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283 N.C. APP.

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[1]Died 18 October 2022.

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 Unpublished cases appear in *Italics*.

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2. This opinion was moved from its original filing date and is listed in Volume 285 of the N.C. App. Reports.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF A.J.D, JR.

No. COA21-402

Filed 19 April 2022

Mental Illness—involuntary commitment—danger to self—based on doctor's testimony as expert

The trial court's involuntary commitment order determining respondent to be mentally ill and a danger to himself was supported by clear, cogent, and convincing evidence where a psychiatrist testified to respondent's history of schizophrenia, delusional behavior, and a past incident when respondent was injured by a vehicle after walking in the middle of a road. Respondent failed to preserve his argument that the psychiatrist's testimony was based on hearsay and was therefore not competent evidence because respondent did not object to the testimony at the hearing. Moreover, pursuant to Evidence Rule 703, since the doctor testified as an expert witness, he was allowed to form an expert opinion after reviewing respondent's medical records, conversations with family, and the police report of the roadway incident.

Appeal by Respondent from Order entered 17 February 2021 by Judge Anna E. Worley in Wake County District Court. Heard in the Court of Appeals 8 February 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind K. Dongre, for the State.

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

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Respondent-Appellant A.D. (Respondent) appeals from an Involuntary Commitment Order entered in Wake County District Court declaring Respondent mentally ill, a danger to self, and ordering Respondent be committed to an inpatient facility for forty-five days. The Record reflects the following:

¶ 2 On 26 January 2021, Edward Cashwell, a nurse at Wake County Detention Center, signed an Affidavit and Petition for Involuntary Commitment in Wake County District Court alleging Respondent was mentally ill and a danger to himself or others or in "need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." The same day, a magistrate issued a form Findings and Custody Order finding reasonable grounds to believe Respondent was mentally ill and a danger to himself or others, and ordering Respondent to be taken into custody within twenty-four hours for examination by a person authorized by law to conduct the examination.

¶ 3 The next day Respondent was taken into custody and examined by Adelmar Winner (Winner), a licensed clinical social worker at UNC WakeBrook. Upon examination, Winner submitted a First Examination for Involuntary Commitment report. In this report, Winner stated Respondent has "a history of Schizoaffective Disorder and Autism" and "had an accident due to walking the middle of traffic while actively psychotic." Winner continued stating:

> Patient has long history of non compliance with medication and going from state to state, running away from the 'people who implanted a microchip in his head.' . . . He endorses paranoia in references to his parents 'stealing millions of dollars from him' and endorses several delusions including that he is 'a valuable witness of federal case.'

¶ 4 On 29 January 2021, Respondent underwent a second evaluation, conducted by Winner, at UNC WakeBrook. Winner's report stated:

> [Respondent] has a history of autism and schizoaffective disorder, recently missing for 10 years and came

> to Raleigh to see daughter (which he never did). [Respondent] is . . . psychotic, believes there is a federal conspiracy against him and he does not believe his parents are his guardians. He believes he is an attorney with the supreme court.

Winner also opined Respondent met the criteria for commitment because Respondent is "an individual with a mental illness" and is "dangerous to self or others."

¶ 5 On 11 February 2021, after a continuance, the trial court heard Respondent's case pursuant to N.C. Gen. Stat. § 122C-268. In support of the Petition, the State called Dr. Michael Zarzar to testify. Dr. Zarzar testified Respondent has a history of schizophrenia with significant periods of delusions in the past. Respondent initially presented to their crisis assessment service (CAS) on petition by the Wake County Detention Center (Center). Dr. Zarzar explained after Respondent arrived at the Center, a jailhouse nurse became concerned about his mental status after he made a statement about suicide, and noticed he was exhibiting symptoms of paranoia and delusions. Dr. Zarzar further testified:

> During the initial assessment with the clinicians in CAS, [Respondent] had voiced that he was running away from people who were implanting chips in his head and trying to get away from them. He also said that his family, his parents were stealing millions of dollars from him. He said that he was an attorney, and he said that he had evidence that was significant for a federal case and that he was supposed to be testifying.

Dr. Zarzar believed Respondent's delusions were driving his behavior and putting Respondent in positions of danger. For example, Dr. Zarzar explained Respondent had a history of walking down the middle of the road and had actually been hit by a car a couple days before he was taken to the Center. Respondent also had paranoia around his identification and would "erase his name if it was on any whiteboard and insist his name not be on the door."

¶ 6 Moreover, Dr. Zarzar testified when Respondent presented to CAS, he refused to take any medications, and clinicians had discovered him "cheeking" his medications or hiding it in his mouth to avoid swallowing it. Thereafter, the clinicians had to crush the medication and put it in liquid to administer the medication. Dr. Zarzar also testified after being on

medications for a while, Respondent continued to have paranoia about his identification. For example:

> He talks about being certified by the U.S. Treasury, and when you ask him what being certified by the U.S. Treasury means, he's said surrendering his identity to the U.S. Treasury. And that was as recently as today.

¶ 7 Ultimately, Dr. Zarzar testified that in his opinion: "Respondent is suffering from schizophrenia, and I believe that he's in an acute episode of the schizophrenia." However, Dr. Zarzar explained Respondent doesn't view himself as having any illness and denies being in psychiatric treatment so "with this continued paranoia that he still acts upon that still drives his decisions and his history of putting himself in dangerous situations . . . I'm very worried that he would represent a danger to himself." Dr. Zarzar also explained they were still in the process of adjusting Respondent's medications to help with the delusions, and he wanted to keep Respondent for at least 45 to 90 days but would consider discharging him earlier if his delusions began to resolve.

¶ 8 After Dr. Zarzar testified, Respondent took the stand. Respondent denied having been previously diagnosed with schizophrenia and denied being previously hospitalized with schizophrenia despite Dr. Zarzar's testimony to the contrary. Nevertheless, Respondent testified he had somewhere to live and did not have any problems with taking medication.

¶ 9 After Respondent testified, the trial court entered a written Order concluding Respondent "has a mental illness, he's a danger himself, and he's to be committed to a period not to exceed 45 days." The trial court also found by clear, cogent, and convincing evidence, the following relevant facts supporting the ultimate Finding of dangerousness to self:

> 3. . . . in the days preceding his admission, the Respondent had received medical treatment for injuries he sustained after being struck by a vehicle while on foot.
>
> 4. . . . Respondent has a history of failing to properly take psychiatric medications and of putting himself in dangerous positions, including a 2010 incident in which he was reported to have walked in the road.
>
> 5. Respondent denied any past mental illness diagnoses or psychiatric hospitalizations. Dr. Zarzar testified that the Respondent has no insight into his mental illness.

> 6. Dr. Zarzar testified that while the Respondent has been under his care, he has observed symptoms of schizophrenia . . .
>
> 8. The Court finds that the above-described and uncontroverted testimony about the 2010 incident comprises applicable evidence of a previous episode of dangerousness to self which the Court should consider in determining reasonable probability of physical debilitation.
>
> 12. The Court finds that all the foregoing testimony demonstrates grossly irrational behavior and grossly inappropriate behavior to the situation by Respondent; actions Respondent was unable to control; and behavior evidencing severely impaired insight and judgment by Respondent.
>
> 14. The court finds . . . a reasonable probability that absent up to forty-five additional days of inpatient treatment given pursuant to Chapter 122C, (a) the Respondent will be unable either to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relation, or to satisfy his need for nourishment, personal, and medical care, shelter, and self-protection and safety; and (b) there's a reasonable probability of serious physical debilitation of Respondent within the near future.

¶ 10 Respondent filed Notice of Appeal from the trial court's Order on 24 February 2021.

Appellate Jurisdiction

¶ 11 Respondents in involuntary commitment actions have a statutory right to appeal a trial court's order. N.C. Gen. Stat. § 122C-272 (2021) ("Judgment of the district court [in involuntary commitment cases] is final. Appeal may be had to the Court of Appeals by the State or by any party on the record as in civil cases."). Rule 3 of our Rules of Appellate Procedure requires a party to file written notice of appeal thirty days after the entry of an order of a superior or district court rendered in a civil action or special proceeding. N.C. R. App. P. 3(a), (c) (2021).

¶ 12 In this case, Respondent filed written notice of appeal on 24 February 2021, within the thirty-day period following entry of the Order on 17 February 2021. Furthermore, although the commitment

period has expired, the appeal is not moot because the challenged order may have collateral legal consequence. *See In re Moore*, 234 N.C. App. 37, 41, 758 S.E.2d 33, 36 (2014) ("The possibility that respondent's commitment in this case might likewise form the basis for a future commitment, along with other obvious collateral legal consequence, convinces us that this appeal is not moot."). Thus, Respondent's appeal is properly before this Court.

Issue

¶ 13 The sole issue on appeal is whether the trial court had competent evidence to support its Finding there was a reasonable possibility of Respondent suffering serious physical debilitation in the near future without treatment.

Analysis

¶ 14 Respondent's sole argument on appeal is that there was insufficient evidence to support the trial court's Finding of dangerousness to self because Dr. Zarzar's testimony regarding Respondent's history of commitment, medication noncompliance, and placing himself in dangerous situations is based on hearsay, and therefore, incompetent evidence.

¶ 15 "To support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self . . ." N.C. Gen. Stat. § 122C-268(j) (2021). "Findings of mental illness and dangerousness to self are ultimate findings of fact." *In re B.S.*, 270 N.C. App. 414, 417, 840 S.E.2d 308, 310 (2020) (citing *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980)). On appeal, "[t]his Court reviews an involuntary commitment order to determine whether the ultimate findings of fact are supported by the trial court's underlying findings of fact and whether those underlying findings, in turn, are supported by competent evidence." *B.S.*, 270 N.C. App. at 417, 840 S.E.2d at 310 (citing *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016)). As such, the trial court must also record the facts that support its "ultimate findings[.]" *Whatley*, 224 N.C. App. at 271, 736 S.E.2d at 530.

¶ 16 Nevertheless, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion and obtained a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10 (b)(1). Indeed, when a respondent fails to raise an objection on hearsay grounds at the court below, "any objection has been waived, and the testimony must be considered competent evidence." *In re F.G.J.*, 200 N.C. App. 681, 693, 684 S.E.2d 745, 753-54 (2009).

¶ 17 Here, Respondent does not argue the trial court failed to support its ultimate Finding but argues the trial court committed reversible error by relying on the alleged hearsay evidence in making its Findings of Fact. However, a review of the Record reveals Respondent did not object to the admission of Dr. Zarzar's testimony on any basis, including impermissible hearsay. As such, Respondent failed to preserve this issue for appellate review, and the testimony must be considered competent evidence. *See id.*

¶ 18 Moreover, Dr. Zarzar testified as an expert witness. Rule 703 of the Rules of Evidence provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C. Gen. Stat. § 8C-1, R. 703 (2021). Indeed, our Supreme Court has held it is appropriate for a psychiatrist to base an expert opinion on both the psychiatrist's personal examination of the patient and other information included in the patient's official medical records. *State v. De Gregory*, 285 N.C. 122, 134, 203 S.E.2d 794, 802 (1974).

¶ 19 Dr. Zarzar testified he learned of Respondent's history of treatment non-compliance and prior hospitalizations from Respondent's medical records, speaking with Respondent's parents about his delusional behavior, and reviewing the police report from the 2010 incident when Respondent walked in the middle of the road. This kind of information is precisely the type that a medical expert may use as the basis for the expert's opinion. *See State v. Daniels*, 337 N.C. 243, 269, 446 S.E.2d 298, 314 (1994) (holding psychiatrist may properly base expert opinion on "(1) her review of the evaluations of other doctors who had interviewed defendant; (2) a personal discussion with a doctor in whose care defendant had been placed; and (3) interviews of defendant's friends, employers, and family"), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995); *De Gregory*, 285 N.C. at 132, 203 S.E.2d at 801 ("[A]n expert witness has wide latitude in gathering information and may base his opinion on evidence not otherwise admissible."). Thus, the rule against hearsay did not bar Dr. Zarzar from testifying about Respondent's medical history and prior incidents of psychosis as he properly relied on this information in forming his expert opinion. Moreover, since Dr. Zarzar's testimony was

competent evidence, the trial court did not err in relying on this testimony in making its Findings of Fact.

Conclusion

¶ 20 Accordingly, since Respondent did not object to Dr. Zarzar's testimony on the basis of hearsay and Dr. Zarzar's testimony was not inadmissible hearsay, we conclude the trial court based its Findings of Fact on competent evidence and affirm the Order.

AFFIRMED.

Judges WOOD and GORE concur.

IN THE MATTER OF J.A.D., A MINOR JUVENILE

No. COA21-228

Filed 19 April 2022

1. Juveniles—petition—sufficiency—extortion—name of victim

A juvenile petition for extortion was not fatally defective for not including the name of the victim. The petition properly alleged each essential element of extortion: that the juvenile made a threat—to expose a photo of the victim partially unclothed—with the intent to obtain wrongfully something of value—cookies from the school cafeteria or help on math homework.

2. Juveniles—delinquency—extortion—threat—First Amendment analysis

In a juvenile delinquency proceeding for extortion, the State was not required to prove that the juvenile threatened unlawful physical violence. Even assuming that the statute criminalizing extortion (N.C.G.S. § 14-118.4) was an anti-threat statute subject to First Amendment "true threat" requirements, the First Amendment did not limit application of the statute to threats of unlawful physical violence.

3. Juveniles—petition—variance between petition and proof—extortion—identification of valuable property

In a juvenile delinquency proceeding for extortion, there was no fatal variance between the petition and the proof at the hearing where the petition alleged that the juvenile threatened to expose a

photo of the victim partially unclothed in order to obtain food from the school cafeteria but where the evidence tended to show that the juvenile demanded that the victim help him with his homework and that two of his friends forced her to buy them cookies at the school cafeteria. The exact identification of the valuable property the juvenile sought was immaterial and therefore that language in the petition was surplusage; further, the juvenile was on notice of the offense for which he was being charged.

4. Juveniles—adjudication order—findings—statutorily required

Where the written findings in an order adjudicating a juvenile delinquent were insufficient to comply with N.C.G.S. § 7B-2411—relying on the pre-printed form language and not affirmatively stating the burden of proof—the case was remanded for the trial court to make the statutorily required findings.

5. Juveniles—disposition order—statutorily required findings—protection of public and needs of juvenile

Where the dispositional order in a juvenile delinquency case failed to make the required findings pursuant to N.C.G.S. § 7B-2501(c) on the five enumerated factors concerning the protection of the public and the needs and best interests of the juvenile, the order was remanded for entry of the appropriate findings.

Appeal by Respondent-Juvenile from orders entered 11 December 2020 by Judge Thomas B. Langan in Surry County District Court. Heard in the Court of Appeals 14 December 2021.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for the Respondent-Juvenile.

GRIFFIN, Judge.

¶ 1 Respondent-juvenile J.A.D. ("Jeremy")[1] appeals from the trial court's orders adjudicating him delinquent for extortion of a classmate and entering a disposition of probation. Jeremy challenges his adjudication and disposition at each step of the proceedings, arguing (1) the

1. We use a pseudonym to protect the anonymity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b).

State's failure to name the victim in his juvenile petition was a fatal defect; (2) the evidence presented at the adjudication hearing did not show that his alleged threat was a "true threat" warranting punishment; (3) the evidence concerning his threat fatally varied from the language alleged in his juvenile petition; (4) the trial court failed to make sufficient written findings of fact in his adjudication order; and (5) the trial court failed to make sufficient written findings of fact in his disposition order. After review, we discern no error in Jeremy's adjudication, but remand each order for additional findings of fact.

I. Factual and Procedural Background

¶ 2 This is a case of an alleged extortion of favors from a middle school student by her classmate through the threat of revealing partially unclothed images to other students. The evidence at the adjudication hearing tended to show as follows:

¶ 3 Sometime in early 2020, Jeremy and three of his classmates were working on an assignment together and using their cell phones in their eighth-grade classroom. Cecilia[2], one of the three classmates, showed messages on her cell phone to the group. Either by permission or by grabbing the phone from Cecilia, Jeremy came into possession of Cecilia's cell phone. Jeremy then ran out of the classroom and into the bathroom for a short period of time. His teacher made him come back to the classroom, where he returned Cecilia's phone and was then sent to the principal's office.

¶ 4 On 26 February 2020, Cecilia reported to school administration that "a picture of [her] in underwear and a bra" was "being used by three eighth graders" to "obtain items from the cafeteria." Two of Jeremy's friends repeatedly used the picture to make Cecilia buy them cookies for approximately three to four months. Cecilia also reported that Jeremy "asked [her] to do his math homework." When she refused, Jeremy said he and his friends "would expose the picture of [her] to [her] face." Jeremy told her, "We always have that picture, you don't want that going around."

¶ 5 The School Resource Officer ("SRO") investigated Cecilia's report. Jeremy admitted to the SRO that he had taken Cecilia's phone, and the SRO confirmed that Cecilia had a picture of herself in underwear and a bra saved on her phone at that time. The SRO observed Jeremy and his friends using Snapchat on school computers and believed they

2. A pseudonym. *See* N.C. R. App. P. 42(b).

had used the software to share the picture of Cecilia. Following his investigation, the SRO filed a juvenile petition against Jeremy for extortion on 12 May 2020.

¶ 6 The trial court continued the juvenile petition on 2 June 2020, and continued it once again on 31 July 2020. On 28 August 2020, the trial court denied a third motion to continue and dismissed the juvenile petition.

¶ 7 On 2 September 2020, a new, identical juvenile petition was filed once again alleging that Jeremy committed extortion. On 11 December 2020, the trial court held an adjudicatory and dispositional hearing on the juvenile petition. The trial court adjudicated Jeremy delinquent on one count on extortion, entered a Level I disposition, and sentenced him to twelve months of probation. Jeremy timely appealed from the adjudication and disposition.

II. Analysis

¶ 8 Jeremy asserts the trial court erred through five arguments challenging subject matter jurisdiction, the sufficiency of the evidence presented at the adjudication hearing, and the sufficiency of the written findings of fact in each of the trial court's orders.

A. Fatal Defect in Petition

¶ 9 **[1]** Jeremy argues that the "trial court lacked subject matter jurisdiction where the petition was fatally defective because it failed to name the victim" of his alleged crime of extortion. We review the jurisdictional validity of a charging instrument *de novo*. *See State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981).

¶ 10 "[A] petition in a juvenile action serves essentially the same function as an indictment in a felony prosecution and is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity that the accused is clearly apprised of the conduct for which he is being charged." *In re T.T.E.*, 372 N.C. 413, 419, 831 S.E.2d 293, 297 (2019) (citation omitted). "When a petition is fatally deficient, it is inoperative and fails to evoke the jurisdiction of the court." *In re J.F.M. & T.J.B.*, 168 N.C. App. 143, 150, 607 S.E.2d 304, 309 (2005) (citation omitted). "[I]t is not the function of [a charging instrument] to bind the hands of the State with technical rules of pleading; rather, its purposes are 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." *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731 (citation omitted).

¶ 11 "Because juvenile petitions are generally held to the standards of a criminal indictment, we consider the requirements of the indictments of the offenses at issue." *J.F.M.*, 168 N.C. App. at 150, 607 S.E.2d at 309 (citation omitted). Jeremy was adjudicated and held responsible for extortion under N.C. Gen. Stat. § 14-118.4 (2019). Section 14-118.4 states that

> Any person who threatens or communicates a threat or threats to another with the intention thereby wrongfully to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and such person shall be punished as a Class F felon.

