours beforehand, defendant and the victim argued just before the shooting, and defendant's actions in fleeing the scene by car and then explaining to law enforcement why he shot the victim—"He come at me; he got what he got"—reflected that defendant understood the nature of what had occurred.

2. Evidence—admission of handgun—relevance—chain of custody

In a trial for first-degree murder and other charges related to a shooting, there was no error in the admission of a handgun in the State's case-in-chief before it had established a connection between the gun and the shooting because the State later produced evidence tying the gun to the crimes. Although the gun was also admitted before the State established chain of custody, any assumed error was not prejudicial in light of the overwhelming evidence of defendant's guilt.

Appeal by Defendant from Judgments entered 7 February 2020 by Judge Stephan R. Futrell in Richmond County Superior Court. Heard in the Court of Appeals 30 November 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert C. Montgomery, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Mitchell Green (Defendant) appeals from Judgments entered upon jury verdicts finding Defendant guilty of one count each of Assault with a Deadly Weapon with Intent to Kill (AWDWIK), Attempted First-Degree Murder, and First-Degree Murder. The Record, including evidence adduced at trial, reflects the following:

¶ 2 On the evening of 6 February 2015, Defendant and Terry Smith (Smith) went to Christopher Goodwin's (Goodwin) home and began drinking alcohol. Both Defendant and Smith drank "liquor" and beer to the point both were drunk at Goodwin's home. While at Goodwin's home, Defendant brandished a firearm in front of Goodwin's minor daughter. Smith and Goodwin admonished Defendant for this behavior and, eventually, the parties made peace and continued drinking. After drinking at Goodwin's for two to three hours, Defendant and Smith left to go drink at a bar.

¶ 3 At the bar, Defendant and Smith met Tyrone Plair (Plair). Plair, Smith, and Defendant began drinking alcohol together. At some point, Defendant gave Plair money to buy a drink, but when Plair returned, Plair could not find Defendant and Smith. Plair eventually went outside the front of the bar and saw Defendant and Smith across the street. Plair went across the street to where Defendant and Smith were. Defendant and Smith were facing each other next to a car, and Plair ended up "at the back of the car" while Defendant and Smith were at the front of the car. Plair was behind Smith, and Defendant was facing Smith and Plair. Plair "was on [his] phone" but heard Defendant ask Smith why Smith took Defendant's car. Smith replied that he wanted to see his family. Plair heard Smith challenge Defendant before hearing gunshots. Plair fled when he heard the shots. Plair looked back after fleeing and saw Defendant get into a car and leave. As Plair walked home after the incident, he noticed he had been shot in the leg. Smith died at the scene as a result of multiple gunshot wounds. Sometime during the evening, Goodwin recalled waking up to find Defendant in Defendant's car in Goodwin's driveway honking the horn for "about 30 minutes."

¶ 4 At approximately 1:17 a.m. on 7 February 2015, officers from the Hamlet Police Department responded to an alarm regarding shots being fired at a bar named Sports Connection. Sometime after the incident—as it was "still dark outside"—investigating officers received information they should go to a specific residential address in Hoffman, North Carolina, in connection with the incident. This address was Defendant's grandmother's address. While there, Defendant's brother gave officers

a black and silver .40-caliber Springfield handgun. Eventually, officers from the State Bureau of Investigation (SBI) arrested Defendant and took him to the Rockingham Police Department. On the way, Defendant told officers "it was self-defense" and that Smith "had taken [Defendant's] car." Defendant further stated: "He come at me; he got what he got." On 16 February 2015, a Richmond County Grand Jury indicted Defendant on one count each of AWDWIK and Attempted First-Degree Murder for shooting Plair, and First-Degree Murder for shooting and killing Smith. Defendant's charges came on for trial on 21 January 2020 in Richmond County Superior Court.

¶ 5 At trial, the State's first witness was Richard Dunn, Sr. (Dunn, Sr.). Dunn, Sr. was the owner of a pawn shop in Rockingham and Dunn, Sr. contacted police because he heard about the shooting and "knew we had transferred the gun." Richard Dunn, Jr. (Dunn, Jr.) also testified. Dunn, Jr. worked in his father's pawn shop and testified that Defendant and Defendant's brother were in the pawn shop two days before the incident to transfer a handgun from Defendant's brother to Defendant. Dunn, Jr. testified to paperwork he filled out with Defendant and Defendant's brother transferring a "Springfield XD-M .40-caliber pistol" with a serial number "MG140V78."The State showed the handgun to the witness "for identification purposes," and Dunn, Jr. identified the handgun as having serial number "MG140278."[1] The State moved to admit the handgun to show that the serial number on the handgun given to police matched the serial number on the paperwork. Defendant objected, and the parties argued the matter outside the jury's presence.

¶ 6 Defense counsel argued:

> At this point what showing has been made that this is relevant to the charge of first-degree murder? There's no showing this was the weapon that was -- that was used in the shooting. All we know right now is Mr. Green bought a gun and the serial number on the gun that's on the -- on the sheet is the same that the gun that the State currently has in their possession. There's been no showing that this was the weapon that was used or is related to the shooting.

The State replied:

> Your Honor, he's charged with first-degree murder for shooting somebody. So we're presenting a gun that

1. The trial transcript reflects a small discrepancy between the serial numbers.

> we have established he bought two days before the alleged murder. So it's been identified by the witness as the gun that he got on that date. That's why we are showing it and why it's relevant.

The trial court asked the State: "All right. And will you be offering evidence after this witness connecting up this gun with the charges at issue?" The State replied: "Yes, Your Honor, a number of witnesses." The trial court ruled: "All right. Subject to that corroboration, I will overrule the objection and will allow the presentation when we return." Defense counsel stated: "For the record, may we still contend that there is -- there has been no chain of custody established with respect to this gun and this shooting or how it's related to the shooting at all at this stage of the trial."

¶ 7 Before testimony resumed, defense counsel again argued the handgun should not be admitted without the State establishing the handgun's relevance and chain of custody. The State argued:

> Your Honor, the State would argue that the defense is misinterpreting "incident" here. The incident is not referring to that the State has to show it's tied to the killing. It's the incident that we're trying to show where it came from. We have played video of the gun being transferred to the defendant. That's the incident that we are trying to show the gun and, in fact, the same object involved with.

The trial court stated it would reserve its ruling until the end of Dunn, Jr.'s testimony. When the State asked if it would have to move to admit the handgun again when asking further questions, the trial court responded: "It's already been admitted so . . . It's already been shown to the jury. And it's limited -- it's been admitted for the limited purpose of showing that it's the gun that was purchased, is my understanding." The State then showed the handgun with its serial number to the jury. The trial court did not give the jury instructions limiting the admission of the handgun for any particular purpose.

¶ 8 The State elicited testimony from Special Agent Russell Holly (Special Agent Holly), an SBI crime scene investigator. Special Agent Holly stated on 7 February 2015, he collected fifteen Smith and Wesson .40-caliber shell casings from the ground near Smith's body. He also processed Defendant's car as evidence. Holly also collected six projectiles from underneath Smith and in Smith's clothing. Testing from the SBI crime lab showed the shell casings had been fired from the handgun in

question. Holly also found possible blood on Defendant's car. There was also evidence of blood on the handgun. Testing of swabs from the handgun and Defendant's car returned positive indications for blood. DNA testing of the blood indicated the blood matched Smith's DNA and not Defendant's. Toxicology results from Smith's autopsy showed Smith had a blood alcohol concentration (BAC) of "0.22 percent."