N.C. Gen. Stat. § 14-118.4. " 'Extortion may be defined as wrongfully obtaining anything of value from another by threat, duress, or coercion.' " *State v. Privette*, 218 N.C. App. 459, 474, 721 S.E.2d 299, 310 (2012) (quoting *Harris v. NCNB Nat. Bank of N.C.*, 85 N.C. App. 669, 675, 355 S.E.2d 838, 843 (1987) (citing *Black's Law Dictionary* 696 (rev. 4th ed.1968))).

¶ 12 The juvenile petition alleging extortion in this case stated:

> [Jeremy] did unlawfully, willfully, and feloniously . . . threaten or communicate threat [sic] to another with the intent to obtain wrongfully anything of value, any acquittance, and advantage or any immunity.
>
> . . .
>
> [Jeremy] did obtain a digital image/picture of the victim without or [sic] knowledge or consent, the photo of the victim only wearing a bra and underwear was then used by [Jeremy] to obtain food from the school cafeteria, while threatening to expose the picture if the victim refused to buy or do what he asked.

The petition did not name Cecilia as the victim to whom Jeremy made his threat.

¶ 13 Jeremy argues the petition was fatally defective because it did not name Cecilia, and instead referred only to "another" and "the victim." Jeremy does not cite authority which states that a charging instrument for extortion must name the victim. Rather, Jeremy derives his argument from the rule for charging armed robbery set out in this Court's opinion in *State v. Oldroyd*, 271 N.C. App. 544, 843 S.E.2d 478 (2020), *rev'd*, 2022-NCSC-27. This Court's opinion in *Oldroyd* has been reversed and is no longer binding.

¶ 14 In *Oldroyd*, the defendant was convicted of attempted armed robbery under an indictment which alleged the defendant attempted to commit armed robbery against "the person and presence of employees of the Huddle House . . . whereby the li[ves] of the Huddle House employees w[ere] threatened and endangered." *Id.* at 548–49, 843 S.E.2d at 481. This Court vacated the defendant's conviction, holding that the general naming of the victims as "Huddle House employees" was insufficient to give the trial court jurisdiction because the defendant's "indictment for attempted armed robbery must have named a victim to be valid." *Id.* at 551–52, 843 S.E.2d at 483.

¶ 15 The North Carolina Supreme Court reversed this Court's decision in *Oldroyd*, holding the indictment was "a plain and concise factual statement which conveyed the exactitude necessary to place [the defendant] on notice of the event or transaction against which he was expected to defend, to protect [him] from being placed in jeopardy twice for the same crime, and to guide the trial court in entering the correct judgment." *State v. Oldroyd*, 380 N.C. 613, 2022-NCSC-27, ¶ 13; N.C. Gen. Stat. § 924(a)(5) (2019). The Supreme Court held that the defendant's indictment plainly and concisely "asserted facts supporting every element of the criminal offense . . . , without allegations of an evidentiary nature, but with the sufficient precision which is statutorily required to inform [the] defendant of his alleged conduct. . . ." *Id.* ¶ 9. In reaching its conclusion, the Supreme Court placed emphasis on modern, less strict criminal pleading requirements set forth in the Criminal Procedure Act of 1975, which affected a "relaxation of the erstwhile common law criminal pleadings" and "signaled a shift 'away from the technical rules of pleading.' " *Id.* ¶ 10 (citation omitted).

¶ 16 It is important that the indictment in *Oldroyd* did name the victims with *some* specificity, i.e., the "employees of the Huddle House." In this case, Jeremy's petition named the victim by referring to Cecilia only as "the victim" and "another."

¶ 17 Having acknowledged that the rule set forth by Jeremy has been overruled, and keeping modern pleading requirements in mind, we are left with the following question: what is the appropriate rule governing whether a victim must be named in a charging instrument for extortion? Neither party cites in their brief on appeal to any North Carolina precedent which dictates whether a charging instrument for extortion requires the victim to be named, much less to what degree of specificity the victim should be named. Our review has also revealed no such precedent. We return to our Courts' armed robbery jurisprudence, as we find a comparison of armed robbery and extortion helpful in our analysis.

¶ 18 With respect to armed robbery, the North Carolina Supreme Court has repeatedly held

> *it is not necessary that ownership of the property be laid in a particular person* in order to allege and prove armed robbery. The gist of the offense of robbery is the taking by force or putting in fear. An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property.

State v. Spillars, 280 N.C. 341, 345, 185 S.E.2d 881, 884 (1972) (emphasis added) (citing *State v. Rogers*, 273 N.C. 208, 212, 159 S.E.2d 525, 528 (1968); *State v. Guffey*, 265 N.C. 331, 333, 144 S.E.2d 14, 16 (1965); *State v. Sawyer*, 224 N.C. 61, 66, 29 S.E.2d 34, 37 (1944)); *see Oldroyd*, 271 N.C. App. at 553, 843 S.E.2d at 483–84 (Bryant, J., dissenting). The longstanding rule in North Carolina is that the language in the charging instrument for armed robbery must show only that the defendant used a dangerous weapon to take personal property *from someone other than himself*. *See State v. Jackson*, 306 N.C. 642, 650–51, 295 S.E.2d 383, 388 (1982); *State v. Ballard*, 280 N.C. 479, 485, 186 S.E.2d 372, 375 (1972).

¶ 19 Armed robbery and extortion are similar offenses which both criminalize the taking of property from another through threat of harm. *See*, *generally*, *United States v. Harris*, 916 F.3d 948, 955 (11th Cir. 2019) ("Extortion is 'closely related to the crime of robbery, having in fact been created in order to plug a loophole in the robbery law by covering sundry threats which will not do for robbery.' " (quoting Wayne R. LaFave, *Criminal Law* § 20.4, 1335–36 (6th ed. 2017))); *State v. Matthews*, 274 N.C. App. 357, 850 S.E.2d 357, 2020 WL 6736823, at *6 (2020) (unpublished) ("Both attempted armed robbery with a dangerous weapon and extortion require a use of threat to deprive another of personal property or to obtain something of value from the victim."), *review denied*, 376 N.C. 902, 855 S.E.2d 278 (2021). "The gist of the offense of robbery is the taking by force or putting in fear." *Spillars*, 280 N.C. at 345, 185 S.E.2d at 884. The "gist" of extortion is also similarly the taking of something of value from the victim through the fear and apprehension of a threatened undesirable outcome.

¶ 20 However, as it pertains to how specifically a victim must be named, extortion is materially distinguishable from armed robbery.

¶ 21 The crime of extortion could apply to "property" beyond items of personal property subject to robbery. It is clear from the statutory

language that extortion applies where the defendant seeks to obtain "anything of value or any acquittance, advantage, or immunity." N.C. Gen. Stat. § 14-118.4. "While an indictment for [armed robbery] need not allege actual legal ownership of property, the indictment must at least name a person who was in charge or in the presence of the property at the time of the robbery." *State v. Burroughs*, 147 N.C. App. 693, 696, 556 S.E.2d 339, 342 (2001). This requirement cannot be practically applied to all cases of extortion. The other properties enumerated in N.C. Gen. Stat. § 14-118.4 are not necessarily owned, possessed, or otherwise in the charge or presence of an extortion victim forced to provide them. *See State v. Wright*, 240 N.C. App. 270, 273, 770 S.E.2d 757, 759 (2015).[3]

¶ 22 Further, the naming requirement found in our courts' armed robbery precedent stems from the notion that the specific identity of the victim is immaterial so long as it is clear that the defendant was not taking his own property. *State v. Pratt*, 306 N.C. 673, 681, 295 S.E.2d 462, 467 (1982) ("As long as it can be shown [the] defendant was not taking his own property, ownership need not be laid in a particular person to allege and prove robbery." (citation omitted)). Indeed, North Carolina acknowledges a "claim of right" defense to the crime of armed robbery, which states that "[a] defendant is not guilty of robbery if he forcibly takes personal property from the actual possession of another under a bona fide claim of right or title to the property[.]" *State v. Spratt*, 265 N.C. 524, 526, 144 S.E.2d 569, 571 (1965); *State v. Cox*, 375 N.C. 165, 172, 846 S.E.2d 482, 487 (2020) (reaffirming in North Carolina "the right of a party to engage in 'self-help' and to forcibly take personal property from the actual possession of another under a bona fide claim or right to the property"). Our precedent shows, therefore, that the requirement that a victim be named with any specificity at all stems not from a material consideration of the victim's identity, but from a need to affirmatively prove that the defendant acted with the requisite felonious intent to take another's property, not to take his own. *See Spratt*, 265 N.C. at 526,

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3. In an effort to describe why extortion cannot be a lesser-included offense of armed robbery, our Court has explained:

> [T]he subject matter of the threat is much broader for the crime of extortion. Specifically, where armed robbery requires that the subject matter be personal property which is taken and carried away, extortion permits obtaining "anything of value or any acquittance, advantage, or immunity." A thing "of value or acquittance, advantage, or immunity" could involve coercing someone not to file a civil suit or to go to the police rather than coercing someone to hand over an item of personal property.

Wright, 240 N.C. App. at 273, 770 S.E.2d at 759 (internal citation omitted).

144 S.E.2d at 571; *State v. Lawrence*, 262 N.C. 162, 168, 136 S.E.2d 595, 599–600 (1964); *State v. Chase*, 231 N.C. 589, 590, 58 S.E.2d 364, 365 (1950).

¶ 23 Extortion does not share armed robbery's focus on the ownership of the valuable property the defendant obtains or seeks to obtain. "North Carolina does not recognize a 'claim of right' defense in extortion-related cases." *Privette*, 218 N.C. App. at 477, 721 S.E.2d at 312. Rather, what matters is the wrongfulness of the method by which the defendant seeks to obtain something of value. *State v. Greenspan*, 92 N.C. App. 563, 568, 374 S.E.2d 884, 887 (1989) ("The wrongful intent required by the statute refers to the obtaining of property and not to the threat itself."). The gravamen of extortion is that the defendant sought to "attain property or some other acquittance, advantage, or immunity *in an unlawful and unjust manner*." *Privette*, 218 N.C. App. at 476, 721 S.E.2d at 312 (emphasis added).

¶ 24 We reject Jeremy's broader contention that the rules dictating what information must be included in a charging instrument for armed robbery may be extended to charging instruments for extortion. The essential elements of extortion do not place the same weight on the identity of the victim that is inherent in the essential elements of armed robbery. We cannot say that modern criminal pleading requirements dictate a need to allege the identity of the victim in order to plead "[a] plain and concise factual statement . . . which, without allegations of an evidentiary nature, asserts facts supporting every element" of extortion "with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5). We hold that a charging instrument charging extortion need only apprise the charged party of the material elements of the offense of extortion: (1) that a wrongful demand was made with (2) the intent to demand something of value.

¶ 25 In Jeremy's case, the juvenile petition sufficiently alleged each essential element of extortion: that Jeremy did "threaten or communicate [a] threat" with the intent to "obtain wrongfully anything of value. . . ." The petition further alleged that Jeremy used a "photo of the victim only wearing a bra and underwear" and "threaten[ed] to expose the picture if the victim refused to buy or do what he asked." The petition clearly apprised Jeremy of the conduct for which he was being charged with sufficient specificity to allow him to prepare an adequate defense. *In re T.T.E.*, 372 N.C. at 419, 831 S.E.2d at 297; N.C. Gen. Stat. § 15A-924(a)(5). The trial court had jurisdiction over Jeremy's extortion charge.

B. Threat Element of Extortion

¶ 26 **[2]** Jeremy next argues the "trial court erred by denying Jeremy's motion to dismiss where . . . North Carolina's extortion statute requires a threat of unlawful physical violence and . . . Jeremy did not make any such threat." Jeremy contends that the crime of extortion in North Carolina is an "anti-threat" statute which punishes a defendant's free speech in opposition to the First Amendment of the U.S. Constitution.

¶ 27 The State contends Jeremy failed to preserve this constitutional argument for this Court's review because he did not raise it during trial. *See State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) ("It is well settled that constitutional matters that are not 'raised and passed upon' at trial will not be reviewed for the first time on appeal." (citation omitted)). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). "However, Rule 10 does not bind a party on appeal only to arguments identical to the ones offered in support of an objection at trial." *State v. McLymore*, 380 N.C. 185, 2022-NCSC-12, ¶ 17. "If a party's objection puts the trial court and opposing party on notice as to what action is being challenged and why the challenged action is thought to be erroneous—or if the what and the why are 'apparent from the context,'—the specificity requirement has been satisfied." *Id.* (citing N.C. R. App. P. 10(a)(1)).

¶ 28 During the adjudicatory hearing, Jeremy's counsel moved to dismiss at the close of the State's evidence because, in part, Jeremy's "alleged threat is not really a threat." At the close of all the evidence, Jeremy's counsel again moved to dismiss, arguing "[Cecilia] simply ignored a juvenile remark, which [Jeremy] denies making, a juvenile remark that was made and never acted upon the alleged threat. . . . [T]his isn't even a threat." Jeremy's counsel did not specifically refer to the First Amendment as grounds for dismissal, but he did argue that the State failed to show that Jeremy made a punishable threat. It was "apparent from the context" of this argument that Jeremy's counsel questioned whether Jeremy's speech was punishable, and the trial court and the State should have been on notice that the case presented constitutional concerns. We hold that Jeremy preserved this issue for our review.

¶ 29 Jeremy asserts that "true threat" crimes require the State to show the defendant threatened "unlawful physical violence" as an essential element of the crime, and that the State was unable to show Jeremy made

such a threat. We review the denial of a motion to dismiss for the State's failure to present substantial evidence of each essential element of the crime charged *de novo* 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. Tucker*, 380 N.C. 234, 2022-NCSC-15, ¶ 10 (citations omitted).

¶ 30 Absent the alleged infringement on free speech, Jeremy's argument fails to refute North Carolina extortion precedent. Restricting the crime of extortion to threats of physical violence would defeat the purpose of the crime. Agnostic of subsequent First Amendment jurisprudence, this Court has held that "[t]he definition of extortion in G.S. 14–118.4 covers any threat made with the intention to wrongfully obtain 'anything of value or any acquittance, advantage, or immunity.' " *Greenspan*, 92 N.C. App. at 567, 374 S.E.2d at 886–87 (emphasis added) ("[Offer[ing] to refrain from pressing criminal charges in exchange for money amounted to threatening criminal prosecution and clearly comes within the purview of the broad language, 'a threat.' "). This Court has also incorporated the United States Court of Appeals for the Fourth Circuit's recognition that "economic harm"—not just physical violence—is a sufficient threatened result to constitute extortion as defined in N.C. Gen. Stat. § 14-118.4. *See id.* at 566, 374 S.E.2d at 886 (citing *Tryco Trucking Co. v. Belk Stores Servs., Inc.*, 634 F. Supp. 1327, 1334 (W.D.N.C. 1986)); *Tryco*, 634 F. Supp. at 1334 ("Fear of economic harm satisfies the definition that extortion is the obtaining of property from another with his consent induced by wrongful use of fear." (citation omitted)).

¶ 31 Nonetheless, Jeremy's argument asserts that current First Amendment jurisprudence imposes a different result. He contends that N.C. Gen. Stat. § 14-118.4 is an "anti-threat" statute criminalizing threatening speech, and that all anti-threat statutes may only criminalize speech which threatens unlawful physical violence. Jeremy's argument presents this Court with two questions. First, does the crime of extortion as defined in N.C. Gen. Stat. § 14-118.4 constitute an "anti-threat" statute subject to First Amendment "true threat" requirements? Second, if N.C. Gen. Stat. § 14-118.4 is an anti-threat statute, does the statute therefore only apply to threats of unlawful physical violence? Assuming without deciding that N.C. Gen. Stat. § 14-118.4 is an anti-threat statute, we hold that First Amendment jurisprudence does not limit application of the statute to threats of unlawful physical violence.

¶ 32 In *State v. Taylor*, the North Carolina Supreme Court recognized that "true threats" are one indisputable category of constitutionally

proscribable free speech that is not protected by the First Amendment. *State v. Taylor*, 379 N.C. 589, 2021-NCSC-164, ¶ 18. Using U.S. Supreme Court decisions to guide its analysis, the Court in *Taylor* recognized that determining whether a defendant's speech was a true threat required our courts to balance the State's interest in protecting individuals' safety with a speaker's substantial right to "engage in controversial but constitutionally permissible speech[.]" *Id.* ¶ 24. "[W]hether a defendant's particular statements contain a true threat" is a fact-specific evaluation, in which "a court must consider (1) the context in which the statement was made, (2) the nature of the language the defendant deployed, and (3) the reaction of the listeners upon hearing the statement, although no single factor is dispositive." *Id.* (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)). The Court further determined that, in order to narrowly define the range of unprotected speech proscribable as true threats, "the State is required to prove [the speaker's intent by] both an objective and a subjective element in order to convict [the] defendant" of a true threat offense. *Id.* ¶ 42.

¶ 33 Even if we assume that N.C. Gen. Stat. § 14-118.4 codifies the crime of extortion as an anti-threat statute within the definition contemplated in *Taylor*, First Amendment "true threat" analysis does not require a threat to include "unlawful physical violence." Jeremy cites to the following language from the United States Supreme Court's decision in *Virginia v. Black* to support his contention that speech is only prosecutable as a true threat if it threatens unlawful physical violence:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Virginia v. Black, 538 U.S. 343, 359–60 (2003) (internal citations and quotation marks omitted). We disagree with Jeremy's characterization of this passage.

¶ 34 As noted in *Taylor*, "[n]either [our Supreme] Court nor the Supreme Court of the United States has ever explicitly defined the scope of the true threats exception to the First Amendment." *Taylor*, 2021-NCSC-164, ¶ 19. Defendant's cited language from *Black* only explains that threats which threaten unlawful physical violence are included under the overall umbrella of "true threats." Indeed, in *Taylor*, our Supreme Court analyzed *Black*'s description of intimidation as a threat "with the intent of placing the victim in fear of bodily harm or death", but only to interpret whether the First Amendment required the State to prove the defendant's subjective intent. *Id.* ¶ 33 (citation omitted). The *Taylor* Court never entertained the notion that a threat of unlawful physical violence could be a required element, concluding only that "*Black* [held] that a speaker's subjective intent to threaten is the pivotal feature separating constitutionally protected speech from constitutionally proscribable true threats." *Id.* There is no federal or North Carolina state constitutional rule that threats are protected speech unless they threaten unlawful physical violence.

¶ 35 The State was under no burden to prove that Jeremy threatened unlawful physical violence. The trial court did not err in denying Jeremy's motion to dismiss.

C. Fatal Variance in Evidence

¶ 36 **[3]** Jeremy contends the "trial court erred by denying his motion to dismiss where there was a fatal variance between the 'threat' alleged in the petition and the proof at the hearing."

¶ 37 We review *de novo* to determine whether the State fulfilled its burden of presenting substantial evidence of each essential element of the crime charged. *Tucker*, 2022-NCSC-15, ¶ 10. "A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged." *State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971). To prevail on a motion to dismiss for a fatal variance, "the defendant must show a fatal variance between the offense charged and the proof as to '[t]he gist of the offense[,]' " a variance with respect to an essential element. *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (citations omitted).