¶ 9 During the charge conference, the trial court indicated it would instruct the jury on "[v]oluntary intoxication, lack of mental capacity, premeditated and deliberate first-degree murder." The State argued it did not think that instruction was "appropriate based on the case law." Defense counsel argued there was evidence of Defendant's intoxication where Defendant had been drinking for hours, consumed a lot of alcohol, Smith's BAC was 0.22, and Plair testified Defendant was "drunk" before the incident. Moreover, defense counsel argued evidence showing Defendant displayed a gun at Goodwin's residence in front of a minor child supported the inference Defendant was intoxicated to a degree such that "it caused the defendant to lose control of his senses sufficient that he could not form the intent to commit the crimes." The trial court ruled, "I'm not going to give that instruction," and Defendant objected to the ruling.

¶ 10 The jury found Defendant guilty of AWDWIK, First-Degree Murder, and Attempted First-Degree Murder. On 7 February 2020, the trial court entered Judgments sentencing Defendant to sixty to ninety months for the AWDWIK charge, life imprisonment for the First-Degree Murder charge, and 140 to 180 months imprisonment, to run consecutively to the life imprisonment sentence, for the Attempted First-Degree Murder charge. Defendant gave oral Notice of Appeal in open court.

Issues

¶ 11 The issues on appeal are whether the trial court erred in: (I) failing to instruct the jury on Defendant's voluntary intoxication, possibly negating the specific intent element of First-Degree Murder; and (II) admitting the handgun into evidence before the State had established the handgun's relevance and chain of custody.

Analysis

I. Voluntary Intoxication Instruction

¶ 12 **[1]** First, Defendant argues the trial court erred in denying his request the trial court instruct the jury on voluntary intoxication because the evidence supported such an instruction. We review whether a defendant was entitled to a jury instruction on voluntary intoxication de novo to

determine whether the evidence supported such an instruction when considered in the light most favorable to the defendant. *State v. Mercer*, 373 N.C. 459, 462, 838 S.E.2d 359, 362 (2020) (citations omitted). "In certain instances voluntary drunkenness, while not an excuse for a criminal act, may be sufficient to negate the requisite intent element. However, [n]o inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law." *State v. Mash*, 323 N.C. 339, 347, 372 S.E.2d 532, 537 (1988) (citations and quotation marks omitted).

> A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the state, of his intoxication. Evidence of mere intoxication, however, is not enough to meet defendant's burden of production. He 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.

Id. at 346, 372 S.E.2d at 536. "The evidence must show that at the time of the [crime] the defendants mind and reason were so completely intoxicated and overthrown as to render [her] utterly incapable of forming [specific intent]." *State v. Meader*, 377 N.C. 157, 2021-NCSC-37, ¶ 17 (alterations in original) (quoting *Mash*, 323 N.C. at 346, 372 S.E.2d at 536). Absent such evidence, a trial court is not required to instruct the jury on voluntary intoxication. *Id.*

¶ 13 Defendant argues he was entitled to a jury instruction on voluntary intoxication because the evidence, taken in the light most favorable to Defendant, showed Defendant had been drinking alcohol for over six hours, acted recklessly in displaying a gun in front of a child before the incident, and went to Goodwin's house and honked the horn of his car for thirty minutes after the incident. Thus, Defendant argues there was substantial evidence supporting the conclusion he could not form a deliberate and premeditated intent to kill Smith. For the following reasons, we disagree.

¶ 14 First, although the Record indicates Defendant and Smith had been drinking for hours before the incident in question, evidence of mere intoxication is insufficient to require a jury instruction on voluntary intoxication. We analyze whether a defendant was unable to form the intent to

kill because of the defendant's intoxication based on the defendant's actions leading up to the incident. *Mash*, 323 N.C. at 346, 372 S.E.2d at 536. *State v. Mash* is particularly instructive here. In *Mash*, the defendant was charged with first-degree murder stemming from the defendant assaulting several people. *Id.* at 342, 372 S.E.2d at 534. The defendant had been drinking alcohol for at least seven hours and "swerved" his car while driving to buy more alcohol. *Id.* at 340-41, 372 S.E.2d at 533-34. The defendant was "sweating" and had difficulty speaking and walking. *Id.* at 341, 372 S.E.2d at 534. Shortly before the defendant killed the victim, the defendant struck one of his friends in the mouth and struck two more friends while the group was at a liquor store. *Id.* at 341-42, 372 S.E.2d at 534. The victim, who lived near the liquor store, came from his home to help subdue the defendant. *Id.* at 342, 372 S.E.2d at 534. The defendant went to the trunk of his car and retrieved a "jack" and beat the victim to death with it. *Id.* When one of the defendant's friends screamed for the defendant to stop, the defendant did and began to cry. *Id.* The Court held this evidence was substantial and sufficient to have required a voluntary intoxication instruction. *Id.* at 348, 372 S.E.2d at 538.

¶ 15 Here, although Defendant had been drinking for hours, and Smith's toxicology report showed a 0.22 BAC, there is not substantial evidence Defendant could not control himself or was so intoxicated he could not form the intent to kill Smith. Although there was testimony Defendant pulled out a firearm in front of Goodwin's child, the parties resolved that incident before Defendant and Smith left to go drink at a bar. Moreover, unlike in *Mash*, the Record does not indicate Defendant engaged in inexplicable behavior just prior to shooting Smith. Plair testified Smith and Defendant argued before Defendant shot Smith, not that Defendant began shooting indiscriminately or inexplicably assaulting people.

¶ 16 After the incident, unlike the defendant in *Mash*, Defendant had the wherewithal to flee the scene in his car and make it back to Goodwin's house without getting into an accident. Although there was evidence, after Defendant returned to Goodwin's home, Defendant sat in his car for thirty minutes honking his horn, this evidence is not substantial evidence Defendant was intoxicated as to be unable to form a deliberate and premeditated intent to kill at the time of the shooting. Indeed, undermining Defendant's invocation of the voluntary intoxication instruction is evidence that Defendant gave an explanation as to why he had shot Smith. Defendant told police he shot Smith in self-defense and that "He come at me; he got what he got." Thus, the evidence tended to reflect Defendant appreciated the nature of his actions after the incident. Therefore, although there was evidence Defendant was very intoxicated

and acted recklessly some hours before the incident in question, there was not substantial evidence Defendant was intoxicated to the point he could not control himself and could not form the intent—based on premeditation or deliberation—to kill Smith at the time of the shooting. Consequently, the trial court did not err in not instructing the jury as to Defendant's voluntary intoxication.

II. Admitting the Handgun

¶ 17 **[2]** Defendant next argues the trial court erred in admitting the handgun into evidence without the State first establishing the handgun's relevance to the case. "[T]he appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted). However, "such rulings are given great deference on appeal." *Id.* (citation and quotation marks omitted). Here, Defendant does not argue that the handgun was not relevant evidence; instead, he argues the trial court erred by admitting the handgun before the State had connected the handgun to the incident and before the State had established a chain of custody.

¶ 18 "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b)." N.C. Gen. Stat. § 8C-1, Rule 104(a) (2021). "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." N.C. Gen. Stat. § 8C-1, Rule 104(b) (2021). "[A] two-pronged test must be satisfied before real evidence is properly received into 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. Campbell*, 311 N.C. 386, 388, 317 S.E.2d 391, 392 (1984) (citations omitted). However, a trial court may properly admit evidence "pending the admission of [other] evidence that would tie the [evidence] to" the case. *State v. Jordan*, 305 N.C. 274, 276, 287 S.E.2d 827, 829 (1982) (citations omitted).

¶ 19 The State moved to admit the handgun during Dunn, Jr.'s testimony regarding Defendant transferring the handgun into Defendant's name at Dunn's pawn shop. Dunn, Jr. testified the paperwork he helped Defendant fill out listed the serial number for the handgun as "MG140V78." Later, the State moved to introduce the handgun to show that the serial number

on the handgun given to police matched the serial number on the paperwork. At this early stage of the State's case in chief, the State had yet to present any evidence the gun was used in the shooting. The State showed the handgun to Dunn, Jr., and he identified the serial number on the handgun as "MG140278." Defense counsel objected to the admission of the handgun. Outside the jury's presence, defense counsel argued, "[t]here's no showing this was the weapon that was – that was used in the shooting." The trial court asked the State: "All right. And will you be offering any evidence after this witness connecting up this gun with the charges at issue?" The State responded: "Yes, Your Honor, a number of witnesses." The trial court then ruled: "All right. Subject to that corroboration, I will overrule the objection and allow the presentation [of the handgun] when we return." Defense counsel stated Defendant would likely still challenge the chain of custody regarding the handgun at a later point. When the jury returned, the State showed the handgun with its serial number to the jury over Defendant's objection.

¶ 20 Even if the trial court should have required the State to establish the handgun's relevance to the charges in this case prior to admitting the handgun into evidence, the trial court did not err in admitting the handgun because the State presented later evidence connecting the handgun to the case. *Jordan*, 305 N.C. at 276, 287 S.E.2d at 829. The State presented evidence police recovered the handgun from Defendant's brother at Defendant's grandmother's house, fifteen shell casings found at the scene were fired from the handgun, and DNA from blood found on the handgun matched Smith's DNA. Thus, the State presented evidence connecting the handgun to the charges in this case after the handgun had been admitted into evidence by the trial court. Therefore, the trial court did not err in admitting the handgun before its relevance had been established.[2]

¶ 21 However, at trial, Defendant stated he would likely challenge the handgun's chain of custody if and when it was later admitted into evidence. The State never presented the handgun again when it presented evidence of police investigation connecting the handgun to the case. Thus, although the State presented evidence linking the handgun to the

2. Defendant also argues the trial court confused the issue by later stating the handgun had been admitted for the limited purpose of showing it had been the subject of the transfer at the Dunn's pawn shop and, because the handgun was never again admitted into evidence for any other purpose, it was never properly admitted to show it was the handgun used in this shooting, and the trial court initially stated it was allowing the handgun subject to later evidence connecting the handgun to the case. Because the State later presented the evidence connecting the handgun to the case, the State established the handgun's relevance.

case, it may not have satisfied the second requirement it establish chain of custody before admitting the handgun. However, Defendant never actually, subsequently objected on this ground, and, thus, appears to have waived any such objection. N.C. R. App. P. 10(a)(1) (2021). Nevertheless, even assuming the issue was preserved for appeal, and the trial court erred in admitting the handgun without the State ever establishing a chain of custody, such error did not prejudice Defendant in light of the other evidence.

¶ 22 "A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached . . . ." N.C. Gen. Stat. § 15A-1443(a) (2021). However, "the presence of [other] overwhelming evidence of guilt can render the erroneous admission of evidence harmless." *State v. McCanless*, 234 N.C. App. 260, 262, 758 S.E.2d 474, 477 (2014) (alteration in original) (citation and quotation marks omitted). Here, the State presented evidence Plair heard Defendant and Smith argue, heard gunshots and ran, and saw Defendant drive away from the scene. The State also presented evidence police recovered a handgun from Defendant's brother, shell casings fired from that gun were found at the scene, and Smith's blood was on the handgun. Moreover, the State presented testimony Defendant told police that "it was self-defense" and "He come at me; he got what he got." Thus, in light of such overwhelming evidence of Defendant's guilt, there was no reasonable possibility the jury would have reached different verdicts absent the handgun's admission. Therefore, the trial court did not commit reversible error by admitting the handgun.

Conclusion

¶ 23 Accordingly, for the foregoing reasons, the trial court did not err in refusing to instruct the jury on Defendant's voluntary intoxication and did not commit prejudicial error in admitting the handgun into evidence, and we affirm the Judgments.

NO PREJUDICIAL ERROR.

Chief Judge STROUD and Judge GORE concur.

STATE v. SHULER

[281 N.C. App. 709, 2022-NCCOA-96]

STATE OF NORTH CAROLINA
v.
SHANNA CHEYENNE SHULER

No. COA19-967-2

Filed 15 February 2022

Constitutional Law—right to silence—notice of intent to raise affirmative defense—preemptive impeachment by State—error harmless beyond a reasonable doubt

In a drug trafficking case on remand from the Supreme Court, which held that the State should not have been permitted to preemptively impeach defendant before she testified—because her pretrial notice of intent to assert the affirmative defense of duress did not constitute a forfeiture of her Fifth Amendment right to silence—the Court of Appeals determined that the error was harmless beyond a reasonable doubt. The impact of the error was minimal where the State made no other reference to defendant's silence during the trial or its closing argument, and produced overwhelming evidence of defendant's guilt.

Appeal by defendant from judgment entered 31 October 2018 by Judge William H. Coward in Haywood County Superior Court. Originally heard in the Court of Appeals 17 March 2020. *State v. Shuler*, 270 N.C. App. 799, 841 S.E.2d 607 (2020). Upon remand from the Supreme Court of North Carolina by opinion issued 13 August 2021. *State v. Shuler*, 378 N.C. 337, 2021-NCSC-89.

Attorney General Joshua H. Stein, by Assistant Attorney General Brent D. Kiziah, for the State.

W. Michael Spivey for defendant-appellant.

TYSON, Judge.

¶ 1 The Supreme Court of North Carolina held Shanna Cheyenne Shuler ("Defendant") did not forfeit her Fifth Amendment right to silence when she provided pretrial notice of her intent to offer an affirmative defense. The Supreme Court remanded the case for this Court to determine whether the erroneously admitted testimony was harmless beyond a reasonable doubt. We conclude and hold the admission of this evidence was harmless beyond a reasonable doubt.

I. Background

¶ 2 The background of the cause is detailed in both the Supreme Court's and this Court's previous opinions. *State v. Shuler*, 378 N.C. 337, 2021-NCSC-89, 861 S.E.2d 512 (2021); *State v. Shuler*, 270 N.C. App. 799, 841 S.E.2d 607 (2020). The allegations underlying Defendant's trafficking in methamphetamine and simple possession of marijuana are unnecessary to determine the issue upon remand.