¶ 38 Juvenile petitions alleging delinquency are charging instruments akin to criminal indictments. *T.T.E.*, 372 N.C. at 419, 831 S.E.2d at 297. "[T]his Court has acknowledged the general rule that [a charging instrument] using 'either literally or substantially' the language found in the statute defining the offense is facially valid," *State v. Williams*, 368 N.C.

620, 626, 781 S.E.2d 268, 272 (2016) (citation omitted), and charging instruments do not need to detail exact, specific events and evidence to distinctively plead the offense charged and avoid risks of double jeopardy. *See State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995). "When an averment in an indictment is not necessary in charging the offense, it will be deemed to be surplusage." *Pickens*, 346 N.C. at 646, 488 S.E.2d at 172 (citations and internal quotation marks omitted).

¶ 39 The petition in this case averred, *inter alia*, that "the photo of the victim only wearing a bra and underwear was then used by [Jeremy] to obtain food from the school cafeteria, while threatening to expose the picture if the victim refused to buy or do what he asked." At trial, the State presented evidence which tended to show that Jeremy asked "[f]or [Cecilia] to do his homework", and that two of Jeremy's friends actually forced Cecilia to buy them cookies from the cafeteria. Jeremy asserts that, "[a]s it stands now, a petition could be filed alleging that Jeremy asked Cecilia to do his math homework in exchange for not exposing the picture, thereby leaving him open to an adjudication for the same conduct." We disagree.

¶ 40 The essential element of extortion at issue regarding this evidence is that the defendant's wrongful threat was made for the purpose to "obtain anything of value or any acquittance, advantage, or immunity[.]" N.C. Gen. Stat. § 14-118.4. The exact, factual identification of the valuable property the defendant sought to obtain is immaterial so long as the State's proof ultimately shows that the defendant obtained or attempted to obtain something of value. *See supra* ¶¶ 21-25 (discussing materiality of identity of property to offense of extortion). In this case, the language in the indictment explaining that Jeremy sought to "obtain food from the school cafeteria" was unnecessarily specific, and therefore surplusage. *See Pickens*, 346 N.C. at 646, 488 S.E.2d at 172. Further, Jeremy was appropriately apprised of the offense for which he was being charged. Regardless of whether the request was specifically for cookies or answers to homework, the petition placed Jeremy on notice of the factual circumstances surrounding his alleged offense. The evidence presented during the adjudication hearing did not create a fatal variance from the language of Jeremy's juvenile petition.

D. Written Findings Required by Section 7B-2411

¶ 41 **[4]** Defendant also argues the "trial court erred by failing to make sufficient findings of fact required by [N.C. Gen. Stat. §] 7B-2411 in its written adjudication order." "An alleged violation of a statutory mandate is a question of law and reviewed *de novo*." *Matter of W.M.C.M.*, 277 N.C. App. 66, 2021-NCCOA-139, ¶ 29.

¶ 42 N.C. Gen. Stat. § 7B-2411 instructs:

> If the court finds that the allegations in the petition have been proved [beyond a reasonable doubt], the court shall so state in a written order of adjudication, which shall include, but not be limited to, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication.

N.C. Gen. Stat. § 7B-2411 (2019); *see* N.C. Gen. Stat. § 7B-2409 (2019) ("The allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt."). "Section 7B-2411 does not require the trial court to delineate each element of an offense and state in writing the evidence which satisfies each element, and we recognize that section 7B-2411 does not specifically require that an adjudication order contain appropriate findings of fact." *In re J.V.J.*, 209 N.C. App. 737, 740, 707 S.E.2d 636, 638 (2011) (citations and internal quotation and editing marks omitted). "Nevertheless, at a minimum, section 7B-2411 requires a court to state in a written order that 'the allegations in the petition have been proved [beyond a reasonable doubt].' " *Id.* (citing N.C. Gen. Stat. § 7B-2411).

¶ 43 In *In re J.V.J.*, the trial court's adjudication order included only the following findings:

> Based on the evidence presented, the following facts have been proven beyond a reasonable doubt:
>
> The court finds that Joseph is responsible.
>
> 1391–ASSAULT GOVT OFFICAL/–14–33 (C)(4) CLASS 1A MISD OCCURRED 11–23–09.

Id. (internal editing marks omitted). The Court concluded that these findings were insufficient to satisfy N.C. Gen. Stat. § 7B-2411 and remanded for additional findings of fact. *Id.* at 741, 707 S.E.2d at 638.

¶ 44 Conversely, in *In re K.C.*, the trial court's adjudication order wrote out the juvenile's offense date, offense, felony or misdemeanor classification in a clear table, and was file-stamped with the date of adjudication. *In re K.C.*, 226 N.C. App. 452, 460–61, 742 S.E.2d 239, 245 (2013). The adjudication order then stated:

> The following facts have been proven beyond a reasonable doubt: . . .
>
> After hearing all testimony in this matter the court finds beyond a reasonable doubt that the juvenile

> committed the offense of Sexual Battery and Simple Assault and he is ADJUDICATED DELINQUENT.

Id. The Court concluded that the adjudication order "satisfie[d] the minimum requirements of section 7B-2411" because it "provide[d] the date of the offense, the fact that the assault [was] a class 2 misdemeanor, the date of the adjudication, and clearly state[d] that the court considered the evidence and adjudicated [the juvenile] delinquent as to the petition's allegation . . . beyond a reasonable doubt." *Id.* at 461, 742 S.E.2d at 245 (footnote omitted).

¶ 45 In the present case, the adjudication order included the date of Jeremy's offense, the offense, and the felony/misdemeanor classification of the offense in the following table:

Offense Date	Offense (with statute number	Date Petition Filed	F/M	Class	Status
11/01/2019	EXTORTION – 14.118.4	09/02/2020	F	Class A through I felony	X Delinq./Hearing

The adjudication order then includes the following written finding of fact:

> The following facts have been proven beyond a reasonable doubt: . . .
>
> At the hearing before the judge, the juvenile was found to be responsible for extortion in violation of 14-118.4.

¶ 46 The State contends that the details of the adjudication order in this case are most similar to the order in *In re K.C.* We disagree, and find the order in this case is materially distinguishable from *In re K.C.* The adjudication orders in *In re J.V.J.*, *In re K.C.*, and the present case all share language pre-printed on the adjudication form: "The following facts have been proven beyond a reasonable doubt". The order in *In re K.C.* reiterates the burden of proof in the language written after the pre-printed prompt, making it clear that, based upon evidence in the hearing, the trial court found the juvenile responsible beyond a reasonable doubt. The adjudication orders in *In re J.V.J.* and the present case rely solely on the pre-printed form language to comply with the requirements of section 7B-2411.

¶ 47 We hold that the findings of fact in the adjudication order in this case were insufficient to comply with section 7B-2411. Section 7B-2411 requires the trial court to affirmatively state the burden of proof in its

written findings, without regard to the pre-printed language on the form it chooses to use. The language in this case appears more thorough, but effectively states nothing more than the order stated in *In re J.V.J.*: a conclusory note that the juvenile was responsible for the offense charged. "As such, we remand this case to the trial court to make the statutorily mandated findings in [Jeremy's] adjudication order." *In re J.V.J.*, 209 N.C. App. at 741, 707 S.E.2d at 638.

E. Written Findings Required by Sections 7B-2512 and 7B-2501(c)

¶ 48 **[5]** Lastly, Defendant contends the "trial court erred by failing to make findings of fact to demonstrate that it considered each of the factors listed in [N.C. Gen. Stat. §] 7B-2501(c)."

¶ 49 In a juvenile delinquency action, "[t]he dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-2512 (2019). Additionally, N.C. Gen. Stat. § 7B-2501(c) instructs that "the court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon" five enumerated factors. N.C. Gen. Stat. § 7B-2501(c) (2019). "The plain language of Section 7B-2501(c) compels us to find that a trial court must consider each of the five factors in crafting an appropriate disposition." *Matter of I.W.P.*, 259 N.C. App. 254, 261, 815 S.E.2d 696, 702 (2018).

¶ 50 In this case, the trial court indicated in its disposition order that it received, considered, and incorporated by reference Jeremy's predisposition report, risks assessment, and needs assessment, and that it was "required to order a Level 1 disposition." The trial court used a disposition form which reminded it to state additional findings showing compliance with the five factors listed in N.C. Gen. Stat. § 7B-2501(c), but the trial court did not make any findings addressing the factors. *See In re V.M.*, 211 N.C. App. 389, 392, 712 S.E.2d 213, 215–16 (2011) (finding insufficient findings of fact under N.C. Gen. Stat. § 7B-2501(c) and remanding for a new dispositional hearing, based upon identical factual circumstances). The record on appeal includes Jeremy's predisposition report, risks assessment, and needs assessment that were incorporated by reference into the trial court's written disposition order, but these documents also do not sufficiently address each of the N.C. Gen. Stat. § 7B-2501(c) factors. *See I.W.P.*, 259 N.C. App. at 264, 815 S.E.2d at 704.

¶ 51 "[W]e hold the trial court's written order contains insufficient findings to allow this Court to determine whether it properly considered all of the factors required by N.C.G.S. § 7B-2501(c)." *V.M.*, 211 N.C. App. at

392, 712 S.E.2d at 216. "Accordingly, the dispositional order is deficient, and we remand for further findings of fact to address [each of the N.C. Gen. Stat. § 7B-2501(c) factors]." *I.W.P.*, 259 N.C. App. at 264, 815 S.E.2d at 704.

III. Conclusion

¶ 52 The petition in this case was not defective because North Carolina law does not require a charging instrument to name the specific identity of a victim to charge the crime of extortion. The trial court did not err by denying Jeremy's motion to dismiss because First Amendment jurisprudence did not require the State to show that Jeremy threatened unlawful physical violence, and because the evidence presented at trial did not fatally vary from evidence alleged in Jeremy's juvenile petition.

¶ 53 However, the trial court failed to include the burden of proof in its written adjudication order as required by N.C. Gen. Stat. § 7B-2411. We vacate and remand the trial court's adjudication order for additional findings of fact in compliance with section 7B-2411, if such findings are possible.

¶ 54 Because we vacate the adjudication order, we vacate the trial court's subsequent disposition order. Independent grounds also exist to warrant vacating and remanding the disposition order. Additionally, the trial court failed to make sufficient findings of fact showing that it considered each of the five factors listed in N.C. Gen. Stat. § 7B-2501(c). The trial court is permitted on remand to hold a new dispositional hearing to hear additional evidence as needed to appropriately consider the five N.C. Gen. Stat. § 7B-2501(c) factors.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judges ZACHARY and WOOD concur.

LEKIA MOYE-LYONS, PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION AND SEDGWICK CMS (THIRD PARTY ADMINISTRATOR), DEFENDANTS

No. COA21-486

Filed 19 April 2022

Workers' Compensation—jurisdiction—timeliness of filing—no tolling of limitations period

The Industrial Commission properly determined that it did not have jurisdiction over plaintiff's worker's compensation claim where the claim was filed more than eleven years after the alleged workplace injury (as a school tutor, plaintiff alleged that her mental health issues began as a result of receiving a letter denying her application for a teaching license). The Commission also correctly concluded that plaintiff was not entitled, pursuant to N.C.G.S. § 97-50, to the tolling of the two-year limitations period in N.C.G.S. § 97-24(a), based on voluminous record evidence supporting the Commission's findings and conclusion that, during the relevant period, plaintiff was not mentally incompetent and could manage her own affairs, even though she was later diagnosed with psychosis and was granted disability benefits as a result.

Appeal by Plaintiff from opinion and award entered 20 April 2021 by North Carolina Industrial Commission. Heard in the Court of Appeals 22 February 2022.

Perry & Associates, by Cedric R. Perry, for Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew E. Buckner, for Defendants-Appellees.

WOOD, Judge.

¶ 1 Plaintiff Lekia Moye-Lyons ("Plaintiff") appeals an opinion and award of the North Carolina Industrial Commission ("the Commission") denying Plaintiff's claim against the North Carolina Department of Public Instruction ("Defendant-Employer") and Sedgwick CMS ("Defendant-Carrier") (collectively, "Defendants") based on the Commission's conclusion that Plaintiff failed to file a timely claim under the Workers Compensation Act and that the Commission did not

acquire jurisdiction over Plaintiff's claim. After careful review, we affirm the Commission's opinion and award.

I. Factual and Procedural Background

¶ 2 On April 20, 2007, Plaintiff was employed by Edgecombe County Public Schools, a school district falling under the authority of Defendant-Employer, as a temporary part-time math tutor for sixth, seventh, and eighth grade students. During Plaintiff's employment as a tutor, Edgecombe County Schools did not require Plaintiff to take any additional classes to become a licensed teacher. Previously, Plaintiff worked as an "emergency" teacher for Halifax County Schools and Nash-Rocky Mount Schools, as she did not possess a teaching license. However, Plaintiff greatly desired and set as a personal goal to become a licensed math teacher.

¶ 3 During the course of her employment with Halifax County Schools and Nash-Rocky Mount Schools, Plaintiff sought to be licensed as a lateral entry math teacher through the Nash Regional Alternative Licensing Center ("NRALC"). To obtain a teaching license through NRALC, Plaintiff had to meet a number of requirements. Although Plaintiff obtained a degree in Business Administration and Management from Shaw University, she was required to obtain her teaching license through NRALC because she did not possess a degree in Mathematics. After taking several courses, Plaintiff believed that she had completed the necessary requirements to obtain her licensure in 2004.

¶ 4 On November 3, 2006, Plaintiff received a letter from NRALC indicating her application for licensure had multiple deficiencies and requiring her to complete additional steps to clear her lateral entry license. In this letter, NRALC advised Plaintiff's only choice in meeting the remaining conditions was to associate with a college or university that had an approved program in middle grades math and have that school evaluate Plaintiff's transcripts and set up a plan of study. This letter indicated that once Plaintiff completed the needed courses, the university she chose to attend would then be able to recommend Plaintiff for a clear teaching license. After receiving NRALC's November 3, 2006 letter, Plaintiff did not enroll in a college or university to finish meeting the remaining licensure requirements. As a result of receiving this letter, Plaintiff testified that she was "devastated" after not being licensed and felt "depressed" and "overwhelmed."

¶ 5 After the denial of her teaching license by NRALC, Plaintiff contends the letter caused her to have several alleged medical symptoms. Plaintiff alleged that while working for the Defendant-Employer on April

20, 2007, she suffered a stroke and subsequently developed Bell's Palsy due to stress she experienced after the denial of her teaching license. Plaintiff also alleged she began experiencing auditory disturbances "a few weeks later," that eventually lead to her diagnosis of schizophrenia in April 2009. Despite hearing beeping noises in the weeks following her alleged April 20, 2007 injuries, Plaintiff continued working for Edgecombe County Public Schools for an additional nine months to one year. During this time, Plaintiff continued to drive herself to work and home, took care of her children, made her meals, and paid her bills.

¶ 6 Documentation of Plaintiff's medical records indicate that Plaintiff first reported signs of mental health issues in 2009. During a medical appointment on March 17, 2009, Plaintiff described hearing voices coming from the TV, ceiling, and vents for several months. After being involuntarily committed to Coastal Plain Hospital on April 5, 2009 and readmitted on April 16, 2009, Plaintiff was diagnosed with psychosis, which involved a "fixed delusion of a plot against her by the school system and this is unfortunately likely to be a long-standing delusion which she had kept well under wraps." On April 29, 2009, Dr. William Oliver Mann, a board-certified psychiatrist, began treating Plaintiff for schizophrenia. Between April 4, 2009 and October 29, 2018, Plaintiff experienced issues related to her diagnosis of schizophrenia. During this period, Plaintiff professed to experiencing auditory hallucinations and delusions, and was the subject of multiple involuntary commitment proceedings instituted on April 4, 2009, October 21, 2012, and January 13, 2015. Plaintiff was also placed into inpatient hospitalization due to her mental health on four separate occasions: from April 5-9, 2009; April 16-29, 2009; October 21-November 2, 2012; and August 26- September 14, 2016. Plaintiff testified that between 2009 and 2017, she was hospitalized for a total of 250 days.

¶ 7 During this same period, Plaintiff applied repeatedly for Social Security Disability benefits through the Social Security Administration (SSA). Plaintiff filed applications on May 6, 2009, July 22, 2010, September 30, 2011, and March 6, 2013. In support of Plaintiff's first application, which was denied on August 14, 2009, Plaintiff submitted a "Function Report-Adult-Third Party" which was completed by her parents on July 27, 2009. The report stated that Plaintiff was living with her parents at the time, described her as "depressed," unable "to make rational decisions to care for children, properly without help," could not hold a job, unable to manage her checkbook, needed assistance taking her medication, but noted that she was taking a twice weekly community college course, was able to pay bills, cooked "about 5% of the time," and when prompted, helped with household chores.

¶ 8 While applying for disability benefits, Plaintiff executed several medical release forms to SSA and signed on her own behalf. On June 30, 2014, Plaintiff hired an attorney to represent her in the Social Security Disability claim and executed paperwork appointing him as her representative in the matter. On May 7, 2015, Plaintiff signed an "Advance Notification of Representative Payment," as SSA had determined that Plaintiff needed assistance in managing her benefits and designated Plaintiff's father as her representative payee. By signing this document, Plaintiff indicated that she understood she had sixty days to appeal SSA's appointment of a representative payee and the identity of the representative payee. Plaintiff was initially approved for Social Security Disability benefits on April 22, 2015 for schizophrenia, mood swings, myalgia, and neuralgia, with SSA determining that Plaintiff became disabled as of October 21, 2012. Plaintiff appealed the date of her disability to SSA's Office of Disability Adjudication and Review and was ultimately approved for full benefits on May 11, 2017, with her date of disability modified to September 1, 2010.

¶ 9 On October 29, 2018, Plaintiff initiated a claim for workers' compensation benefits by filing a Form 18 *Notice of Accident to Employer and Claim of Employee, Representative, or Dependent* for her alleged 2007 workplace injuries. At an April 25, 2019 hearing before Deputy Commissioner Kevin Howell on this claim, Plaintiff, appearing *pro se*, confirmed that she had not previously filed any workers' compensation claim for these injuries. At this hearing, a claims adjuster for Defendant-Carrier confirmed that Defendant-Carrier had not authorized any payment of indemnity or medical compensation to Plaintiff in relation to this claim.

¶ 10 On June 14, 2019, the Deputy Commissioner issued an opinion & award dismissing Plaintiff's claim with prejudice, determining that Plaintiff did not file her workers' compensation claim in a timely manner. While still proceeding *pro se*, Plaintiff appealed to the Full Commission. Prior to the matter being heard before the Full Commission, Plaintiff retained counsel and moved the Commission to amend the Record and accept new evidence. On December 19, 2019, the Full Commission issued an order directing Plaintiff to produce to Defendants, and file with the Commission, the complete set of SSA medical documentation and other records from the 2017 hearing before the Office of Disability Adjudication and Review. Plaintiff was also ordered to subpoena any involuntary commitment records from the appropriate county clerk of court.