¶ 3 The salient facts from the Supreme Court's opinion are as follows:

> Defendant was charged with felony trafficking in methamphetamine and with misdemeanor simple possession of marijuana. Prior to trial, defendant filed a notice of her intent to rely upon the affirmative defense of duress pursuant to N.C.G.S. § 15A-905(c)(1). In its entirety, the notice stated the following:
>
> > Now comes the Defendant, by and through her attorney, Joel Schechet and, in accordance with N.C.G.S. § 15A-905(c), gives notice of the following defense:
> >
> > 1. Duress
>
> At trial, Detective Regner testified for the State during its case-in-chief. The State asked Detective Regner if defendant made "any statements" about Joshua Warren when she handed over the substances in her possession. Defense counsel objected, and the trial court overruled the objection. Detective Regner then testified: "No, ma'am. She made no—no comment during that one time."
>
> Defense counsel asked for the trial court to excuse the jury and then moved for a mistrial arguing that the State's question had "solicited an answer highlighting [defendant's] silence at the scene." The trial court conducted a voir dire to determine the admissibility of Detective Regner's testimony. Ultimately, the trial court allowed the State to ask the question again when the jury returned.
>
> After the State's case-in chief, defense counsel gave its opening statement. Defendant then took the witness stand to testify in her own defense. At the close of all the evidence, the trial court instructed the jury

> on the defense of duress. Ultimately, the jury found defendant guilty of both charges. Defendant appealed to the Court of Appeals.

Shuler, ¶¶ 4-7, 378 N.C. at 338-39, 861 S.E.2d 512, 514-15.

¶ 4 Our Supreme Court recognized Defendant's "silence could not have achieved the purpose of impeaching her credibility as a witness" at the time of the detective's testimony since she had not testified yet. *Id.* ¶ 11, 378 N.C. at 339, 861 S.E.2d at 515. The Court held: "The State cannot preemptively impeach a criminal defendant by anticipating that the defendant will testify because of defendant's constitutional right to decide not to be a witness." *Id.* ¶ 11, 378 N.C. at 340, 861 S.E.2d at 515. The Court concluded it was error to admit the detective's testimony into evidence. *Id.* ¶ 15, 378 N.C. at 341, 861 S.E.2d at 516.

¶ 5 Because the State did not argue any Fifth Amendment violation was harmless beyond a reasonable doubt before the Supreme Court of North Carolina, that Court remanded to this Court. In its original brief before this Court, the State posited that if the challenged evidence is substantive evidence of guilt, prohibited by the North Carolina Constitution, the violation and its admission was harmless beyond a reasonable doubt.

II. Analysis

¶ 6 "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2021).

¶ 7 This Court "may consider a number of factors" in making its determination of whether the constitutional error was harmless beyond a reasonable doubt. *State v. Boston*, 191 N.C. App. 637, 652-53, 663 S.E.2d 886, 896-97 (2008). These factors include:

> whether the State's other evidence of guilt was substantial; whether the State emphasized the fact of [the defendant's] silence throughout the trial; whether the State attempted to capitalize on [the defendant's] silence; whether the State commented on [the defendant's] silence during closing argument; whether the reference to [the defendant's] silence was merely benign or *de minimis*; and whether the State solicited the testimony at issue.

Id.

¶ 8 In *Boston*, the Court pointed to the State's overwhelming evidence of the defendant's motive that was established through the testimony of two witnesses. *Id.* at 653, 663 S.E.2d at 897. One of the witnesses also gave a consistent and detailed account of the defendant's involvement in the charged arson. Another witness corroborated the source of the arson, which was consistent with other witness' testimony. *Id.*

¶ 9 The trial transcript showed the testimony relating to the defendant's pre-arrest silence was minimal. The State had not made the defendant's "pre-arrest silence a recurring theme of its case at trial," and had not commented on the defendant's silence during closing argument. *Id.* This Court concluded beyond a reasonable doubt that the jury would have reached the same verdict had the testimony been excluded and held the error was harmless beyond a reasonable doubt. *Id.*

¶ 10 Here, the erroneously admitted evidence of Defendant's silence could have only related to Defendant's affirmative defense of duress. The State contends even when the evidence is considered in the light most favorable to Defendant, she failed as a matter of law to assert or present a proper affirmative duress defense.

¶ 11 The State's evidence tended to show Defendant was the driver and in control of the vehicle. Defendant asserted at trial that she had only sat in the driver's seat. She testified Joshua Warren was the owner of the drugs and he had threatened her in order to convince her to possess and hold onto the drugs.

¶ 12 Defendant testified that as police approached, Warren pulled the bag of methamphetamine from his pants and placed the drugs into her lap before he exited the vehicle. The State's evidence showed once Warren exited the vehicle, he did not return.

¶ 13 The State's evidence tended to show Defendant could have removed the methamphetamine from her body after Warren had exited the vehicle. Both officers investigating the incident testified Defendant showed no signs of duress and that Warren was not present when they approached and communicated with Defendant.

¶ 14 In its closing arguments, the State argued duress was not applicable because duress cannot be invoked by someone who has a reasonable opportunity to avoid the undue exposure to death or serious bodily harm. *See State v. Cheek*, 351 N.C. 48, 61-62, 520 S.E.2d 545, 553 (1999) ("In order to successfully invoke the duress defense, a defendant would have to show that his 'actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so

act.' ") (citation omitted). Defendant's testimony at trial was the only evidence presented indicating she acted under duress, and it was clearly likely for the jury to have rejected Defendant's affirmative defense.

¶ 15 The State also argues the error was harmless because other evidence of Defendant's guilt of possession of the marijuana and methamphetamine was overwhelming. Defendant testified and admitted she knew what substances the bags contained when she placed them inside of her bra and admitted to possessing both bags of illegal drugs on her person.

¶ 16 Defendant also acknowledged her purpose of being with Warren was "to get high." Defendant failed to contest the quantity of methamphetamine she possessed. After Defendant's arrest, officers executed a search warrant on the vehicle and obtained a set of digital scales from the vehicle's console, within the driver's reach. Beside the scale was a small handbag labeled, "Shanna Shuler, insane outlaw."

¶ 17 Defendant offered the testimony of Joshua Warren at trial. He denied threatening Defendant and pled the Fifth Amendment when asked if he had tossed the bags of drugs into Defendant's lap. Substantial and overwhelming evidence was presented from which the jury could find beyond a reasonable doubt that Defendant knowingly possessed both the small bag of marijuana and the approximately 40.39 grams of methamphetamine.

¶ 18 The State argues here, as in *Boston*, the sole reference to Defendant's silence regarding her duress occurred during the State's questioning of Detective Regner. No further reference to Defendant's lack of response or silence was made by the State for the remainder of the trial. The State did not cross-exam Defendant regarding her silence after her testimony during which she repeatedly claimed duress or threats from Warren.

¶ 19 Finally, the State argues the prosecutor did not reference her silence during its closing argument. The State did not attempt to "capitalize on" the challenged evidence and asserts the evidence of Defendant's silence was "*de minimis*." *Boston*, 191 N.C. App. at 652-53, 663 S.E.2d at 897.

¶ 20 The State also cites *State v. Richardson*, 226 N.C. App. 292, 741 S.E.2d 434 (2013) and *State v. Hoyle*, 325 N.C. 232, 382 S.E.2d 752 (1989) to support the erroneous admission of the detective's testimony in the present case does not rise to the level of the prejudicial error found in both cases. We agree.

¶ 21 In *Richardson*, the prosecutor questioned the defendant about his trial testimony being his first statement, the number of attempts law

enforcement had made to interview him and also commented on his post-arrest silence in closing argument. *Richardson*, 226 N.C. App. at 303-08, 741 S.E.2d at 442-45.

¶ 22 Our Supreme Court concluded: "The prosecutor's cross-examination of Defendant impermissibly focused almost exclusively on Defendant's failure, unlike other witnesses, to make a statement to investigating officers. Similarly, the comments made by the prosecutor during his concluding argument to the jury clearly constituted an impermissible comment upon Defendant's decision to exercise his constitutional right to remain silent after being placed under arrest." *Id.* at 308, 741 S.E.2d at 445. The Supreme Court held, "the trial court's failure to preclude the challenged prosecutorial questions and comments rose to the level of plain error despite the fact that the State elicited substantial evidence, taken in isolation, of [the defendant's] guilt." *Id.* at 310, 741 S.E.2d at 446.

¶ 23 In *Hoyle*, the defendant asserted his actions were in self-defense after a struggle with the victim. *Hoyle*, 325 N.C. at 234, 382 S.E.2d at 753. The prosecutor "repeatedly questioned" detectives and the defendant about whether the defendant had ever told anyone that the victim had attacked him on the night of his murder. *Id.* at 235, 382 S.E.2d at 753. Further, the prosecutor "made reference" to the defendant's silence in his closing argument before the jury. *Id.* at 236, 382 S.E.2d at 754.

¶ 24 Our Supreme Court held the trial court erred by allowing the questions and that the "improper evidence was reinforced by the jury argument." *Id.* at 237, 382 S.E.2d at 754. The Court held:

> In this case there was not an eyewitness to the shooting other than the defendant. His defense depended on the jury's acceptance of his version of the event. The State has not demonstrated beyond a reasonable doubt that it was harmless to attack the credibility of this version by improper evidence[.]

Id.

¶ 25 In both cases, the prosecutors repeatedly referenced the challenged evidence and in *Richardson*, referred to it in closing arguments. Here, there was only one reference during the detective's testimony, and the impact on Defendant was minimal. The State has proven the trial court's error to be harmless beyond a reasonable doubt.

III. Conclusion

¶ 26 The State produced overwhelming evidence at trial showing Defendant's guilt. The State did not capitalize on the detective's

statement of Defendant's silence and did not reference Defendant's silence in closing argument. The impact of Detective Regner's reference to Defendant's silence was *de minimis*. Any erroneously admitted testimony was harmless beyond a reasonable doubt. *It is so ordered.*

NO ERROR.

Judges ARROWOOD and GORE concur.

LISA WALKER-SNYDER, PLAINTIFF
v.
GERARD REGIS SNYDER, DEFENDANT

No. COA21-186

Filed 15 February 2022

1. Domestic Violence—protective order—subject matter jurisdiction—minor child—summons

The trial court had subject matter jurisdiction to enter a domestic violence protective order (DVPO) against defendant where his ex-wife filed the motion requesting the DVPO on behalf of herself and their daughter, who was seventeen years old at the time of the filing but turned eighteen years old before the DVPO was issued, because N.C.G.S. § 50B-2(a) conferred jurisdiction on the trial court over "actions instituted under this Chapter." Further, although defendant argued that a summons was not issued to him, his voluntary appearance and participation in the hearing gave the trial court jurisdiction to enter the order.

2. Domestic Violence—protective order—substantial emotional distress—text messages—lack of evidentiary support

The domestic violence protective order (DVPO) entered against defendant with respect to his daughter lacked support by competent evidence where the daughter testified that defendant had sent her text messages about his litigation with her mother and about not paying for her college education or her car—to which she sent flippant responses and which did not cause her to attempt to block him from text messaging her—which made her feel anxious and upset. The evidence did not support the conclusion that defendant's text messages tormented, terrorized, or terrified her.

Appeal by Defendant from order entered 20 May 2020 by Judge Tracy H. Hewett in Mecklenburg County District Court. Heard in the Court of Appeals 2 November 2021.

No brief filed for Plaintiff-Appellee.

Arnold & Smith, PLLC, by Matthew R. Arnold and Ashley A. Crowder, for Defendant-Appellant.

GRIFFIN, Judge.

¶ 1 Defendant Gerard Regis Snyder appeals from a domestic violence protective order entered against him and in favor of his daughter, Kristen Alexis Snyder. Kristen's mother, Plaintiff Lisa Walker-Snyder, pursued the order on Kristen's behalf. Defendant argues that the order should be vacated because (1) the trial court lacked subject matter jurisdiction to enter the order and (2) competent evidence did not support the trial court's conclusion that Defendant committed an act of domestic violence. We conclude that the trial court had jurisdiction to enter the order but that the order was unsupported by competent evidence of domestic violence. We therefore vacate the order entered against Defendant.

I. Factual and Procedural Background

¶ 2 Defendant and Plaintiff are former spouses. On 21 November 2019, Plaintiff filed a motion in Mecklenburg County District Court requesting that the court issue a protective order against Defendant "with respect to both [Plaintiff] and the parties' minor child," Kristen, who was 17 years old at the time. Plaintiff alleged in her motion that "Defendant[] has committed acts of domestic violence against both Plaintiff[] and the minor child[.]"

¶ 3 On 17 February 2020, a hearing was held on Plaintiff's motion for a protective order. Plaintiff tendered exhibits showing text message exchanges between Defendant and Kristen which spanned from June to November of 2019. Kristen testified during the hearing and characterized Defendant's text messages to her as follows:

> A lot of them were just about my mom's litigation and. . . the interaction between them in court. Some of them were about college, and how he was no longer going to be able to pay for me to go. Some of them were odd, and earlier in the morning, about just either not paying for college or no longer being [able]

> to pay for my car. So it was those, basically, what I would receive.

When asked how the messages made her feel, Kristen testified, "I really thought that . . . it was really hurtful, and I just didn't know what . . . to do with all of this. . . . [I]t feels that I'm always anxious and upset to get these."

¶ 4 On 20 May 2020, the trial court granted Plaintiff's motion for a protective order with respect to Kristen but denied Plaintiff's request for a protective order for herself. The order stated that Defendant's text messages to Kristen "placed [Kristen] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress[.]" Defendant timely filed notice of appeal from the trial court's order.

II. Analysis

¶ 5 Defendant argues that (1) the trial court lacked jurisdiction to enter the order because Kristen attained the age of majority before the order was entered and (2) competent evidence did not support the trial court's conclusion that Defendant committed an act of domestic violence. Although the trial court had jurisdiction to enter the order, we vacate the order for lack of competent evidence of domestic violence.

A. Jurisdiction

¶ 6 **[1]** Defendant argues that the trial court lacked jurisdiction to enter the protective order because Kristen "had reached the age of majority" before the order was entered. Defendant contends that "[o]nce [Kristen] reached the age of 18," a protective order "could no longer be entered on her behalf[] as a minor child of Plaintiff[.]" We disagree.

¶ 7 "Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question" and "is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citation omitted). With respect to domestic violence protective orders, subject matter jurisdiction is conferred by statute:

> Any person residing in this State may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person. Any aggrieved party entitled to relief under this Chapter

> may file a civil action and proceed pro se, without the assistance of legal counsel. The district court division of the General Court of Justice shall have original jurisdiction over actions instituted under this Chapter.

N.C. Gen. Stat. § 50B-2(a) (2019).