¶ 11 On April 20, 2021, the Full Commission issued its opinion & award, concluding that Plaintiff's claim was not timely filed, was not entitled to

the tolling of the two-year limitations period pursuant to N.C. Gen. Stat. § 97-24 because Plaintiff was not mentally incompetent between April 20, 2007 to April 20, 2009, and that the Commission did not properly acquire jurisdiction over Plaintiff's claim. The Commission further concluded that even "assuming, arguendo, that Plaintiff became mentally incompetent" on April 4, 2009, the date of her first involuntary commitment, "the Full Commission concludes that she was no longer mentally incompetent by 11 November 2009, the date when her treating psychiatrist deemed her able to return to work and provide instruction to children as young as twelve years old." The Commission's conclusions were based in part upon a letter Plaintiff provided from Dr. Mann, dated November 11, 2009, which stated:

> You have requested me to determine whether or not you are capable of returning to work on a part time basis. I have been treating [you] since 4/29/2009 for schizophrenia. This condition has improved significantly, and you are stable for the last several months. You have been compliant with treatment. It is my medical opinion that you are capable of returning to part time work at this time. Although it is difficult to determine if and when you may become sick again, as long as you remain on medication, follow up with your treatment and see me every 6 weeks to monitor for any breakthrough symptoms, I see no reason to keep you from working at this time . . . It is my medical opinion that your condition does not prevent you from tutoring children as young as 12 years old.

The Commission further held that Plaintiff did not present sufficient competent evidence to establish that she was mentally incompetent at any point after November 11, 2009, so that any tolling of N.C. Gen. Stat. § 97-24 expired as of that date. The Commission dismissed Plaintiff's claim with prejudice. Plaintiff filed notice of appeal to this Court on May 18, 2021.

II. Appellate Jurisdiction

¶ 12 The ruling of the Full Commission dismissing Plaintiff's claim with prejudice is a final decision and appeal lies to this Court pursuant to N.C. Gen. Stat. § 7A-29.

III. Discussion

¶ 13 On appeal, Plaintiff contends that despite not filing a workers compensation claim within two years of April 20, 2007, the Commission

erred in its finding of her claim being time barred and dismissing her claim for want of jurisdiction. Plaintiff argues her claim should not be barred because Plaintiff became mentally incompetent after the alleged April 20, 2007 incident, thus qualifying her claim to the tolling of the N.C. Gen. Stat. § 97-24's two-year limitation period. Plaintiff's arguments will each be addressed in turn.

A. Standard of Review

¶ 14 The primary issue presented to this Court is whether Plaintiff timely filed her claim, and thereby, invoked the jurisdiction of the Commission over her April 20, 2007 alleged injury. Our Court has established that "the timely filing of a claim for compensation is a condition precedent to the right to receive compensation and failure to file timely is a jurisdictional bar for the Industrial Commission." *Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 86, 401 S.E.2d 138, 140 (1991). "Whether a party timely filed a claim with the Commission is a question of jurisdiction . . . ." *Cunningham v. Goodyear Tire & Rubber Co.*, 273 N.C. App. 497, 503, 849 S.E.2d 880, 885 (2020). As this Court explained in *Capps v. Southeastern Cable*, the finding of a jurisdictional fact by the Commission "is not conclusive upon appeal even though there be evidence in the record to support such finding. The 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." 214 N.C. App. 225, 226-27, 715 S.E.2d 227, 229, (2011) (citation omitted). As such, this Court is tasked to review the entire record *de novo*. *Morales-Rodriguez v. Carolina Quality Exteriors, Inc.*, 205 N.C. App. 712, 715, 698 S.E.2d 91, 94 (2010).

¶ 15 "This Court makes determinations concerning jurisdictional facts based on the greater weight of the evidence" by assessing the credibility of the witnesses and the weight to be given their testimony and by weighing the evidence "using the same tests as would be employed by any fact-finder in a judicial or quasi-judicial proceeding." *Cunningham*, 273 N.C. App. at 503-04, 849 S.E.2d at 885 (first quoting *Capps*, 214 N.C. App. at 227, 715 S.E.2d at 229; and then quoting *Morales-Rodriguez*, 205 N.C. App. at 715, 698 S.E.2d at 94).

B. The Commission's Jurisdiction over Plaintiff's claim

¶ 16 Pursuant to N.C. Gen. Stat. § 97-24(a), a claim is:

> forever barred unless (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation

> as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article. The provisions of this subsection shall not limit the time otherwise allowed for the filing of a claim for compensation for occupational disease in G.S. 97-58, but in no event shall the time for filing a claim for compensation for occupational disease be less than the times provided herein for filing a claim for an injury by accident.

N.C. Gen. Stat. § 97-24(a) (2021). This requirement of "filing a claim within two years of the accident is not a statute of limitation, but a condition precedent to the right to compensation." *Reinhardt*, 102 N.C. App. at 84, 401 S.E.2d at 139 (citation omitted). The Commission's dismissal of a claim "is proper where there is an absence of evidence that the Industrial Commission acquired jurisdiction by the timely filing of a claim or by the submission of a voluntary settlement agreement to the Commission." *Id.* at 86-87, 401 S.E.2d at 140-41.

¶ 17 Plaintiff acknowledges that she did not file her worker's compensation claim with the Commission within the two years after her alleged April 20, 2007 injury, and in fact, filed her claim in 2018, more than eleven years after the injury. The Record further reflects that based on the testimony of Defendant's claims adjuster, the Defendant-Carrier never paid indemnity or medical compensation to the Plaintiff in relation to her claim. Additionally, no evidence in the Record reflects Plaintiff and Defendant-Employer ever submitting a voluntary settlement agreement in connection to Plaintiff's claim. Applying N.C. Gen. Stat. § 97-24(a) to the facts of this case, Plaintiff did not meet this condition precedent of a timely filing of her claim for the jurisdiction of the Commission to be invoked. Therefore, if Plaintiff's claim does not qualify for tolling of N.C. Gen. Stat. § 97-24's two-year limitation period, the dismissal of her claim is proper and the right to compensation is barred. *Id.*

C. Mental Incompetency of Plaintiff Affecting Commission's Jurisdiction

¶ 18 Despite her untimely filing to the Commission, Plaintiff contends that her claim is not time barred under N.C. Gen. Stat. § 97-24(a) because

she was mentally incompetent within the meaning of N.C. Gen. Stat. § 97-50. In spite of N.C. Gen. Stat. § 97-24(a)'s two year time limitation, N.C. Gen. Stat. § 97-50 makes clear that there is no time limitation "provided in this Article for the giving of notice or making claim under this Article [that] shall run against any person who is mentally incompetent." N.C. Gen. Stat. § 97-50 (2021); *Hand v. Fieldcrest Mills, Inc.*, 85 N.C. App. 372, 377-78, 355 S.E.2d 141, 145 (1987).

¶ 19 To qualify for the tolling protections of N.C. Gen. Stat. § 97-50, a mentally incompetent adult is one "who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C. Gen. Stat. § 35A-1101(7) (2021); *In re Z.V.A.*, 373 N.C. 207, 210, 835 S.E.2d 425, 428 (2019). As such, the determination of incompetency is an adjudication process as Chapter 35A lays out that its provisions establish "the exclusive procedure for adjudicating a person to be an incompetent adult." N.C. Gen. Stat. § 35A-1102 (2021); *In re Dippel*, 249 N.C. App. 610, 612, 791 S.E.2d 684, 686 (2016).

¶ 20 Prior to the Full Commission's hearing, the Plaintiff has never undergone the mandatory procedure to be adjudged incompetent under the provisions of N.C. Gen. Stat. § 35A-1101. However, we note that the Commission possesses the authority to determine whether Plaintiff was mentally incompetent during the two-year time limitation laid out in N.C. Gen. Stat. § 97-24(a). *See Hand*, 85 N.C. App. at 378-79, 355 S.E.2d at 145.

¶ 21 In deciding whether someone is incompetent as defined by N.C. Gen. Stat. § 35A-1101, "[t]he appropriate test for establishing an adult incompetent 'is one of mental competence to *manage one's own affairs*.' " *Soderlund v. Kuch*, 143 N.C. App. 361, 373, 546 S.E.2d 632, 640 (2001) (quoting *Cox v. Jefferson-Pilot Fire and Casualty Co.*, 80 N.C. App. 122, 125, 341 S.E.2d 608, 610 (1986)). In explaining the term "affairs," our Supreme Court elaborated that it encompasses "a person's entire property and business — not just one transaction or one piece of property to which he may have a unique attachment." *Hagins v. Redevelopment Comm.*, 275 N.C. 90, 104, 165 S.E.2d 490, 499 (1969). In the adjudication of competency, "[t]he facts in every case will be different and competency or incompetency will depend upon the individual's 'general frame and habit of mind.' " *Id.* at 105, 165 S.E.2d at 500 (citation omitted). However, "mere weakness of mind will not be sufficient to put a person among those who are incompetent to manage their own affairs." *Id.* (citation omitted).

¶ 22 Here, the Full Commission concluded that Plaintiff's claim was jurisdictionally barred because Plaintiff did not file a claim within two years of April 20, 2007 and Plaintiff was not mentally incompetent during the relevant time, which would have qualified her for a tolling of N.C. Gen. Stat. § 97-24(a)'s two-year timeframe. Plaintiff challenges findings of fact 27 and 29 as well as conclusion of law 6 concluding Plaintiff was not mentally incompetent and therefore, not entitled to the tolling of N.C. Gen. Stat. § 97-50. Plaintiff contends that because she (1) experienced symptoms and her diagnosis of schizophrenia was the subject of several involuntary commitment proceedings, and (2) was awarded full Social Security Disability benefits, the Commission erred when it concluded she had not established mental incompetency within the required time period to qualify for the tolling exemption.

1. Finding of Fact 27

¶ 23 Plaintiff challenges the Commission's finding of fact 27 that states:

> 27. Based upon a preponderance of the evidence, the Full Commission finds that Plaintiff has not shown sufficient evidence to establish that she was mentally incompetent during the two-year limitations period following her alleged 20 April 2007 workplace injury. Although Plaintiff was involuntarily committed on 5 April 2009 and again on 16 April 2009, the Full Commission finds that these incidents are insufficient, on their own, to show that Plaintiff was incapable of managing her own affairs between 20 April 2007 and 20 April 2009, as involuntary commitment and incompetency proceedings are statutorily distinct and involve different legal standards. The record contains no evidence that Plaintiff has ever been declared incompetent by the General Court of Justice. To the contrary, the records Plaintiff submitted to the Commission indicate that she was undergoing treatment, was taking her medication, and was generally considered to be in stable psychological condition for several years following her 2009 hospitalizations, and indeed was not hospitalized again until 21 October 2012, over three and a half years after her previous involuntary commitment. Moreover, Plaintiff remained legally capable of signing medical records releases and attorney-client agreements as late as 11 August 2014, over five years after her first involuntary commitment.

¶ 24 As we have previously noted, the Record reflects that Plaintiff has never been adjudicated as mentally incompetent or that there have been incompetency proceedings instituted against her. In preparation for her hearing before the Full Commission, Plaintiff submitted 1,289 pages of documents featuring medical records dating back to 2001. A close review of the Record indicates that in the two years spanning April 20, 2007 to April 20, 2009, Plaintiff possessed the frame of mind to manage her own affairs and to make or communicate important decisions regarding her person, family, or property. *See id.* at 105-06, 165 S.E.2d at 500. Plaintiff acknowledged that even after the alleged April 20, 2007 injury, she continued working for Defendant-Employer for the next nine months to one year. During her employment, Plaintiff drove herself to and from work, prepared meals, took care of her children, and paid her bills.

¶ 25 Continuing our review of the Record, we note the absence of any medical documentation tending to show that Plaintiff suffered from a psychiatric illness between April 20, 2007 and March 17, 2009. Instead, the Record demonstrates that Plaintiff underwent treatment for a hypertensive episode following the birth of a child on April 15, 2007 and on May 28, 2007 for tingling in the teeth and gums intermittently. Later, on June 29, 2007, the Plaintiff underwent a tubal ligation surgery. At these medical appointments and procedures, the Plaintiff reported "no previous psychiatric history" and did not endorse any psychiatric symptoms.

¶ 26 The Record also reflects Plaintiff's documented experience of having psychiatric issues on March 17, 2009, where Plaintiff reported auditory hallucinations to a physician. Plaintiff was assessed to have schizophrenia but was noted to possess an intellect within normal limits, and to not be a danger to herself or others. In April 2009, Plaintiff was hospitalized on two separate occasions at Coastal Plain Hospital, where she received a diagnosis of psychosis. The Record demonstrates that even during Plaintiff's involuntary hospitalizations, she actively participated in her treatment while hospitalized. During Plaintiff's April 16-29, 2009 hospitalization, Plaintiff expressed concerns of excessive sedation from her medications, at which point Plaintiff agreed to taking another medication to address this issue. At her April 30, 2009 discharge, Plaintiff's medical document stated, Plaintiff "was felt to be stable medically and psychiatrically at the time of discharge with the patient exhibiting no behavior consistent with wish to harm herself or others." While it is notable that Plaintiff experienced exacerbations of her psychiatric condition during these periods, Plaintiff still was able to manage her own affairs and make important decisions regarding her person and

her affairs during her inpatient admissions. The Record tends to show that by November 11, 2009, Plaintiff's psychiatric state had improved considerably. As noted previously, Plaintiff's psychiatrist, Dr. Mann, found Plaintiff to be stable and capable of returning to work.

¶ 27 The Record shows that Plaintiff's mental competency continued as she actively underwent treatment, medication management, physician follow-up and remained in stable psychological condition for several years following her 2009 hospitalizations. Between 2009 and 2010, Plaintiff's mental status exams remained consistent in reporting normal speech, unremarkable thought content, denying any hallucinations, and attending individual and group therapy. Plaintiff was not hospitalized again for her psychosis until October 21, 2012, over three and a half years after her previous involuntary commitment.

¶ 28 Additionally, Plaintiff executed medical release forms on September 21, 2010, November 27, 2011, April 1, 2013, June 30, 2014, and August 11, 2014 which permitted SSA to request medical records on her behalf. On June 30, 2014, Plaintiff also entered into an agreement with an attorney to represent her in the Social Security Disability claim. As a result, the undisputed Record evidence tends to show that Plaintiff remained legally capable of managing her own affairs when entering into these agreements.

¶ 29 Plaintiff contends that this Court should consider the incompetency proceedings she underwent between 2009 to 2015 in determining that she was mentally incompetent during the two-year period after the alleged April 20, 2007 workplace injury. We disagree. Involuntary commitment proceedings and the determination of mental incompetency are two different proceedings and require separate legal standards. Involuntary commitment proceedings determine whether an individual is a danger to themselves or others, or requires treatment in order to prevent a further disability or deterioration that would result in dangerousness. N.C. Gen. Stat. § 122C-261(a) (2021); *In re Webber*, 201 N.C. App. 212, 217, 689 S.E.2d 468, 473 (2009); *Gregory v. Kilbride*, 150 N.C. App. 601, 612, 565 S.E.2d 685, 693 (2002).

¶ 30 In contrast, an incompetency proceeding determines whether an adult has the capacity to manage their own affairs or make or communicate important decisions regarding their person, family, or property. *See* N.C. Gen. Stat. § 35A-1101(7); *In re Dippel*, 249 N.C. App. at 612, 791 S.E.2d at 686; *Leonard v. England*, 115 N.C. App. 103, 107-08, 445 S.E.2d 50, 52 (1994). Our General Assembly defines the distinction between the two proceedings as,

> [t]he admission or commitment to a facility of an individual who allegedly has a mental illness. . . or an individual who allegedly has an intellectual or other developmental disability under the provisions of this Article shall in no way affect incompetency proceedings as set forth in Chapter 35A . . . of the General Statutes and incompetency proceedings under those Chapters shall have no effect upon admission or commitment proceedings under this Article.

N.C. Gen. Stat. § 122C-203 (2021). Therefore, we conclude that the initiation of involuntary commitment proceedings against Plaintiff in 2009, 2012, and 2015 is not determinative of her mental competence in her 2007 workers compensation claim.

2. Finding of Fact 29

¶ 31 Next, Plaintiff challenges the Full Commission's finding of fact that the SSA's decisions related to Plaintiff do not establish Plaintiff as being mentally incompetent during the period of time between the time of the alleged workplace injury and when she filed the workers compensation claim at issue here. The Commission's finding of fact 29 states:

> Based on a preponderance of the evidence, the Full Commission finds that neither the 2017 SSA Fully Favorable Decision that Plaintiff was disabled as of 1 September 2010 nor the 2015 appointment of a representative payee for Plaintiff's SSA disability benefits establish that Plaintiff was mentally incompetent under North Carolina state law at any point during the relevant period.

Plaintiff argues that the Commission erred by not placing a greater weight on the evidence contained in SSA's documentation pertaining to its 2017 Fully Favorable Decision. Plaintiff contends that SSA's decision was based on her "longitudinal medical history" and her records since 2008, and that these records should serve as "decisive evidence in this proceeding." Again, we disagree. The Industrial Commission has the duty to "consider *all* of the competent evidence, make *definitive* findings, draw its conclusions of law from these findings, and enter the appropriate award." *Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980).

¶ 32 The Record tends to show that the Commission considered and weighed the fully favorable decision of SSA awarding Plaintiff Social

Security Disability benefits as well as the 1,289 pages of medical documentation from Plaintiff's packet to SSA that were submitted to the Commission. The Record indicates that the Commission addressed in its findings of fact the decision of the administrative law judge from the Social Security Administration's Office of Disability Adjudication and Review, noting that the Plaintiff successfully appealed the date of her disability so that she was granted disability benefits as of September 1, 2010. The administrative law judge found that Plaintiff had not engaged in substantial gainful activity after September 1, 2010 because of her schizophrenia and that Plaintiff possessed "the residual functional capacity to perform a full range of work," but that Plaintiff is unable to make a successful vocational transition to other jobs that she could perform.

¶ 33 Despite SSA's fully favorable decision for the Plaintiff and its appointment of a representative payee for the Plaintiff, Defendant-Employer contends that the determination of mental incompetency pursuant to N.C. Gen. Stat. § 35A-1101 considers different legal standards and principles than the ascertainment of Social Security Disability benefits pursuant to 42 U.S.C. § 416(i).

¶ 34 The Commission concluded that although Plaintiff was disabled as of September 1, 2010, SSA's determination was based upon federal statutes and regulations, rather than North Carolina state law. In reliance on 42 U.S.C. § 416(i), the Commission explained that the determination of whether an individual is "disabled" and entitled to the benefits of Social Security rests on whether the individual is capable of gainful employment. *See* 20 C.F.R. § 404.1572 (2021).

¶ 35 In evaluating the evidence in the Record, the Commission looked to the logic of this Court's finding in *Hand* that while the ability to work may be part of the determination of mental incompetency under N.C. Gen. Stat. § 35A-1101, it is not dispositive and other factors may be considered. *See Hand*, 85 N.C. App. at 378-79, 355 S.E.2d at 145 (holding that the record contained evidence which supported the Commission's finding that Plaintiff was not incompetent and her untimely workers compensation claim was barred because, among other factors, Plaintiff continued in her job, which required physical and mental dexterity, understood her pay scale and contested the amount when she thought it was too low.).

¶ 36 Thus, we hold that the evidence of SSA's Fully Favorable Decision of Plaintiff's disability supports the Commission's finding that Plaintiff was not mentally incompetent under North Carolina law during the time in question.