¶ 8 We conclude the above-referenced statute provided the trial court with jurisdiction to enter the protective order. Kristen was seventeen years old when Plaintiff filed the motion for a protective order on her behalf. N.C. Gen. Stat. § 50B-2(a) provides that district courts "shall have original jurisdiction over actions instituted under this Chapter." *Id.* Because Plaintiff filed her motion while Kristen was still a minor, the trial court had jurisdiction to act on the motion and enter the protective order.

¶ 9 Plaintiff also argues that the trial court lacked jurisdiction because a summons was not issued to Defendant after Plaintiff filed her motion. *See id.* ("Any action for a domestic violence protective order requires that a summons be issued and served."). "The purpose of the summons is to[,]" *inter alia*, "give jurisdiction of the subject matter of litigation and the parties in that connection[.]" *In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009). However, "when the parties are voluntarily before the [c]ourt, and . . . a judgment is entered in favor of one party and against another, such judgment is valid, although not granted according to the orderly course of procedure." *Id.* (citation omitted). Because Defendant appeared at and participated in the hearing voluntarily, the trial court had jurisdiction to enter its order.

B. Competent Evidence of Domestic Violence

¶ 10 **[2]** Defendant argues that the trial court's order was unsupported by competent evidence of domestic violence. Specifically, Defendant contends that there was no competent evidence to support the trial court's conclusion that Defendant "placed [Kristen] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress." We agree.

¶ 11 We review a domestic violence protective order to determine "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal." *Hensey v. Hennessy*, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009). "The trial

court's conclusions of law are reviewable *de novo* on appeal." *Bunting v. Bunting*, 266 N.C. App. 243, 249, 832 S.E.2d 183, 188 (2019) (citation and internal quotation marks omitted).

¶ 12 "To support entry of a [protective order], the trial court must make a conclusion of law 'that an act of domestic violence occurred.' " *Kennedy v. Morgan*, 221 N.C. App. 219, 223, 726 S.E.2d 193, 196 (2012) (citing N.C. Gen. Stat. § 50B-3(a) (2011)). "Although N.C. Gen. Stat. § 50B-3(a) states that the trial court must 'find' that an act of domestic violence occurred, in fact this is a conclusion of law; the trial court must make findings of fact based upon the definition of domestic violence to support this conclusion[.]" *Id.* at 223, 726 S.E.2d at 196 n.2. "While the trial court need not set forth the evidence in detail[,] it does need to make findings of ultimate fact which are supported by the evidence; the findings must identify the basis for the 'act of domestic violence.' " *Id.* at 223, 726 S.E.2d at 196.

¶ 13 Here, the trial court concluded that Defendant's text messages to Kristen "placed [her] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress." N.C. Gen. Stat. § 14-277.3A defines "harassment" as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3A(b)(2) (2019). "The plain language of the statute requires the trial court to apply only a subjective test to determine whether the aggrieved party was in actual fear; no inquiry is made as to whether such fear was objectively reasonable under the circumstances." *Bunting*, 266 N.C. App. at 250, 832 S.E.2d at 188 (citation omitted). "Substantial emotional distress" is defined as "[s]ignificant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." N.C. Gen. Stat. § 14-277.3A(b)(4).

¶ 14 We conclude that competent evidence does not support the conclusion that Defendant's texts to Kristen "torment[ed], terrorize[d], or terrifie[d]" her. N.C. Gen. Stat. § 14-277.3A(b)(2). When asked to describe Defendant's texts to her, Kristen testified,

> A lot of them were just about my mom's litigation and . . . the interaction between them in court. Some of them were about college, and how he was no longer going to be able to pay for me to go. Some of them were odd, and earlier in the morning, about just either not paying for college or no longer being [able] to pay for my car. So it was those, basically, what I would receive.

When asked how the messages made her feel, Kristen testified, "I really thought that . . . it was really hurtful, and I just didn't know what . . . to do with all of this. . . . [I]t feels that I'm always anxious and upset to get these."

¶ 15 At no point did Kristen's testimony indicate that she was in any state of fear because of Defendant's text messages to her. If anything, her texts to Defendant indicate the opposite. For example, after receiving one message from Defendant about finances, Kristen replied, "Oh boy I'm really shook [laughing emoji.]" Her other responses to Defendant's messages were similarly flippant and did not indicate any state of fear. At no point did Kristen attempt to block Defendant from texting her. Instead, she continuously replied to the messages she received.

¶ 16 Moreover, Kristen's testimony did not assert substantial emotional distress stemming from Defendant's messages to her. Being generally "anxious" or "upset" about Defendant's conduct cannot constitute substantial emotional distress. If such feelings rose to the level of substantial emotional distress under N.C. Gen. Stat. § 14-277.3A(b)(4), then we would cease to have any real standard at all for "substantial" emotional distress.

¶ 17 We are mindful that "[w]here the trial judge sits as the finder of fact, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial judge." *Wornstaff v. Wornstaff*, 179 N.C. App. 516, 519, 634 S.E.2d 567, 569 (2006) (citation and internal quotation marks omitted). "[T]he trial court was present to see and hear the inflections, tone, and temperament of the witnesses, and . . . we are forced to review a cold record." *Id.* Here, however, the Record contains no evidence that Kristen was "torment[ed], terrorize[d], or terrifie[d]" by Defendant's text messages to her. N.C. Gen. Stat. § 14-277.3A(b)(2). Her own testimony as well as her messages to Defendant indicate that she was not in any state of fear. There is also no evidence of substantial emotional distress. We therefore vacate the protective order entered against Defendant for lack of competent evidence of domestic violence.

III. Conclusion

¶ 18 We hold that the trial court had jurisdiction to enter the order against Defendant pursuant to N.C. Gen. Stat. § 50B-2(a). However, we vacate the order for lack of competent evidence of domestic violence.

VACATED.

Judges MURPHY and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 FEBRUARY 2022)

ABERNATHY v. MISSION HEALTH SYS., INC. 2022-NCCOA-98 No. 21-253	Buncombe (19CV02220)	Affirmed
CECIL HOLCOMB RENOVATIONS, INC. v. L. FIRM OF WILSON & RATLEDGE, PLLC 2022-NCCOA-99 No. 21-65	Wake (13CVS16189)	Affirmed
COGHILL v. BROWN 2022-NCCOA-100 No. 21-361	Vance (20CVD1268)	Affirmed
DOW-REIN v. SARLE 2022-NCCOA-101 No. 21-262	Wake (18CVS9604)	Affirmed
GRACE RIDGE GATEWAY TERRACE DURHAM, LLC v. MATTRESS FIRM, INC. 2022-NCCOA-102 No. 21-334	Durham (20CVD3149)	Affirmed
IN RE E.M. 2022-NCCOA-103 No. 21-564	Mecklenburg (20JA315)	Vacated and Remanded
IN RE L.J.J. 2022-NCCOA-104 No. 21-234	Henderson (20JB47)	Reversed
IN RE Z.B. 2022-NCCOA-105 No. 21-405	Mecklenburg (20JA60-61)	Affirmed
JONES v. ATLAS DISTRIBS., LLC 2022-NCCOA-106 No. 21-214	Guilford (20CVS7341)	Affirmed
JONES v. BROCK & SCOTT, PLLC 2022-NCCOA-107 No. 20-792	Davidson (19CVS1295)	Affirmed in Part, Reversed in Part and Remanded
NEHEMIAH v. AMERIGLIDE, INC. 2022-NCCOA-108 No. 21-122	Wake (19CVS15587)	Dismissed

STATE v. BATES 2022-NCCOA-109 No. 21-423	McDowell (19CRS51551)	Affirmed
STATE v. ENGLISH 2022-NCCOA-110 No. 20-595	Scotland (12CRS50676-78)	No Error
STATE v. McGILL 2022-NCCOA-111 No. 21-453	Catawba (19CRS56315-17) (19CRS56319) (20CRS1026)	Appeal dismissed.
STATE v. PORTER 2022-NCCOA-112 No. 21-237	Brunswick (19CRS52196)	Affirmed
STATE v. THOMAS 2022-NCCOA-113 No. 20-814	Guilford (19CRS24225) (19CRS67598-601) (19CRS67750-51) (19CRS67844)	New Trial
STATE v. WASHINGTON 2022-NCCOA-114 No. 20-844	Onslow (16CRS51278)	VACATED AND REMANDED FOR NEW TRIAL.
STATE v. YOUNG 2022-NCCOA-115 No. 20-523	Iredell (14CRS55313-76)	No Error
THOMAS v. CENTURY EMP. ORG., LLC 2022-NCCOA-116 No. 21-399	N.C. Industrial Commission (15-043416)	Affirmed
UTLEY v. SWANN'S MILL HOMEOWNERS ASS'N 2022-NCCOA-117 No. 21-166	Durham (20CVS2932)	Affirmed
VANGUARD SPORTS GRP., LLC v. SMITH 2022-NCCOA-118 No. 21-420	Wake (19CVS14445)	Reversed and Remanded
VERDONE v. VERDONE 2022-NCCOA-119 No. 20-888	Mecklenburg (18CVS22971)	Affirmed

WILLIAMS v. JOHNSON 2022-NCCOA-120 No. 21-340	New Hanover (17CVD160)	Vacated and Remanded
WOOTEN v. WOOTEN 2022-NCCOA-121 No. 21-367	Mecklenburg (19CVD11612)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

to the hearsay rule, and therefore the court's findings based on this evidence supported its conclusion that respondents' home was an injurious environment for the child. Even disregarding this evidence, the court's unchallenged findings describing respondents' prolonged substance abuse and keeping of paraphernalia in the home supported an adjudication of neglect. **In re K.H., 259.**

Permanency planning—ceasing further review hearings—statutory requirements—In a permanency planning matter in which legal custody of the child was granted to the father, the trial court met the requirements of N.C.G.S. §§ 7B-906.1(k) and 7B-905.1(d) when it stated in its visitation decree that no further regular review hearings would be held but that the parties could file a motion for review of the visitation plan. Although respondent-mother had an intellectual disability, the Americans with Disabilities Act did not impose additional requirements on the trial court before cessation of further review hearings. **In re A.P., 347.**

Permanency planning order—reunification efforts—in light of mother's disability—sufficiency of evidence and findings—In a permanency planning matter, the trial court's conclusion that the department of social services (DSS) made reasonable efforts to prevent the need for placement of the child was supported by its findings of fact, which in turn were supported by the testimony of social workers, the guardian ad litem's report, and a psychological assessment. DSS provided services as recommended by the assessment, but respondent either declined to participate in or did not make sufficient improvement after using those services. Although respondent argued that DSS did not accommodate her intellectual disability, where DSS satisfied the reasonable efforts requirement under state law, DSS also met the reasonable accommodation requirement of the Americans with Disabilities Act. **In re A.P., 347.**

CHILD CUSTODY AND SUPPORT

Attorney fees—denied—bad faith—sufficient means to defray expense—no refusal to pay support—In a child support action, the trial court properly denied an award of attorney fees to defendant-mother where she pursued an increase in child support even though she knew that plaintiff-father had been diagnosed with cancer and planned to attend law school, she knew that the action was unlikely to be decided in her favor, she had sufficient means to defray the expense of the action, and there was no evidence that plaintiff had failed to pay the required child support. **Mendez v. Mendez, 36.**

Child support—calculation—work-related childcare costs—extraordinary expenses—arrears—The trial court in a divorce case properly calculated defendant husband's child support obligation where competent evidence supported its finding that the parties' reasonable work-related childcare costs were $600 per month; where, when calculating the children's extraordinary expenses, the court did not abuse its discretion by including costs for certain extracurriculars because although there was no evidence that these costs would be recurring, there also was no evidence that they would not be; and where, when calculating defendant's arrears, the court was not required to give defendant a credit for any extraordinary expenses he had paid while the case was still pending. **Wadsworth v. Wadsworth, 201.**

Child support—Child Support Guidelines—deviation—motion—In a child support action, the trial court properly excluded expenses for the children's activities where defendant-mother did not move to deviate from the Child Support Guidelines. **Mendez v. Mendez, 36.**

CRIMINAL LAW—Continued

CRIMINAL LAW—Continued

evidence presented at trial; rather, the State's arguments drew reasonable inferences from the evidence presented, and therefore they were not grossly improper. **State v. King, 587.**

DAMAGES AND REMEDIES

Punitive—medical malpractice action—summary judgment granted to defendants on all claims—In plaintiff's suit asserting that an adhesion barrier implant placed during a prior surgery caused her infertility, where defendants were entitled to summary judgment on all of plaintiff's claims, plaintiff had no independent basis for seeking punitive damages. **Bryant v. Wake Forest Univ. Baptist Med. Ctr., 630.**

Restitution—criminal case—evidentiary support—ability to pay—In a dogfighting and animal cruelty case in which thirty dogs were seized and placed in the care of a county animal shelter, the trial court's seven orders requiring defendant to pay a total of $70,000 in restitution for the dogs' care and housing was supported by sufficient evidence. The appellate court rejected defendant's argument that, where he was convicted of crimes relating to only seventeen out of thirty dogs seized, he could not be required to pay the costs associated with all thirty animals, since restitution may be imposed for any injuries or damages directly and proximately caused by criminal offenses pursuant to N.C.G.S. § 15A-1340.34(c), and in this case, all the dogs needed to be removed due to defendant's criminal activities. Further, the trial court was not required to make specific findings and conclusions of law to support its determination that defendant had the ability to pay the amount of restitution where there was sufficient supporting evidence. **State v. Crew, 437.**

Restitution—fair market value—unsold painting—injury to personal property—After an incident at an art gallery where defendant—with help from an accomplice—threw a paint balloon at a painting during the artist's live performance, the trial court at defendant's trial for injury to personal property did not err in ordering defendant to pay restitution equal to half the painting's market value, which was based on evidence of the gallery's base price for paintings of that size. Contrary to defendant's argument, the fact that the painting had not been sold yet did not mean that the market value assigned by the trial court was speculative. **State v. Redmond, 283.**

Restitution—foreclosure sale—insufficient service of process—redemption—In a matter involving the foreclosure and sale of a disabled woman's (defendant) home for past-due property taxes, the trial court did not err in concluding that defendant was entitled to restitution pursuant to N.C.G.S. § 1-108 where defendant moved to have the default judgments declared void for insufficient service of process and where she properly redeemed the property before it was sold at a foreclosure sale. **Cnty. of Mecklenburg v. Ryan, 646.**