¶ 37 Next, Plaintiff contends the Commission erred in not placing greater weight on SSA's assignment of a representative payee for Plaintiff on May 7, 2015, in relation to Plaintiff's claim for Social Security Disability benefits. The Record does not, however, contain any evidence tending to show that the Commission is bound by SSA's determination, nor that SSA's assignment is dispositive evidence of Plaintiff being mentally incompetent under North Carolina Law. (citing *Program Operations Manual System (POMS) GN 00501.010(B)(8)*, Soc. Sec. Admin, https://secure.ssa.gov/apps10/poms.nsf/lnx/0200501010 (last visited Apr. 10, 2022)). The Commission found that SSA's regulations and rules articulate that a determination of incapability "is a DECISION BY SSA that a claimant is unable to manage or direct the management of benefits in his/her best interests" and that "an incapability decision is valid only for SSA matters." *Id.*

¶ 38 SSA defines a "legally competent adult" as an individual who "has not been found to be legally incompetent by a court of law" and "may include an adult who SSA has determined is incapable of managing or directing the management of funds." *Id.* Although SSA determined Plaintiff is unable to manage her benefits and requires a representative payee, under SSA's regulations and in the absence of an adjudication of incompetence, Plaintiff qualifies as a legally competent adult. *See* 42 U.S.C. § 405(j)(1)(A) (2021); N.C. Gen. Stat. § 35A-1102.

¶ 39 Based on the greater weight of the evidence, we conclude that SSA's 2017 fully favorable decision for Social Security Disability benefits and the 2015 Representative Payee Appointment does not establish that Plaintiff was mentally incompetent under North Carolina state law.

3. Conclusion of Law 6

¶ 40 Finally, Plaintiff challenges the Commission's conclusion of law that "[b]ased on the foregoing findings of fact, the Full Commission concludes that between 20 April 2007 and 20 April 2009, Plaintiff was capable of managing her own affairs and as such, was not mentally incompetent."

¶ 41 As previously discussed, the Commission's function is "to *weigh and evaluate* the *entire* evidence and determine as best it can where the truth lies." *Harrell*, 45 N.C. App. at 205, 262 S.E.2d at 835 (citation omitted). In reaching its conclusion, the Commission relied on its findings discussed herein. The Commission weighed and evaluated the entire Record, including the 1,289 pages of documentation featuring Plaintiff's medical records, the decisions made by SSA in awarding Plaintiff Social Security Disability benefits, and Plaintiff's involuntary commitment proceedings and hospitalizations. For these reasons, we hold that the greater weight

of the evidence demonstrates that Plaintiff was not mentally incompetent during the two-year period after her alleged work injury.

IV. Conclusion

¶ 42 After a careful examination of the Record before us, we conclude because Plaintiff failed to file a timely claim and does not qualify for tolling of N.C. Gen. Stat. § 97-24's two-year limitation period, Plaintiff's claim was time-barred and the Commission did not err when it dismissed her claim for lack of subject matter jurisdiction. *Reinhardt*, 102 N.C. App. at 86-87, 401 S.E.2d at 140-41. The opinion and award of the Full Commission in this matter is affirmed.

AFFIRMED.

Chief Judge STROUD and Judge ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
JUAN CARLOS BENITEZ, DEFENDANT

No. COA20-766

Filed 19 April 2022

Confessions and Incriminating Statements—by juvenile—Miranda rights—knowing and voluntary waiver—sufficiency of findings—expert testimony unnecessary

In a juvenile defendant's prosecution for murder, where the trial court's order denying defendant's motion to suppress his statements to police was remanded on appeal for further factual findings, the court's order denying the motion on remand was affirmed where the court's findings properly addressed the key factors—as identified in N.C.G.S. § 7B-2101(d)—in determining whether defendant knowingly and voluntarily waived his *Miranda* rights during his police interrogation. The court did not need expert testimony to support its findings where they were otherwise supported by competent evidence and where the court adequately explained how it had determined the weight and credibility of all the evidence. Further, the State was not required to affirmatively establish through expert testimony that defendant did in fact understand his *Miranda* warnings.

STATE v. BENITEZ

[283 N.C. App. 40, 2022-NCCOA-261]

Appeal by defendant from judgment entered on or about 20 May 2013 by Judge Douglas B. Sasser and order entered on or about 8 August 2019 by Judge C. Winston Gilchrist in Superior Court, Lee County. Heard in the Court of Appeals 16 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant appeals a trial court order entered upon remand which denied his motions to suppress. On remand, the trial court properly conducted review as directed by *State v. Benitez*, 258 N.C. App. 491, 813 S.E.2d 268 (2018), addressed the totality of the circumstances relevant to defendant's statements to law enforcement, and concluded defendant knowingly and voluntarily waived his *Miranda* rights. We therefore affirm the trial court's order denying defendant's motions to suppress.

I. Procedural Background

¶ 2 This case has a lengthy procedural history with the trial court, this Court, and the Supreme Court. *See State v. Benitez*, 258 N.C. App. 491, 813 S.E.2d 268 (2018) ("*Benitez I*").[1]

A. Prior *Benitez I* Appeal

¶ 3 The procedural background in this case was provided in *Benitez I*:

> After the denial of his motions to suppress, defendant pled guilty to first degree murder; he appealed and also filed a motion for appropriate relief with this Court. In 2014, this Court allowed defendant's

1. We note that there was also a *State v. Benitez*, 810 S.E.2d 781 (N.C. App. 2018), opinion filed on 6 February 2018. The 6 February 2018 opinion was withdrawn prior to the issuance of the Court's mandate by order entered 19 February 2018, and replaced with *State v. Benitez*, 258 N.C. App. 491, 813 S.E.2d 268 (2018), filed on 20 March 2018. It is unclear to this Court why the withdrawn February 2018 opinion was published in West's South Eastern Reporter. Regardless, the March 2018 opinion is the official opinion of this Court as "[t]he North Carolina Reports and the North Carolina Court of Appeals Reports remain the official reports of the opinions of the Supreme Court of North Carolina and of the North Carolina Court of Appeals, respectively." Administrative Order Concerning the Formatting of Opinions and the Adoption of a Universal Citation Form, 373 N.C. 605 (2019).

> motion for appropriate relief, reversed the denial of his motions to suppress, and vacated his judgment. The State petitioned the Supreme Court for discretionary review and ultimately that Court vacated this Court's opinion and ordered that defendant's motion for appropriate relief be remanded for consideration by the trial court. On remand, the trial court denied defendant's motion for appropriate relief. Defendant now appeals the denial of his motion for appropriate relief.

Id. at 492, 813 S.E.2d at 270.

¶ 4 In *Benitez I*, we addressed defendant's motion for appropriate relief ("MAR") and motions to suppress. *See id.*, 258 N.C. App. 491, 813 S.E.2d 268. As to the MAR, we affirmed the trial court's ruling to deny that motion. *See id.* As to the motions to suppress, we remanded:

> Because the trial court failed to address the key considerations in determining whether defendant had knowingly and intelligently waived his rights during police interrogation, we must remand the order denying defendant's motion to suppress for further findings of fact. We note that both the State and defendant have already presented evidence regarding these issues, but if either the State or defendant should request that the trial court allow presentation of further evidence or argument on remand, the trial court may in its sole discretion either allow or deny this request.

Id. at 515, 813 S.E.2d at 283.

B. Trial Court Order Upon Remand from *Benitez I*

¶ 5 Thus, on or about 8 August 2019, the trial court again considered defendant's motions to suppress. The trial court noted that "[n]either the State nor the [d]efendant chose to submit additional evidence[.]" Ultimately, regardless of the extensive procedural history of this case, the only issue presently before this Court is the 2019 order denying defendant's motions to suppress, which was based solely upon evidence from prior hearings, and entered on remand for the trial court to address "the key considerations in determining whether defendant had knowingly and intelligently waived his rights during police interrogation[.]" *Id.*

¶ 6 The trial court began its order by incorporating two findings of fact from its prior orders and evidence:

> 1. This Court's prior order entitled, "ORDER DENYING MOTIONS TO SUPRESS STATEMENT", signed on December 13, 2012 is hereby incorporated by reference in its entirety.
>
> 2. Evidence admitted at the hearing on Defendant's capacity to proceed, held on May 2nd and 3rd 2012, was stipulated into evidence by the parties at the October 4, 2012 hearing on Defendant's Motion to Suppress Statement.

¶ 7 The trial court then made findings of fact regarding the circumstances of defendant's statement to law enforcement:

> 1. Defendant was in custody at the Lee County Sheriff's Office when he made his statement through the interpreter with his uncle present.
>
> 2. The length of Defendant's interrogation was just under two and one half (2 ½) hours in that he was advised of his rights under NCGS § 7B-2101 at 10:30 p.m. on August 1, 2007 and his typed, signed statement was completed at 12:56 a.m. on August 2, 2007.
>
> 3. There was no credible evidence that the Defendant was tired or fatigued during the time that he was questioned and made his statement.
>
> 4. In the making and reviewing of his statement, the Defendant related a consistent version of events.
>
> 5. The interpreter, Celinda Carney, had experience in working with children at the local domestic abuse shelter.
>
> 6. Defendant understood all questions asked and statements made to him. Defendant responded coherently to all questions. The interpreter present during Defendant's interrogation accurately translated the juvenile Miranda rights given into Spanish for Defendant. The interpreter accurately translated the questions asked of Defendant as well as all of Defendant's statements. The interpreter experienced no difficulty in translating for Defendant.
>
> 7. Defendant was never threatened, coerced or otherwise harassed and all conversations were done in a conversational tone without yelling.

¶ 8 The trial court then made several findings of fact about defendant's background, education, and experience:

> 8. Defendant was born in El Salvador, Central America and came to the United States in 2005. Defendant was transported to the United States at the behest of his family by a "coyote", a person hired to smuggle undocumented immigrants into the United States. Defendant experienced physical abuse while living in El Salvador. Defendant reported receiving blows to the head in El Salvador.
>
> 9. At the time the Defendant gave his statement, while still in his thirteenth (13th) chronological year, he was actually just two (2) months and a day shy of his fourteenth (14th) birthday.
>
> 10. After coming to the United States, the Defendant had been enrolled in and attending public school in the English as a Second Language program in Lee County, North Carolina for at least one (1) year.
>
> 11. In a school setting for ESL (English as a Second Language), prior to interrogation, Defendant responded to simple directions with appropriate actions.
>
> 12. Two (2) months prior to making his statement the Defendant had been promoted to the eighth (8th) grade, a grade level appropriate for his age. In the school year before this incident, Defendant achieved grades of 70 or above in Language Arts 7, Math 7, Art, Technology and Health and P.E. Notes for one of Defendant's classes contained in Defendant's school records for 2007, the year of this offense, state that "This student does not pay attention during class." During the 2006-2007 school year, Defendant exhibited poor disciplinary behavior, such as disrespecting his teachers, use of profanity, calling a female student a bitch, touching a female student's buttocks, tripping another student and skipping class. Defendant was placed in in-school suspension four times and out of school suspensions were imposed three times during the 2006-2007 school year. Defendant's conduct likely affected his school performance to some degree.

> 13. Defendant reported to Dr. Bartholomew that he had been "caught in a stolen car with a friend" in a prior incident which occurred before his arrest for first degree murder in the case at bar and that he had received criminal charges as a result. However, there is no credible evidence before the court that Defendant was advised of his Miranda rights for any prior incidents.
>
> 14. Defendant was riding a bicycle alone on or near a street outside the mobile home park where he lived when he was first encountered by law enforcement on August 1, 2007.
>
> 15. Defendant has exhibited manipulative behavior that was goal oriented and rewarding to him.

¶ 9 The trial court then made findings regarding defendant's mental state, mental capabilities, and his intelligence level:

> 16. Defendant had Intelligence Quotient (IQ) scores of 44, 60 and 65 from a number of IQ tests and screenings. However, the score of 44 was inconsistent with the other evidence of Defendant's intellectual or cognitive abilities and did not reflect Defendant's actual level of intelligence or intellectual function. Defendant's full scale IQ score on the Wechsler Adult Intelligence scale Mexican version (administered in Spanish) was 60. No examiner conducted a credible formal assessment of Defendant's adaptive skills.
>
> 17. Dr. Antonio Puente, Ph. D., an expert witness called on behalf of Defendant, opined that Defendant was "mildly retarded".
>
> 18. The totality of the credible evidence does not support a finding that Defendant suffered from significant limitations in adaptive functioning in two or more adaptive skill areas. The totality of the credible evidence does not support a finding that Defendant had significant limitations in communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills or work skills at the time he was questioned by law enforcement.

19. Dr. Richard Rumer, Ph. D., who was recognized as an expert in forensic and clinical psychology, credibly testified that Defendant did not "function in the extremely low range of functioning." Dr. Rumer credibly testified that Defendant was not "mentally retarded" or intellectually disabled. Among other things, Defendant scored an 84, at the 17th percentile for his chronological peers, on a subtest of on-verbal intelligence.

20. The trial court carefully observed the demeanor of Dr. Puente and considered the time frame and context of his evaluations and testing. Some of Dr. Puente's testimony on behalf of Defendant was exaggerated or inaccurate. His opinions lacked credibility.

21. Among other things, Dr. Puente testified that the results of his testing of Defendant reflected Defendant lacked "the ability to understand English at all." This opinion was contradictory to credible evidence regarding Defendant's ability to understand some English at the time of his arrest. Dr. Puente's opinion was not credible.

22. Among other things, Dr. Puente stated that Defendant's "understanding of Spanish was very rudimentary", that his comprehension of Spanish, the Defendant's native tongue, "was closer to about pre-kindergarten levels" and that "he barely knew Spanish". These conclusions by Dr. Puente were contradicted by the totality of the credible evidence presented. These conclusions by Dr. Puente were not credible.

23. Dr. Puente's own testimony showed that by one measure, Defendant's spoken vocabulary, his ability to say words, was as high as fifteen years of age.

24. Defendant exhibited "varied" and "less than optimal" effort during the testing done by Dr. Puente. Defendant also exhibited inconsistent effort during testing performed by Dr. Rumer, one of the State's experts. For example, during testing Defendant sometimes answered more difficult items correctly, only to answer easier test questions incorrectly. Defendant's

less than optimal effort during testing contributed to lowering his scores on the tests administered by the experts examining him.

25. There is no credible evidence that Defendant experienced or exhibited delusions, hallucinations or distractions by internal stimuli such as psychotic ideas or thought disorder. Further, Defendant was not incoherent or disoriented.

26. There was no credible evidence that at the time the Defendant made his statement he was under the influence of any impairing substance. Defendant was prescribed Zoloft, an antidepressant, months after his interrogation and after being held in secure custody on a first degree murder charge for a substantial period of time. There is no credible evidence before the court the Defendant suffered from depression or any other mental health disorder not otherwise specifically addressed in these findings at the time of his interrogation.

27. David Bartholomew, a psychiatrist and medical doctor at Central Regional Hospital, testified as an expert in forensic psychiatry with a subspecialty in child adolescent psychiatry. Dr. Bartholomew examined Defendant in 2008. Bartholomew focused on Defendant's understanding of the criminal legal process and the roles of various participants in that process. In response to Bartholomew's questioning Defendant, then at the age of fifteen, knew that he was charged with first degree murder, that he was accused of killing someone, that this was a serious charge and that he could receive life in prison for murder if treated as an adult. He understood that he could receive less severe punishment if treated as a juvenile. Defendant knew the difference between a person who was "guilty" and one who was "not guilty". Defendant understood the role of witnesses in trials. He understood that various forms of evidence might support opposing arguments in a case. He knew that the district attorney presented information against a defendant, and that Defendant's lawyer's job was to present information on his behalf and to assist

> Defendant in his case. Defendant understood that a defendant can potentially provide information to law enforcement in an effort to help themselves. After some education by Dr. Bartholomew, Defendant articulated the basic concept of plea bargaining (i.e., receiving a reduced sentence in exchange for pleading guilty). He comprehended that the role of a judge is to be neutral between the defendant and the prosecution. Defendant's understanding of these legal concepts was demonstrated in his interview with Dr. Bartholomew after Defendant had been in secure custody facing the charge at bar for a year and a half, [sic] does not necessarily reflect Defendant's level of knowledge at the time of his interrogation and will not be used by the court as evidence of Defendant's legal sophistication or experience at the time Defendant was advised of his Miranda rights. However, Defendant's ability to understand important aspects of the legal process provides some credible and relevant evidence of Defendant's general intelligence level.

¶ 10 Lastly, the trial court made findings of fact regarding defendant's capacity to understand the *Miranda* warning:

> 27.[2] Defendant had at least a general ability to recall, or memory of, especially important events including who was present at such events.
>
> 28. Defendant demonstrated an ability to recall information between interview sessions six (6) days apart conducted by Dr. Bartholomew.
>
> 29. Defendant's ability to concentrate and pay attention was generally within normal limits.
>
> 30. Defendant had the ability to develop complex themes and switch concepts.
>
> 3l. There is no credible evidence from any form of medical imaging, such as a CAT scan, that the Defendant suffers from any organic brain injury.

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2. There are two findings of fact numbered as 27.

32. Dr. Puente's opinion that the Defendant probably did not understand his Miranda Warnings because of his not understanding the legal system in the United States; limited appreciation of the words used in either English or Spanish, and limited cognitive abilities is not credible.

33. Defendant's mental state, illness or defect did not impair the Defendant's ability to understand the warnings given or the nature of his Miranda Rights pursuant to NCGS § 7B-2101.

34. Defendant evidenced an ability to be evasive and appreciative of his position in relation to legal authority and jeopardy by initially denying to Sheriff Carter and Detective Holly his true identity, providing a false name and later taking them to a wrong address as his home. All of these conversations, including later when the Defendant volunteered to show Detective Holly where Defendant had put the gun being sought, were in English. Defendant also disposed of the murder weapon outside his uncle's house. Defendant led Sheriff Carter and Detective Holly directly to the gun he had hidden 20-30 feet in the woods and did so without confusion. Even before being advised of his rights, the Defendant's conduct showed he understood that speaking to the police could have negative consequences. Defendant sought to manipulate and mislead law enforcement. Defendant possessed and exhibited the mental capacity to understand the meaning and effect of statements made by him to the police.

35. Defendant appeared to exhibit some understanding of English by starting to answer before the interpreter was finished translating some of the questions during his interrogation.

36. During questioning Defendant stated he would tell the interpreter what happened but would not tell Detective Clint Babb directly. Defendant was told, and understood, that whatever he said to the interpreter would be repeated to Detective Babb by the interpreter. Defendant chose to make a statement to

> the interpreter without anyone other than the interpreter present. Defendant understood he was not required to speak directly to law enforcement officers, or speak to anyone, if he did not wish to do so. Defendant later also gave a complete statement to Detective Babb.
>
> 37. The findings of fact above describe Defendant's circumstances and abilities at the time of his interrogation at age 13, and not at a later time.

(Emphasis in original.)

¶ 11 The trial court then concluded,

> 1. At the time of his interrogation at age 13, Defendant suffered from a mental defect in the form of a below average or borderline intelligence. However, the credible evidence does not support the conclusion or finding that Defendant was "intellectually impaired" or "mentally retarded".
>
> 2. Defendant's mental state, illness or defect did not impair his ability to make a knowing, voluntary and intelligent waiver of his rights pursuant to NCGS 7B-2101. Likewise, the Defendant's mental state, illness or defect did not prevent him from understanding these rights or from appreciating the consequences of waiving these rights.
>
> 3. Defendant had the capacity, at age 13 and at the time of his encounter with law enforcement in this case, to understand the warnings given to him, the nature of his Fifth Amendment and statutory rights, and the consequences of waiving his rights. Defendant in fact understood each and all of these rights and warnings and the consequences of waiving them. Defendant made a rational and voluntary decision to waive each and all of his rights.
>
> 4. Even if Defendant was "mentally retarded" or "intellectually impaired", as these terms are defined by statute or in the field of psychology or psychiatry, Defendant nevertheless in fact had the capacity, at the time of his interrogation, to understand the warnings given to him by law enforcement, the nature

> of these rights and the consequences of waiving his rights, and Defendant still in fact understood these rights, their nature and the consequences of waiving them and in fact made a knowing, intelligent and voluntary waiver of his rights.
>
> 5. Considering the totality of the circumstances, including Defendant's mental defect, age, experience, education, background and intelligence, the Defendant made a knowing, voluntary, willing, understanding and intelligent waiver of his properly advised juvenile rights under NCGS § 7B-2101.
>
> 6. Under the totality of the circumstances, Defendant made a knowing, intelligent, willing, understanding and voluntary waiver of his Miranda and juvenile rights under the fifth, sixth and fourteenth amendments to the U.S. Constitution, and of his rights under Article l, sections 19 and 23 of the N.C. Constitution. There were no substantial violations of Defendant's rights under the North Carolina General Statutes.
>
> 7. The. State has met its burden of proof in establishing each of the findings and conclusions set forth above.
>
> 8. The statements made by Defendant were knowingly, willingly, freely, intelligently, voluntarily and understandingly made.
>
> 9. The parties had proper notice of the hearing of this matter, and the court has jurisdiction over the subject matter and the parties.

Ultimately, the trial court again denied defendant's motions to suppress. Defendant appeals.

II. Understanding *Miranda* Warnings

¶ 12 Defendant first contends that "where no expert opined that . . . [he] could understand *Miranda* warning, the trial court erred by finding that [he] understood." (Capitalization altered.) Defendant contends the trial court should have allowed his motions to suppress.

> It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are

> conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. In addition, findings of fact to which defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task is to determine whether the trial court's conclusions of law are supported by the findings. The trial court's conclusions of law are reviewed *de novo* and must be legally correct.

State v. Campbell, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724 (2008) (citations, quotation marks, and brackets omitted).

¶ 13 We specifically addressed the denial of defendant's motion to suppress, as a juvenile, in *Benitez I*,

> North Carolina General Statute § 7B-2101(d) includes an additional requirement before evidence of a statement by a juvenile may be admitted as evidence: "Before admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights." N.C. Gen. Stat. § 7B-2101(d) (2007).
>
> To determine if a defendant has "knowingly and voluntarily" waived his right to remain silent, the trial court must consider the totality of the circumstances of the interrogation, and for juveniles, this analysis includes the "juvenile's age, experience, education, background, and intelligence, and [evaluation] into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights":
>
> > [T]he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel.

> This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

Benitez I, 258 N.C. App. 491, 509-510, 813 S.E.2d 268, 279-80 (alterations in original). Ultimately, in *Benitez I*, this Court remanded for further findings of fact regarding the totality of the circumstances surrounding defendant's understanding of the *Miranda* warning provided to him. *See id.* at 515, 813 S.E.2d at 283. Yet even at the time of *Benitez I*, approximately four years ago, we noted:

> This case has gone on for a long time. When it started, defendant was a 13 year old child. When defendant entered his plea, he was nearing his 20th birthday. At the time of the filing of this opinion, defendant is 24 years old. Nonetheless, we must remand for the trial court to make additional findings of fact addressing whether defendant's waiver of rights *at age 13* was knowing and intelligently made, taking into account the evidence regarding defendant's "experience, education, background, and intelligence" and evaluation of "whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving these rights." *Id.* These considerations under *Fare* are not technicalities but are essential to any conclusion of whether defendant knowingly and intelligently waived his right to remain

> silent. *See generally id.* The trial court's order did not properly address the constitutional arguments before it in defendant's motion to suppress, and thus remand is necessary at this late stage in defendant's ongoing criminal proceedings. Certainly the trial court may consider later evaluations and events in its analysis of defendant's knowing and intelligent waiver at age 13 but should take care not to rely too much on hindsight. Hindsight is reputed to be 20/20, but hindsight may also focus on what it is looking for to the exclusion of things it may not wish to see. The trial court's focus must be on the relevant time period and defendant's circumstances at that time as a 13 year old boy who required a translator and who suffered from a "mental illness or defect" and not on the 10 years of litigation of this case since that time. The trial court must make findings as to defendant's mental state and capacity to understand the Miranda warnings at age 13, including the nature of his "mental illness or defect[,]" and the impact, if any, this condition had on his ability to make a knowing and intelligent waiver. *See generally id.*

Id. at 514–15, 813 S.E.2d at 282–83 (alterations in original).

¶ 14 In defendant's argument he does not directly challenge the trial court's findings of fact but rather contends that the trial court was not in a position to make certain findings because it needed specific expert testimony on certain issues. For example, the trial court found in finding of fact 18 that

> [t]he totality of the credible evidence does not support a finding that Defendant suffered from significant limitations in adaptive functioning in two or more adaptive skill areas. The totality of the credible evidence does not support a finding that Defendant had significant limitations in communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills or work skills at the time he was questioned by law enforcement.

Defendant contends "[t]he trial court's conclusion that Juan did not suffer from adaptive deficits is unsupported. (FF 18) . . . The trial court was

not qualified, on its own, to make this determination." But the trial court did not simply decide on its own that defendant does not suffer from adaptive deficits, as defendant frames it, but rather found that "[t]he totality of the credible evidence does not support a finding" that defendant suffers from adaptive deficits. *See generally Kabasan v. Kabasan*, 257 N.C. App. 436, 457, 810 S.E.2d 691, 705 (2018) ("Questions of credibility and the weight to be accorded the evidence remain in the province of the finder of facts." (citation and quotation marks omitted)). In other words, the trial court did not independently determine defendant has no adaptive deficits, but rather considered the expert testimony presented by both defendant and the State, determined the credibility and weight of the evidence, and found the credible evidence did not support defendant's contentions regarding the extent of his adaptive deficits.

¶ 15 Primarily, defendant's argument reiterates facts already established in *Benitez I*: defendant was a juvenile; he was from El Salvador; and he had "intellectual limitations." *See generally Benitez I*, 258 N.C. App. 491, 813 S.E.2d 268. As to a need for further expert testimony to support the trial court's determinations, defendant essentially argues that because the trial court had testimony from Dr. Puente that defendant did not understand his *Miranda* rights; the State was required to affirmatively establish through expert testimony, that defendant did in fact understand his rights and subsequent waiver of them. But defendant essentially acknowledges the fallacy of his own argument by correctly noting in his brief, "The State is not necessarily required to present expert testimony to prove validity of a rights waiver." Indeed, defendant fails to direct us to any law requiring an expert to testify he understood the *Miranda* warnings; this is a question of law for the trial court to address based upon the evidence presented by both sides. *See State v. Nguyen*, 178 N.C. App. 447, 452, 632 S.E.2d 197, 201–02 (2006) ("We must now determine whether these findings support the trial court's conclusion that defendant's *Miranda* waiver was understandingly, voluntarily, and knowingly made. The trial court's conclusion of law that defendant's statements were voluntarily made is a fully reviewable legal question. The court looks at the totality of the circumstances of the case in determining whether defendant's confession was voluntary." (citation, quotation marks, and brackets omitted)).

¶ 16 Whether a defendant knows and understands his rights is a legal question to be answered by the trial court. *See State v. Hunter*, 208 N.C. App. 506, 511, 703 S.E.2d 776, 780 (2010) ("A trial court's findings of fact regarding the voluntary nature of an inculpatory statement are conclusive on appeal when supported by competent evidence. However, a trial

court's determination of the voluntariness of a defendant's statements is a question of law and is fully reviewable on appeal. Conclusions of law regarding the admissibility of such statements are reviewed de novo. The standard for judging the admissibility of a defendant's confession is whether it was given voluntarily and understandingly. Voluntariness is to be determined from consideration of all circumstances surrounding the confession." (citations and quotation marks omitted)).

¶ 17 While defendant focuses heavily on his age in his argument, we note that this factor was already addressed by the trial court as noted in *Benitez I*:

> The findings of fact in the motion to suppress *do* address defendant's age and the circumstances surrounding the interrogation, but not defendant's experience, education, background, and intelligence or whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

Benitez I, 258 N.C. App. at 514, 813 S.E.2d at 282 (emphasis in original) (citation, quotation marks, and brackets omitted). As to defendant's background, education, and experience, the trial court found:

> 8. Defendant was born in El Salvador, Central America and came to the United States in 2005. Defendant was transported to the United States at the behest of his family by a "coyote", a person hired to smuggle undocumented immigrants into the United States. Defendant experienced physical abuse while living in El Salvador. Defendant reported receiving blows to the head in El Salvador.
>
> 9. At the time the Defendant gave his statement, while still in his thirteenth (13th) chronological year, he was actually just two (2) months and a day shy of his fourteenth (14th) birthday.
>
> 10. After coming to the United States, the Defendant had been enrolled in and attending public school in the English as a Second Language program in Lee County, North Carolina for at least one (1) year.
>
> 11. In a school setting for ESL (English as a Second Language), prior to interrogation, Defendant responded to simple directions with appropriate actions.

> 12. Two (2) months prior to making his statement the Defendant had been promoted to the eighth (8th) grade, a grade level appropriate for his age. In the school year before this incident, Defendant achieved grades of 70 or above in Language Arts 7, Math 7, Art, Technology and Health and P.E. Notes for one of Defendant's classes contained in Defendant's school records for 2007, the year of this offense, state that "This student does not pay attention during class." During the 2006-2007 school year, Defendant exhibited poor disciplinary behavior, such as disrespecting his teachers, use of profanity, calling a female student a bitch, touching a female student's buttocks, tripping another student and skipping class. Defendant was placed in in-school suspension four times and out of school suspensions were imposed three times during the 2006-2007 school year. Defendant's conduct likely affected his school performance to some degree.
>
> 13. Defendant reported to Dr. Bartholomew that he had been "caught in a stolen car with a friend" in a prior incident which occurred before his arrest for first degree murder in the case at bar and that he had received criminal charges as a result. However, there is no credible evidence before the court that Defendant was advised of his Miranda rights for any prior incidents.
>
> 14. Defendant was riding a bicycle alone on or near a street outside the mobile home park where he lived when he was first encountered by law enforcement on August 1, 2007.
>
> 15. Defendant has exhibited manipulative behavior that was goal oriented and rewarding to him.

¶ 18 As to defendant's intelligence level, the trial court made 12 findings of fact explaining which expert evidence it deemed credible and how that evidence led to the ultimate finding that defendant was intellectually capable of understanding the *Miranda* warnings. Finally, as to defendant's ability to understand *Miranda*, the trial court found:

> 27. Defendant had at least a general ability to recall, or memory of, especially important events including who was present at such events.

28. Defendant demonstrated an ability to recall information between interview sessions six (6) days apart conducted by Dr. Bartholomew.

29. Defendant's ability to concentrate and pay attention was generally within normal limits.

30. Defendant had the ability to develop complex themes and switch concepts.

3l. There is no credible evidence from any form of medical imaging, such as a CAT scan, that the Defendant suffers from any organic brain injury.

32. Dr. Puente's opinion that the Defendant probably did not understand his Miranda Warnings because of his not understanding the legal system in the United States; limited appreciation of the words used in either English or Spanish, and limited cognitive abilities is not credible.

33. Defendant's mental state, illness or defect did not impair the Defendant's ability to understand the warnings given or the nature of his Miranda Rights pursuant to NCGS § 7B-2101.

34. Defendant evidenced an ability to be evasive and appreciative of his position in relation to legal authority and jeopardy by initially denying to Sheriff Carter and Detective Holly his true identity, providing a false name and later taking them to a wrong address as his home. All of these conversations, including later when the Defendant volunteered to show Detective Holly where Defendant had put the gun being sought, were in English. Defendant also disposed of the murder weapon outside his uncle's house. Defendant led Sheriff Carter and Detective Holly directly to the gun he had hidden 20-30 feet in the woods and did so without confusion. Even before being advised of his rights, the Defendant's conduct showed he understood that speaking to the police could have negative consequences. Defendant sought to manipulate and mislead law enforcement. Defendant possessed and exhibited the mental capacity to understand the meaning and effect of statements made by him to the police.

> 35. Defendant appeared to exhibit some understanding of English by starting to answer before the interpreter was finished translating some of the questions during his interrogation.
>
> 36. During questioning Defendant stated he would tell the interpreter what happened but would not tell Detective Clint Babb directly. Defendant was told, and understood, that whatever he said to the interpreter would be repeated to Detective Babb by the interpreter. Defendant chose to make a statement to the interpreter without anyone other than the interpreter present. Defendant understood he was not required to speak directly to law enforcement officers, or speak to anyone, if he did not wish to do so. Defendant later also gave a complete statement to Detective Babb.
>
> 37. The findings of fact above describe Defendant's circumstances and abilities at the time of his interrogation at age 13, and not at a later time.

(Emphasis in original.) Defendant has not substantively challenged any of the findings of fact, and thus they are binding on appeal. *Benitez I*, 258 N.C. App. at 510–11, 813 S.E.2d at 280 ("Defendant does not challenge any of the trial court's findings of fact in the order denying his motion to suppress, so all of its findings are binding on appeal. *See State v. Osterhoudt*, 222 N.C. App. 620, 626, 731 S.E.2d 454, 458 (2012) ('Any unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal.')"). We conclude the trial court followed this Court's instructions in *Benitez I* and has addressed "the key considerations in determining whether defendant had knowingly and intelligently waived his rights during police interrogation[.]" *Benitez I*, 258 N.C. App. at 510–11, 813 S.E.2d at 280. Moreover, the trial court did not need further expert testimony, as defendant contends, to make these determinations.

¶ 19 Defendant's only other argument on appeal is that "even if the trial court could conclude on its own that . . . [defendant] understood Miranda warnings, the trial court still erred." (Capitalization altered.) Despite framing this issue as an error in the conclusions of law, defendant again heavily focuses on the testimony from experts noting, "reliance upon the evaluations by Drs. Bartholomew and Rumer was improper because competency to proceed is very different than understanding one's

rights." But once again, defendant acknowledges, "the evaluations took place long after the interrogation. The trial court realized this greatly detracted from the relevance of Dr. Bartholomew's evaluation, stating the court would not use it 'as evidence of [Juan's] legal sophistication or experience at the time [he] was advised of his Miranda rights.' (FF 27(1))[.]" (Alterations in original.) In other words, defendant contends that the trial court should not use evaluations about defendant's competency to stand trial which were conducted "long after the interrogation," but the trial court considered this factor and explicitly noted it was not using the evaluations for the purpose of determining if defendant understood *Miranda* warnings. The trial court took great care to underline and emphasize that its determinations were based upon defendant's age, experience, intelligence level, and ability to understand *Miranda* warnings at the time of interrogation.

¶ 20 Essentially, defendant contends, the trial court should have viewed the evidence in a light more favorable to him, and ultimately wrongly put the burden on him to prove he was not capable of understanding the *Miranda* warnings provided to him. But this is simply not what occurred; the findings which indicate the trial court did not find specific credible evidence do not, as defendant suggests, shift the burden to him, but rather address which evidence the trial court found credible and which it did not, an act completely within the province of the trial court as finder of fact. *See Kabasan*, 257 N.C. App. at 457, 810 S.E.2d at 705. In addressing defendant's argument regarding further expert testimony, we noted above the numerous findings of fact made by the trial court, in its proper discretion, and we conclude the binding findings of fact do indeed support the trial court's determination that defendant understood the *Miranda* warnings, and thus, the trial court properly denied defendant's motions to suppress. These arguments are overruled.

III. Conclusion

¶ 21 Because the trial court considered all factors as directed by *Benitez I* and properly concluded that under the totality of the circumstances, defendant made a knowing and voluntary waiver of his *Miranda* rights when he made a statement to law enforcement, we affirm.

AFFIRMED.

Judges ARROWOOD and JACKSON concur.

STATE v. CARTER

[283 N.C. App. 61, 2022-NCCOA-262]

STATE OF NORTH CAROLINA
v.
MICHAEL EUGENE CARTER, DEFENDANT

No. COA20-885

Filed 19 April 2022

1. Satellite-Based Monitoring—lifetime—recidivist—sexual offenses against child under age of thirteen

The trial court's order imposing lifetime satellite-based monitoring (SBM) on defendant upon his release from prison based on his status as a recidivist was affirmed where—although lifetime SBM constituted a substantial intrusion into defendant's not greatly diminished privacy interests beyond the period of his post-release supervision—defendant would have the opportunity to be freed from the SBM after ten years pursuant to statute, and SBM would be effective in promoting the State's paramount interest in protecting the public against a defendant who had committed sexual offenses against a child under the age of thirteen (which the State was not required to prove on an individualized basis).

2. Satellite-Based Monitoring—trial court's statutory authority—additional reasonableness hearing—same conviction

The portion of the trial court's satellite-based monitoring (SBM) order (which required defendant to enroll in SBM for his natural life upon his release from prison) requiring a second reasonableness hearing after defendant's release from prison was vacated because the trial court lacked statutory authority to order the second hearing for a reassessment on the same conviction. The trial court nevertheless retained continuing authority to amend or modify its own orders, and defendant still retained the ability to petition the trial court for modification or termination pursuant to statute.

Appeal by Defendant from order entered 11 February 2020 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 19 October 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden William Hayes, for the State.

Joseph P. Lattimore for Defendant-Appellant.

INMAN, Judge.

¶ 1 Following our Supreme Court's recent decision in *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, and in light of recent amendments to North Carolina's satellite-based monitoring ("SBM") statutes, we affirm the trial court's order imposing SBM for the sex offender's life.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 The facts underlying the sex offender's convictions are undisputed:

¶ 3 Defendant-Appellant Michael Eugene Carter ("Defendant") and his partner, Elizabeth Hairston ("Ms. Hairston"), lived together with their child and Ms. Hairston's two other children from prior relationships. At the time they were living together, Defendant was a registered sex offender based on a conviction in 2002 for solicitation to commit statutory rape.

¶ 4 In May 2014, Ms. Hairston went out of town for the weekend, leaving the children in Defendant's sole care. While Ms. Hairston was away, Defendant lured Ms. Hairston's 12-year-old daughter, Takira,[1] to Ms. Hairston's bedroom and forced her to perform oral sex on him. Defendant silenced Takira by telling her "no one would believe her."

¶ 5 In June 2014, Defendant again forced Takira to perform oral sex on him and digitally penetrated her vagina. On a third occasion, Defendant forced Takira to perform oral sex on him in a closet in the home while the other children played outside. Ms. Hairston's father saw Defendant and the child emerge from the closet and told Ms. Hairston.

¶ 6 In late October and early November 2014, Defendant was arrested for various traffic violations. Following his release, Defendant assaulted Takira a fourth time, forcing her to perform oral sex. Before August of 2015, Takira reported the abuse to her mother. Ms. Hairston confronted Defendant and kicked him out of the home. She did not report the abuse to police until 2019.