DISCOVERY

Post-conviction—instructions on remand—scope of in camera review—failure to comply with mandate—In a sexual offense case in which the appellate court instructed the trial court on remand to conduct an in camera review of child protective services records for materiality—requested in defendant's motion for post-conviction discovery seeking information regarding prior unfounded claims of sexual abuse made by the victim—the trial court impermissibly narrowed the scope of its review to records involving specific time periods and accusations against

EMINENT DOMAIN—Continued

the trial court did not abuse its discretion in denying the association's motion to consolidate the condemnation action with the declaratory judgment actions. The parties had already reached a settlement in the condemnation action as to the total compensation owed for the taking, and the distribution of those funds could be completed without injury or prejudice to the association after the issues in the declaratory judgment actions—which would affect how the funds were apportioned—were fully litigated and resolved. **Dep't of Transp. v. Bloomsbury Ests., LLC, 660.**

Summary judgment—condemnation—settlement proceeds—apportionment—genuine issues of material fact—In a condemnation matter, where a condominium complex contracted with a developer to construct new buildings, the Department of Transportation (DOT) condemned part of the property reserved for the construction project, and then a consent judgment was entered settling the total amount of just compensation DOT owed to the developer and to the condominium homeowner's association, the trial court erred in granting summary judgment for the developer regarding the apportionment of the settlement proceeds as between the developer and the association. Genuine issues of material fact existed that would affect how much of the proceeds each party would be entitled to, including the developer's right to complete the construction project past its deadline and the valuation of the property before and after the taking. **Dep't of Transp. v. Bloomsbury Ests., LLC, 660.**

EVIDENCE

Admission of handgun—relevance—chain of custody—In a trial for first-degree murder and other charges related to a shooting, there was no error in the admission of a handgun in the State's case-in-chief before it had established a connection between the gun and the shooting because the State later produced evidence tying the gun to the crimes. Although the gun was also admitted before the State established chain of custody, any assumed error was not prejudicial in light of the overwhelming evidence of defendant's guilt. **State v. Green, 699.**

Expert testimony—dogfighting case—leading question on direct exam—In a dogfighting and animal cruelty case, the trial court exercised appropriate discretion when it allowed the State to ask a leading question of the forensic veterinary medicine expert on direct examination as a follow-up to an earlier, non-leading question that elicited the expert's opinion that the dogs were being kept for the purpose of organized dogfighting. **State v. Crew, 437.**

Expert testimony—gunshot residue—reliability—The trial court did not abuse its discretion in a murder trial by admitting expert testimony regarding gunshot residue where the State sufficiently established the reliability of the expert's analysis pursuant to Evidence Rule 702(a). Despite defendant's argument that the expert failed to follow his own lab's protocols by testing the residue on defendant's hands outside the prescribed time period, the protocols contained an exception that permitted the delayed testing. **State v. Thomas, 159.**

Hearsay—exception—past recollection recorded—interview with law enforcement—email to law enforcement—The trial court did not err in a murder trial by admitting an interview with a witness that had been recorded by law enforcement the night of the murder and a later email that the same witness dictated to a family member to send to law enforcement. Pursuant to Evidence Rule 803(5), there was sufficient evidence that the admissions accurately reflected the

PROBATION AND PAROLE—Continued

term by twelve months was void, and when the State filed a new probation violation report after the expiration of defendant's original probationary period (but during the extended period), the trial court lacked subject matter jurisdiction to revoke defendant's probation. **State v. Guinn, 446.**

PROCESS AND SERVICE

Service by publication—due diligence requirement—email address on file—In a matter involving the foreclosure and sale of a disabled woman's (defendant) home for past-due property taxes, the county failed to exercise due diligence in informing defendant of the tax delinquency and of the subsequent foreclosure where, although the county attempted to serve her personally and by certified mail, it did not attempt to contact her by email—even though it had her email address on file and had prior notice of her preference to be contacted by email due to her disabilities. Therefore, the county's service by publication under Civil Procedure Rule 4 was insufficient, and the trial court erred by denying defendant's motion to set aside the entry of default and the default judgment. **Cnty. of Mecklenburg v. Ryan, 646.**

REAL PROPERTY

Foreclosure sale—good faith purchaser—reliance on county's representations—In a matter involving the foreclosure and sale of a disabled woman's (defendant) home for past-due property taxes, the person who made the final upset bid to purchase defendant's home after defendant had paid the past-due taxes was a good faith purchaser even though defendant informed him, before he accepted the commissioner's deed, that she had paid the past-due taxes. The purchaser reasonably relied on the county's assertion that the property was being sold due to outstanding taxes and on the certificate of taxes due. Therefore, the trial court did not err by declining to set aside the commissioner's deed to the purchaser. **Cnty. of Mecklenburg v. Ryan, 646.**

Foreclosure sale—right of redemption—phone call to county tax office—In a matter involving the foreclosure and sale of a disabled woman's (defendant) home for past-due property taxes, the trial court did not err by finding as fact or concluding as a matter of law that defendant had exercised her right of redemption of the property when she called the county tax office, spoke with an authorized representative about the amount she owed, and paid the amount from her bank account over the phone four days before the foreclosure sale. The county's argument that defendant could not rely on the oral statements of the tax collector's authorized representative could not be made for the first time on appeal. **Cnty. of Mecklenburg v. Ryan, 646.**

Retreat community—Planned Community Act—retroactive provisions—applicability—A retreat community established before the year 1999 was not subject to the Planned Community Act where plaintiff, who had purchased a lot within the community in 2011 (which was subject to the community's protective covenants recorded in the chain of title), failed to assert any events or circumstances occurring after 1 January 1999 to invoke the retroactive provisions of the Act (N.C.G.S. § 47F-1-102(c)). The community therefore was not subject to the Act's financial disclosure requirements. **Davis v. Lake Junaluska Assembly, Inc., 339.**

WORKERS' COMPENSATION—Continued

Sanctions—noncompliance with order compelling discovery—The Industrial Commission did not abuse its discretion in a workers' compensation case by imposing sanctions against plaintiff's employer and the employer's insurance carrier (defendants) under Workers' Compensation Rule 605(9), where defendants failed to comply with the deputy commissioner's order granting plaintiff's motion to compel discovery. Specifically, defendants gave incomplete answers to plaintiff's interrogatories regarding the training courses and subsequent evaluations the employer had provided to plaintiff and, in response to plaintiff's requests for production, defendants failed to produce over ten hours' worth of audio recordings from plaintiff's two-week training course with the employer. **Mahone v. Home Fix Custom Remodeling, 676.**

Timeliness of claim—notice to employer of occupational disease—post-traumatic stress disorder—timing of diagnosis—The Industrial Commission erred by denying plaintiff's claim for workers' compensation for failure to timely give notice to his employer of his post-traumatic stress disorder (PTSD) (N.C.G.S. § 97-22) and failure to timely file his claim (N.C.G.S. § 97-58(c)) where plaintiff gave notice and filed his claim shortly after being clearly, simply, and directly informed that his PTSD was related to his cumulative exposure to trauma as a firefighter. Although the employer argued that plaintiff learned that he had PTSD many years earlier, medical records indicated that plaintiff at times self-reported PTSD symptoms or that his doctors considered PTSD when evaluating him, but he was not actually diagnosed with PTSD as a work-related condition by a medical authority until much later after displaying more severe and particularized symptoms. **Rimmer v. Town of Chapel Hill, 560.**