¶ 7 In 2019, Defendant was indicted for unlawfully being at a school while a sex offender, three charges of sexual offense with a child while in a parental role, three charges of indecent liberties with a child, and four charges of first-degree sexual offense with a child below the age of thirteen. Defendant pled guilty to all charges. Pursuant to the plea agreement, the trial court consolidated the charges and sentenced Defendant to 220 to 324 months in prison on 10 February 2020.

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1. We use a pseudonym to protect the identity of the child.

¶ 8 During sentencing, the trial court announced its intent to order SBM along with related proposed factual findings. The trial court considered Defendant for SBM because he was a recidivist and had committed a sexually violent offense. After stating its proposed findings, the trial court asked the case detective to testify about Defendant's prior 2002 conviction. The State then elicited testimony from the detective about Defendant's past sex offender registration violations. The State presented no further evidence. The trial court recessed the proceeding for additional research.

¶ 9 The next day, after returning from recess, the trial court judge announced, "I don't know that lifetime monitoring is appropriate. What I'm considering is satellite-based monitoring as a condition to his five-year post-release supervision[.]" Defense counsel objected, asserting that a reasonableness hearing was required under *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"). In response to defense counsel's final objection to SBM's reasonableness, the trial court said, "I don't know, given that it is not lifetime, I don't know that the reasonable Fourth Amendment concerns that from [sic] the basis of Grady, or post Grady decisions, apply." Then the trial court orally ordered "as a condition of Mr. Carter's post-release supervision, pursuant to [N.C. Gen. Stat. §] 15(a)-1368.4(b)(1), subsection (6), that he be required to enroll in satellite-based monitoring for the duration of his post-release supervision, as provided by statute."

¶ 10 In its written judgment, the trial court entered a form order titled "Judicial Findings and Order for Sex Offenders—Active Punishment," AOC-CR-615 (rev. 11/18), requiring SBM enrollment upon Defendant's release from prison for his "natural life" based on his status as a recidivist.[2] Although Defendant committed sexual offenses with a child younger than thirteen, the trial court did not check the box on the order imposing SBM indicating that fact, which is an independent basis for the imposition of lifetime SBM. It is undisputed that Defendant pled guilty to and was convicted of committing sexual offenses against a child younger than thirteen.

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2. Our statutes at the time mandated lifetime enrollment for recidivists. N.C. Gen. Stat. § 14-208.40A(c) (2019) ("If the court finds that the offender . . . is a recidivist, the court *shall* order the offender to enroll in a satellite-based monitoring program for life." (emphasis added)); *see also infra* ¶ 22. To the extent the trial court's oral findings conflict with its written findings, the trial court's written findings and order control on appeal. *State v. Johnson*, 246 N.C. App. 677, 684 (2016) ("Even if there is some conflict between oral findings and ones that are reduced to writing, the written order controls for purposes of appeal." (citation omitted)).

¶ 11 The trial court entered additional written findings addressing the reasonableness of Defendant's post-release SBM and ordered further trial court review after Defendant's release to consider then-existing technology and constitutional standards:

> 1. The defendant was on the Sex-Offender Registry at the time of the present offenses and the Registry was not effective in deterring the defendant's conduct or providing for public safety;
>
> 2. The offenses for which the defendant has now been convicted occurred over many dates and over a span of time, indicating persistent child sexual criminal intent and fixation;
>
> 3. The span between the defendant's initial conviction for a child sex offense and the present series of offenses indicates a long-standing and persistent tendency and is predictive of future offenses;
>
> 4. The defendant's expectation of privacy is necessarily limited during Post-Release Supervision, and the additional Search attendant with Satellite-Based Monitoring during Supervision is reasonable under the circumstances;
>
> 5. During the commission of the present child sex offenses the defendant repeatedly went upon school property in violation of the North Carolina General Statutes, and furthermore was in the presence and care of unauthorized children in violation of the North Carolina General Statutes, and thus the Sex-Offender Registry and Statutes relating to child sex offenders were not effective in deterring the defendant's conduct or providing for the public safety.
>
> It is further Ordered that the defendant have a Hearing before the Superior Court after his release from the Division of Adult Correction so that the Court may determine the nature and degree that a "Search" such as Satellite-Based Monitoring will constitute under then existing technology, and therefore determine whether Satellite-Based Monitoring is constitutional under then-existing circumstances pursuant to Grady and subsequent case law.

Defendant timely appealed.

II. ANALYSIS

A. Appellate Jurisdiction

¶ 12 As an initial matter, we overrule the State's contention this issue is not ripe for our review. Although the trial court has ordered another reasonableness hearing upon Defendant's release from prison, the trial court has already imposed SBM upon Defendant. We have reviewed challenges to the reasonableness of SBM at the time it is imposed on many occasions. *See, e.g.*, *State v. Hutchens*, 272 N.C. App. 156, 162, 846 S.E.2d 306, 312 (2020) ("Defendant's SBM order was entered at the same time as his sentence, so he will not be subject to SBM until he serves his prison term of roughly seven-and-a-half to fourteen-and-a-half years."); *State v. Gordon*, 270 N.C. App. 468, 474, 840 S.E.2d 907, 913 (2020) ("Defendant was ordered to submit to satellite-based monitoring solely due to his conviction of an aggravated offense; however, he will not actually enroll in the program for approximately 15 to 20 years, after he has completed his active prison sentence. The State filed its satellite-based monitoring application at the time of Defendant's sentencing, in accordance with N.C. Gen. Stat. § 14-208.40A.").

B. SBM and Fourth Amendment Reasonableness

¶ 13 **[1]** Defendant asserts the trial court erred by imposing SBM because the State failed to present any evidence about the reasonableness of the monitoring and the trial court did not conduct a formal hearing on this issue. A recent decision from our Supreme Court and legislative amendments to our SBM statutes compel us to disagree.

¶ 14 Reviewing a trial court order, we consider "whether the trial judge's underlying findings of fact are supported by competent evidence, . . . and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted). We review a trial court's determination that SBM is reasonable *de novo*. *State v. Gambrell*, 265 N.C. App. 641, 642, 828 S.E.2d 749, 750 (2019) (citation omitted).

1. Recent Reasonableness Precedence

¶ 15 The Supreme Court of the United States held in *Grady v. North Carolina*, 575 U.S. 306, 191 L. Ed. 2d 459 (2015) ("*Grady I*"), that the imposition of SBM constitutes a warrantless search under the Fourth Amendment and necessitates an inquiry into reasonableness under the totality of the circumstances. 575 U.S. at 310, 191 L. Ed. 2d at 462.

¶ 16 Following that holding by the Supreme Court of the United States, in *Grady III*, our Supreme Court considered whether mandatory lifetime

SBM based solely on the defendant's status as a "recidivist" sex offender "is reasonable when 'its intrusion on the individual's Fourth Amendment interests' is balanced 'against its promotion of legitimate governmental interests.' " 372 N.C. at 527, 831 S.E.2d at 557 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53, 132 L. Ed. 2d 564, 574 (1995)). After extensive and careful balancing, our Supreme Court concluded:

> [A]pplication of the relevant portions of N.C.G.S. §§ 14-208.40A(c) and 14-208.40B(c) to individuals in the same category as defendant, under which these individuals are required to submit to a mandatory, continuous, nonconsensual search by lifetime satellite-based monitoring, violates the Fourth Amendment to the United States Constitution. The category to which this holding applies includes only those individuals who are not on probation, parole, or post-release supervision; who are subject to lifetime SBM solely by virtue of being recidivists as defined by the statute; and who have not been classified as a sexually violent predator, convicted of an aggravated offense, or are adults convicted of statutory rape or statutory sex offense with a victim under the age of thirteen.

Id. at 545, 831 S.E.2d at 568.

¶ 17 This Court, in resolving an array of other SBM appeals, looked to *Grady III* for guidance as to the scope of the reasonableness analysis required by the United States Supreme Court in *Grady I*. *See, e.g.*, *State v. Gordon*, 270 N.C. App. 468, 469, 840 S.E.2d 907, 908 (2020), *remanded by* 379 N.C. 670, 865 S.E.2d 852 (2021); *State v. Griffin*, 270 N.C. App. 98, 106, 840 S.E.2d 267, 273 (2020), *remanded by* 379 N.C. 671, 865 S.E.2d 849 (2021); *Hutchens*, 272 N.C. App. at 160-61, 846 S.E.2d at 310-11. For example, the majority opinion set forth factors to be considered in determining whether SBM is reasonable under the totality of the circumstances, including an offender's "legitimate" and not "greatly diminished" privacy interests and SBM's "substantial" and "deep, if not unique, intrusion" into them, as weighed against the State's "without question legitimate" interest in monitoring sex offenders. *Grady III*, 372 N.C. at 527, 534, 538, 543-44, 831 S.E.2d at 557, 561, 564, 568.

¶ 18 Two years after *Grady III*, in *Hilton*, a case involving a defendant whose sex offenses fit the legal category of "aggravated," our Supreme Court narrowly construed *Grady III*'s holding:

> [T]his Court held the SBM program to be unconstitutional as applied to the narrow category of individuals "who are subject to mandatory lifetime SBM based solely on their status as a statutorily defined 'recidivist' who have completed their prison sentences and are no longer supervised by the State through probation, parole, or post-release supervision." *State v. Grady* (*Grady III*), 372 N.C. 509, 522, 831 S.E.2d 542, 553 (2019) (footnote omitted). Our *Grady III* decision, however, left unanswered the question of whether the SBM program is constitutional as applied to sex offenders who are in categories other than that of recidivists who are no longer under State supervision.

State v. Hilton, 378 N.C. 692, 2021-NCSC-115, ¶ 2.[3] Disregarding much of the reasoning provided in *Grady III*, in *Hilton*, our Supreme Court held "the SBM statute as applied to aggravated offenders is not unconstitutional" because the "search effected by the imposition of lifetime SBM on the category of aggravated offenders is reasonable under the Fourth Amendment." *Id.* ¶ 36.[4]

¶ 19 *Hilton* does not remove the requirement of a reasonableness hearing altogether. As in cases challenging pre-trial searches as violating the Fourth Amendment, trial courts must continue to conduct reasonableness hearings before ordering SBM unless a defendant waives his or her right to a hearing or fails to object to SBM on this basis. *See State v. Ricks*, 378 N.C. 737, 2021-NCSC-116, ¶ 10 ("Absent an objection, the trial court was under no constitutional requirement to inquire into the reasonableness of imposing SBM.").

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3. The Supreme Court has remanded several SBM decisions by this Court for reconsideration in lieu of *Hilton*'s interpretation of *Grady III*. *See, e.g.*, *State v. Anthony*, 379 N.C. 668, 865 S.E.2d 851 (2021) (remanding to this Court "to reconsider its holding in light of *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, 862 S.E.2d 806, and *State v. Strudwick*, 2021-NCSC-127, 864 S.E.2d 231, as well as the General Assembly's recent amendments to the satellite-based monitoring program"); *State v. Cooper*, 379 N.C. 669, 865 S.E.2d 855 (2021) (same); *State v. Gordon*, 379 N.C. 670, 865 S.E.2d 852 (2021) (same); *State v. Griffin*, 379 N.C. 671, 865 S.E.2d 849 (2021) (same); *State v. O'Kelly*, 379 N.C. 673, 865 S.E.2d 851 (2021) (same).

4. To date, the Supreme Court and this Court have applied *Hilton*'s per se reasonableness determination to SBM orders in cases where defendants have been convicted of an aggravated offense. *See, e.g.*, *State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 20 (declining to follow *Grady III* and applying *Hilton* because the defendant was convicted of an aggravated offense); *State v. McCauley*, 2022-NCCOA-80, ¶ 10 (unpublished) (affirming the imposition of satellite-based monitoring for a period of ten years following an aggravated offender's release from incarceration).

¶ 20 Since the trial court imposed lifetime SBM in this case and Defendant objected on constitutional grounds, the trial court was required to consider whether the monitoring was constitutional under the Fourth Amendment. *Grady I*, 575 U.S. at 310, 191 L. Ed. 2d at 462. Contrary to Defendant's assertion, the record reveals the trial court grappled with North Carolina's rapidly evolving jurisprudence on this issue, conducted a hearing regarding the facts and applicable law, and weighed the State's interests against Defendant's expectation of privacy. The trial court heard testimony from the State's witness about Defendant's 2002 sex offense conviction as evidence of his recidivism. It reviewed Defendant's STATIC-99 assessment, which rated Defendant an "average risk" to reoffend. It further considered how Defendant's prior sex offender registration had proved ineffective to deter his conduct or protect public safety. Finally, the trial court measured Defendant's sex offender registry violations, including repeatedly going onto school property while registered. In particular, the trial court balanced Defendant's "long-standing and persistent tendency" for sexual abuse, his disposition as a reoffender, and his sex offender registry violations, against the State's interest in protecting the public from a recidivist sex offender. Following this fact-specific analysis, the trial court concluded SBM was reasonable as applied to Defendant.

¶ 21 We now review the trial court's determination *de novo*. *Gambrell*, 265 N.C. App. at 642, 828 S.E.2d at 750.

2. Fourth Amendment Reasonableness Analysis in this Case

¶ 22 The trial court found Defendant was a recidivist. Because Defendant is a recidivist, the trial court was required to order Defendant to "enroll in satellite-based monitoring for the duration of his post-release supervision" and the duration of his natural life. N.C. Gen. Stat. §§ 15A-1368.4(b1)(6), 14-208.40A(c) (2019) ("If the court finds that the offender . . . is a recidivist, the court *shall* order the offender to enroll in a satellite-based monitoring program for life." (emphasis added)). However, during the pendency of this appeal, our legislature amended the SBM statutes, in part, to create an avenue by which Defendant may petition a superior court to terminate his monitoring after ten years of enrollment. *An Act . . . to Address Constitutional Issues with Satellite-Based Monitoring*, S.L. 2021-138, § 18(i) ("If the petitioner has been enrolled in the satellite-based monitoring program for more than 10 years, the court *shall* order the petitioner's requirement to enroll in the satellite-based monitoring program be terminated." (emphasis added)) and S.L. 2021-182, § 2(e) (collectively to be codified at N.C. Gen. Stat. § 14-208.46). Therefore, we consider the reasonableness of Defendant's SBM within

the parameters of not only recent Supreme Court precedent but also the amended statutes.

a. Intrusion upon Defendant's Privacy Interests

¶ 23 An offender subject to post-release supervision has a diminished privacy expectation. *See Samson v. California*, 547 U.S. 843, 844, 165 L. Ed. 2d 250, 254 (2006) ("An inmate electing to complete his sentence out of physical custody remains in the Department of Corrections' legal custody for the remainder of his term and must comply with the terms and conditions of his parole. The extent and reach of those conditions demonstrate that parolees have severely diminished privacy expectations by virtue of their status alone."); *Hilton*, ¶ 29 ("SBM is clearly constitutionally reasonable during a defendant's post-release supervision period."); § 15A-1368.4(b1)(6) (mandating SBM as a condition of post-release supervision for recidivists). So SBM as a condition of Defendant's 60-month period post-release supervision is constitutional. *Cf. Grady III*, 372 N.C. at 546, 831 S.E.2d at 569-70 ("Our holding is as-applied in the sense that it addresses the current implementation of the SBM program and does not enjoin all of the program's applications or even all applications of the specific statutory provision we consider here (authorizing lifetime SBM based on a finding that an individual is a recidivist) because this provision is still enforceable against a recidivist during the period of his or her State supervision[.]").

¶ 24 Our Supreme Court's decision in *Hilton* concluded that for aggravated offenders, "the imposition of lifetime SBM causes only a limited intrusion into [the] diminished privacy expectation." *Hilton*, ¶ 36. Defendant is not in the same statutorily-defined category of "aggravated offender" as the offender in *Hilton*. And because he has not completed his prison sentence and post-release supervision period, he does not fit neatly into *Grady III*'s limited category of "recidivist"[5] not otherwise subject to State supervision in the form of imprisonment, post-release supervision, parole, or probation. *See Grady III*, 372 N.C. at 545, 831 S.E.2d at 568. Yet, because the trial court enrolled Defendant in SBM solely because of his status as a recidivist, we look to *Grady III* for guidance about the intrusion upon Defendant's privacy interests.

¶ 25 *Grady III* held recidivists "do not have a greatly diminished privacy interest in their bodily integrity or their daily movements merely by being also subject to the civil regulatory requirements that accompany

5. Amendments to the SBM statutes also replace "recidivist" with "reoffender," defining a reoffender as, "A person who has two or more convictions for a felony that is described in G.S. 14-208.6(4)." S.L. 2021-138, § 18(b) (amending N.C. Gen. Stat. § 14-208.6 (2021)).

the status of being a sex offender. The SBM program constitutes a substantial intrusion into those privacy interests . . . [.]" *Id.* at 544-45, 831 S.E.2d at 568. As in *Grady III*, lifetime monitoring of Defendant in this case constitutes a substantial intrusion into his not greatly diminished privacy interests well beyond the period of his post-release supervision. However, the opportunity to be freed from monitoring after a period of ten years renders SBM, while still serious, something less than the "substantial intrusion" identified in *Grady III*.

b. State's Interests in SBM

¶ 26 Next, we consider the State's interests in monitoring Defendant. In *Hilton*, the Supreme Court acknowledged the paramount purpose of the SBM program to protect the public from sex crimes, *Hilton*, ¶ 42, but it distinguished the State's interest in monitoring *recidivists* from its interest in monitoring *aggravated offenders*:

> [W]e opined in *Grady III* that the State's "interests [in protecting the public through SBM] are without question legitimate." *Grady III*, 372 N.C. at 543, 831 S.E.2d at 568. There, however, our analysis applied only to the recidivist category. *Id.* at 522, 831 S.E.2d at 553. Notably, we made the following observation regarding the recidivist category:
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> > [l]ifetime monitoring for recidivists is mandated by our statute for anyone who is convicted of two sex offenses that carry a registration requirement. A wide range of different offenses are swept into this category. For example, a court is required to impose lifetime SBM on an offender who twice attempts to solicit a teen under the age of sixteen in an online chat room to meet with him, regardless of whether the person solicited was actually a teen or an undercover officer, or whether any meeting ever happened.
>
> *Id.* at 544, 831 S.E.2d at 568. Unlike the recidivist category, the aggravated offender category applies only to a small subset of individuals who have committed the most heinous sex crimes.

Id. ¶ 21. The Court further explained, "after our decision in *Grady III*, the three categories of offenders who require continuous lifetime SBM

to protect public safety are (1) sexually violent predators, (2) aggravated offenders, and (3) adults convicted of statutory rape or a sex offense with a victim under the age of thirteen." *Id.* ¶ 23 (footnote omitted).

¶ 27 In this case, Defendant was convicted of committing sex offenses against a child under the age of thirteen. So we must follow the Supreme Court's holding in *Hilton* that he requires continuous lifetime SBM to protect public safety. *Id.*

c. Efficacy of SBM

¶ 28 Relying on the same study our General Assembly included as a legislative finding in its recent amendments to the State's SBM program, the Supreme Court in *Hilton* relieved the State of its burden to demonstrate the efficacy of SBM in promoting the State's interests on an individualized basis and concluded SBM is generally effective in reducing recidivism. *Id.* ¶ 28 ("These studies demonstrate that SBM is efficacious in reducing recidivism. Since we have recognized the efficacy of SBM in assisting with the apprehension of offenders and in deterring recidivism, there is no need for the State to prove SBM's efficacy on an individualized basis.)".[6]

¶ 29 *Hilton* compels us to conclude that the State was not required to present further evidence of the efficacy of SBM monitoring in this case "because the SBM program serves a legitimate government interest." *Id.* ¶ 29.

d. Totality of the Circumstances

¶ 30 Considering the totality of the circumstances, we weigh SBM's serious intrusion into Defendant's not "greatly diminished privacy interest," *Grady III*, 372 N.C. at 543, 831 S.E.2d at 568, against the State's paramount interest in protecting the public through lifetime monitoring of offender's convicted of a sexual offense with a child under the age of thirteen and the declared efficacy of SBM in promoting those interests, *Hilton*, ¶¶ 23, 28, in the context of our recently amended and enacted SBM statutes. We are compelled by the Supreme Court's holding

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6. We note the tension between our Supreme Court's reliance on a legislative finding in *Hilton* and the Court's previous descriptions of legislative findings. *See Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 294, 749 S.E.2d 429, 433 (2012) (opining that legislative findings "have no magical quality to make valid that which is invalid" (citation omitted)); *Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 44, 175 S.E.2d 665, 673 (1970) (explaining legislative findings are entitled to limited deference in determining the constitutionality of legislative amendments). *See also* Jamie Markham, UNC Sch. of Gov't, *Revisions to North Carolina's Satellite-Based Monitoring Law*, (Oct. 11, 2021) https://nccriminallaw.sog.unc.edu/revisions-to-north-carolinas-satellite-based-monitoring-law/.

in *Hilton* to hold the search of Defendant as imposed is reasonable and therefore constitutional under the Fourth Amendment. We affirm the trial court's order in this regard.

C. Trial Court's Authority to Order a Second Reasonableness Hearing

¶ 31 **[2]** Defendant also contends the trial court was without statutory authority and jurisdiction to order Defendant to appear for a second SBM hearing after completing his prison sentence. We agree, in part.

¶ 32 Assuming *arguendo* Defendant is aggrieved by this portion of the trial court's order, our "SBM statutes do not provide for reassessment of [a] defendant's SBM eligibility based on the same reportable conviction, after the initial SBM determination is made based on that conviction." *State v. Clayton*, 206 N.C. App. 300, 305-06, 697 S.E.2d 428, 432 (2010). Section 14-208.40A of our General Statutes provides:

> (a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), *during the sentencing phase*, the district attorney shall present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a reoffender, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.23 or G.S. 14-27.28, or (v) the offense involved the physical, mental, or sexual abuse of a minor.
>
> . . .
>
> (c) If the court finds that the offender has been classified as a sexually violent predator, is a reoffender, has committed an aggravated offense, or was convicted of G.S. 14-27.23 or G.S. 14-27.28, the court shall order the offender to enroll in a satellite-based monitoring program for life.

N.C. Gen. Stat. § 14-208.40A (a),(c) (2021) (emphasis added). Section 14-208.40B provides a different mechanism for the trial court to hold an SBM hearing only when there is no previous determination that the offender enroll in SBM. *Id.* § 14-208.40B(a) (2021) ("When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), *and there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring . . . .*") (emphasis added)); *see also State v. Kilby*, 198 N.C. App. 363, 367, 679

S.E.2d 430, 432-33 (2009) (holding Section 14-208.40B(a) "applies in cases in which the offender has been convicted of an applicable conviction and the trial court has not previously determined whether the offender must be required to enroll in SBM").

¶ 33 Here, the trial court ordered Defendant enroll in SBM during the sentencing phase pursuant to Section 14-208.40A based on his reportable 10 February 2020 sex offense convictions. The trial court did not have statutory authority to require another reasonableness hearing at the end of Defendant's active sentence or make a second eligibility determination by the mechanism provided in Section 14-208.40B based on those same convictions. *Clayton*, 206 N.C. App. at 305-06, 697 S.E.2d at 432.

¶ 34 However, SBM is a "civil, regulatory scheme," *State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010), and the trial court maintains continuing jurisdiction over its civil actions. N.C. Gen. Stat. § 7A-20 (2021) ("[O]riginal general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice."). The trial court also retains authority to modify its own civil judgments. *See Hilton*, ¶ 34 ("Since the SBM program is civil in nature, the North Carolina Rules of Civil Procedure govern. As such, a defendant may also seek removal of SBM[.]" (citing N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2019)). For example, as noted above, the legislature has created an avenue by which an offender who has been enrolled in SBM for a period of more than ten years may petition the superior court to have their monitoring terminated. S.L. 2021-138, § 18(i) and 2021-182 § 2(e) (to be codified at § 14-208.46).

¶ 35 We vacate the portion of the trial court's order requiring a second reasonableness hearing after Defendant's release. Our holding does not otherwise affect the trial court's continuing authority to amend or modify its own orders or Defendant's ability to petition the trial court for modification or termination pursuant to our statutes.

III. CONCLUSION

¶ 36 For the reasons set forth above, we affirm the trial court's SBM order in part and vacate the portion which orders a second SBM hearing after Defendant's release.

AFFIRMED IN PART; VACATED IN PART.

Chief Judge STROUD and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
WENDY DAWN LAMB HICKS, DEFENDANT

No. COA20-665

Filed 19 April 2022

Homicide—second-degree—jury instructions—self-defense—aggressor doctrine—evidentiary support

Defendant was entitled to a new trial on her second-degree murder charge because the trial court erred in instructing the jury on the aggressor doctrine. The record showed no evidence from which a reasonable jury could infer that defendant was the aggressor, showing instead that—over a span of roughly two minutes—the victim (defendant's lover) forcefully entered defendant's home even though she had asked him not to come over; the victim threatened to kill defendant and grabbed defendant's firearm from her nightstand, pointing it at her while demanding her cellphone; the victim relinquished the firearm and defendant armed herself with it, afraid that the victim would harm her, her teenage daughter, or her daughter's friend who was staying over; the victim repeatedly assaulted defendant during her multiple attempts to escape; and then defendant shot the victim.

Judges INMAN and MURPHY concurring in result only.

Appeal by Defendant from judgment entered 12 December 2019 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 13 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Marilyn G. Ozer, for Defendant- Appellant.

WOOD, Judge.

¶ 1 Defendant Wendy Hicks ("Defendant") appeals from her conviction of second-degree murder. On appeal, Defendant contends the trial court erred by instructing the jury on the aggressor doctrine and committed plain error by allowing certain exhibits to be published to the jury

without a limiting instruction. For the reasons stated herein, we reverse and remand for a new trial.

I. Factual and Procedural Background

¶ 2 In September 2015, Defendant and the deceased, Caleb Adams ("Caleb"), met through their employment at Dart Container in Randleman, North Carolina. At the time, Caleb was married to Dana Adams ("Dana") and the couple had three children together. Three weeks after they met, Defendant and Caleb began an intimate relationship in which they would meet at a warehouse to have sexual intercourse. Caleb and Defendant maintained their affair from September 2015 until Caleb's death on June 13, 2017.

¶ 3 While employed at Dart Container, Caleb maintained sexually intimate relationships with several women. At some point, one of the other women discovered Caleb's infidelity and argued with him, causing an internal investigation. Thereafter, Caleb obtained employment at Murphy Trucking. Caleb told his wife, Dana, he obtained employment at Murphy Trucking because Dart Container had changed its policies. Defendant and Caleb had a tumultuous relationship and had several vehement arguments. During their relationship, they frequently referred to each other in a vulgar manner. The Record is replete with text-messages between Defendant and Caleb that reflect the ardent nature of their relationship.

¶ 4 In early 2017, Caleb[1] and Defendant began taking methamphetamine together. Caleb introduced Defendant to methamphetamine and taught her how to smoke it. Upon the arrest of Caleb's methamphetamine supplier, Defendant introduced Caleb to a man named "Doug." Defendant testified that, after a while, she began performing oral sex on Doug at Caleb's instruction, to pay for the methamphetamine. According to Defendant's testimony, consuming methamphetamine affected Caleb's emotional state. Specifically, Defendant stated the methamphetamine consumption caused Caleb to become angry.

¶ 5 Beginning in May and June 2017, Dana noticed significant changes in Caleb's behavior. For example, on May 22, 2017, the husband and wife exchanged text messages concerning his whereabouts, in which Dana asked Caleb where he was sleeping because she noticed his sleep habits had changed. A few days later, the couple exchanged angry text messages about a picture Defendant posted on Facebook depicting Defendant

1. Caleb had a history of substance abuse.

and Caleb kissing. Around this same time, Defendant began placing anonymous calls to Dana. On the morning of June 8, 2017, Defendant informed Dana that she and Caleb were having an affair. On June 11, 2017, Caleb was helping one of his children work on a boat when he received a phone call. After receiving the call, Caleb left the family's residence and did not return for approximately ten hours. The following morning, Dana discovered Caleb had slept in their camper rather than the bed they usually shared.

¶ 6 During the week of June 12, 2017, Defendant and Caleb had several arguments, including an argument regarding a photograph of the couple kissing that she had posted to the social media networking site, Facebook. Defendant also testified Caleb was upset and angry because his supplier had raised the price of methamphetamine and he was concerned about owing people money.

¶ 7 On the morning of June 12, 2017, Caleb was not at the couple's residence when Dana woke up. When she called him, Caleb told his wife he was at work and would be home that evening. Rather than going to work, however, Caleb traveled to Defendant's residence in the early morning. At trial, Defendant's daughter, April,[2] testified that she was awakened by Defendant and Caleb arguing that morning. According to April's testimony, Caleb slung the door to their residence open, causing the door to hit a baby gate that Defendant had in place for her household pets. Caleb proceeded to enter the home and to scream profanities and threats at Defendant. April heard Caleb say, "I've never hit a bitch but you're pushing me to bust your damn head" and that Defendant was ruining his life and his family. April sent messages to her boyfriend describing the events as they occurred because she was afraid. At some point that morning, Defendant managed to get Caleb to calm down, and he left the residence.

¶ 8 That evening Caleb sent text messages to Defendant. Defendant replied that she would leave his drugs on the nightstand in her bedroom, and around 9:15 p.m. Caleb picked up his drugs. Around 11:30 p.m., Defendant threatened to send sexually explicit photographs to Dana to expose Caleb's affair. Approximately half an hour later, around midnight, Defendant called Dana, identified herself, and told her that she and Caleb were having an affair. Defendant also told Dana that Caleb was using recreational drugs. During the conversation, Defendant told Dana she and Caleb had been arguing and asked if he was ever a violent person. Defendant explained that Caleb had threatened her and that she

2. In June 2017, April was seventeen years old and resided with Defendant.

was concerned for her safety.[3] Dana was not aware of Caleb's behavior on the morning of June 12, 2017. Dana told Defendant that Caleb had never been violent with her and stressed that he needed assistance with his substance abuse.

¶ 9 Later that evening, an unknown and unidentified man arrived at Defendant's residence. He stood in Defendant's yard and yelled, "[W]here's Caleb?" Defendant informed the man that Caleb was not at her residence, and the man instructed Defendant to tell Caleb to "call his people." In response, Defendant began calling Caleb repeatedly. Caleb's reply text stated, "You'll be lucky you don't end up in a ditch."

¶ 10 In the early morning hours of June 13, 2017, Defendant and Caleb engaged in one of their episodic arguments. At 5:58 a.m. Caleb texted Defendant, and Defendant called him in response. During this conversation, Caleb told Defendant he was on the way to her house. Defendant told Caleb not to come to her house. Defendant texted Caleb at 6:14 a.m. not to come to her house as people were "looking for [him.]" Caleb ignored Defendant's directive to stay away from her home.

¶ 11 At 6:28 a.m., Defendant received a text message from Caleb that said, "Fuck you." Also, at 6:28 a.m., Defendant texted Doug that Caleb was at her residence. Immediately after Defendant sent that text, Caleb stormed into Defendant's home in an enraged state, located her in her bedroom and demanded that she give her phone to him. At first, Defendant refused to allow Caleb to search her cellphone, but acquiesced when Caleb picked her firearm up off the nightstand and pointed it at her. After searching her phone, Caleb threw it at Defendant. Caleb then turned to leave Defendant's bedroom with her firearm, but she told Caleb that he could not leave with the gun and requested that he leave it at her residence. In anger, Caleb threw the gun down on the nightstand beside Defendant's bed. Defendant picked her firearm and her cellphone up before attempting to exit her bedroom. However, when Defendant tried to leave the bedroom, Caleb began pushing, punching, kicking, and shoving her. Defendant testified at that moment, she thought she was going to die, and that Caleb would hurt her family.

¶ 12 April testified that she heard Caleb burst into the home and slam the door, as he had done the previous morning.[4] April also heard Caleb tell

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3. Dana testified Caleb was never violent toward her but used coarse language. Dana attributed Caleb's language to truck driver's patios.

4. One of April's friends had slept over that night, and, when April could not get ahold of her boyfriend, she tried to use her friend's cellphone to do so.

Defendant he was going to kill her, and she could hear that they were engaged in a physical struggle violent enough to move furniture. During the altercation with Caleb, Defendant fired two shots. The bullets entered Caleb's back. At 6:30 a.m., approximately two minutes after Caleb entered the residence, Defendant called 911 and told the operator that she had shot Caleb.

¶ 13 When law enforcement arrived at Defendant's trailer, they immediately entered the residence. It was apparent that Caleb had died before law enforcement arrived. Law enforcement found a key that fit the front door of Defendant's home next to Caleb's leg. In his pocket, officers found a glass pipe. Officers also found a white substance on Caleb's person and in his truck. The substance tested positive for methamphetamine. At trial, a toxicologist reported that Caleb's blood level for methamphetamine was 1.5 milligrams per liter and the amphetamine level was .12 milligrams per liter. The toxicologist further testified to the effects of methamphetamine, including that it can cause heightened alertness, aggression, paranoia, violence, and sometimes psychosis.

¶ 14 On July 11, 2017, Defendant was indicted on one count of second-degree murder. Defendant's trial began on November 18, 2019. At the charge conference, defense counsel objected to an instruction on the aggressor doctrine, arguing that the evidence presented did not give any inference Defendant was the aggressor. Defendant's objections were overruled, and the trial court instructed the jury on the aggressor doctrine as an element of self-defense. The jury subsequently convicted Defendant of second-degree murder. Defendant timely gave notice of appeal in open court.

II. Analysis

¶ 15 On appeal, Defendant argues the trial court (1) erred in instructing the jury on the aggressor doctrine; and (2) plainly erred in admitting Exhibits 174 and 175.

A. Aggressor Doctrine

¶ 16 Defendant first contends the trial court committed reversible error by instructing the jury on the aggressor doctrine. We agree.

¶ 17 "A trial court must give the substance of a requested jury instruction if it is 'correct in itself and supported by the evidence . . . .' " *State v. Mercer*, 373 N.C. 459, 462, 838 S.E.2d 359, 362 (2020) (quoting *State v. Locklear*, 363 N.C. 438, 464, 681 S.E.2d 293, 312 (2009)); *see State v. Stephens*, 275 N.C. App. 890, 893-94, 853 S.E.2d 488, 492 (2020) (citation omitted). "[Arguments] challenging the trial court's decisions regarding

jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). "An error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal rises." *State v. Hicks*, 241 N.C. App. 345, 356, 772 S.E.2d 486, 494 (2015) (quoting *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009)) (alterations omitted).

¶ 18 "[W]hen a person, who is free from fault in bringing on a difficulty, is attacked in his own dwelling, or home . . . , the law imposes upon him no duty to retreat before he can justify his fighting in self-defense, — *regardless of the character of the assault*." *State v. Benner*, 2022-NCSC-28, ¶ 28 (quoting *State v. Francis*, 252 N.C. 57, 59, 112 S.E.2d 756, 758 (1960)). Pursuant to N.C. Gen. Stat. § 14-51.3, "a person is justified in the use of deadly force and does not have a duty to retreat" if he is in a lawful place and "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another" or "[u]nder the circumstances permitted pursuant to [N.C. Gen. Stat. §] 14-51.2." N.C. Gen. Stat. § 14-51.3(a) (2020). Our Supreme Court has noted that in the event a person is in his own home and is acting in defense of himself or his habitation, he is "not required to retreat in the face of a threatened assault, regardless of its character, but [is] entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault." *Benner*, 2022-NCSC-28, ¶ 28 (alteration omitted) (quoting *Francis*, 252 N.C. at 60, 112 S.E.2d at 758). Additionally, under Section 14-51.2:

> (b) The lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:
>
> (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home . . . or if that person had removed or was attempting to remove another against that person's will from the home. . . .

> (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C. Gen. Stat. § 14-51.2(b) (2020). The presumption outlined in Subsection (b) is rebuttable and does not apply if "[t]he person against whom the defensive force is used has the right to be in or is a lawful resident of the home . . ." or if "[t]he person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home . . . and (ii) has exited the home." N.C. Gen. Stat. § 14-51.2(c)(1)(5). "A person who unlawfully and by force enters or attempts to enter a person's home . . . is presumed to be doing so with the intent to commit an unlawful act involving force or violence." N.C. Gen. Stat. § 14-51.2(d). "A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force . . . ." N.C. Gen. Stat. § 14-51.2(e).

¶ 19 Self-defense pursuant to Section 15-51.2 and Section 15-51.3 is not available to a person who used defensive force, and who

> (2) Initially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur:
>
> a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.
>
> b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.

N.C. Gen. Stat. § 14-51.4(2) (2020). This provision of our general statutes is known as the "aggressor doctrine." The aggressor doctrine "denies a

defendant 'the benefit of self-defense if he was the aggressor in the situation.' " *State v. Corbett*, 269 N.C. App. 509, 566, 839 S.E.2d 361, 403 (2020) (quoting *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016)).

¶ 20 "In determining whether a self-defense instruction should discuss the 'aggressor' doctrine, the relevant issue is simply whether the record contains evidence from which the jury could infer that the defendant was acting as an 'aggressor' *at the time* that he or she allegedly acted in self-defense." *State v. Mumma*, 372 N.C. 226, 239, n.2, 827 S.E.2d 288, 297, n.2 (2019) (emphasis added). "[W]here the evidence does not indicate that the defendant was the aggressor, the trial court should not instruct on that element of self-defense." *State v. Jenkins*, 202 N.C. App. 291, 297, 688 S.E.2d 101, 105 (2010).

¶ 21 "When there is no evidence that a defendant was the initial aggressor, it is reversible error for the trial court to instruct the jury on the aggressor doctrine of self-defense." *Juarez*, 369 N.C. at 358, 794 S.E.2d at 300. Where the trial court delivers an aggressor instruction "without supporting evidence, a new trial is required." *State v. Vaughn*, 227 N.C. App. 198, 202, 742 S.E.2d 276, 278 (2013) (citation and quotation marks omitted); *see also State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995) (holding "[w]here jury instructions are given without supporting evidence, a new trial is required.").

¶ 22 "Broadly speaking, the defendant can be considered the aggressor when she 'aggressively and willingly enters into a fight without legal excuse or provocation.' " *Vaughn*, 227 N.C. App. at 202, 742 S.E.2d at 279 (quoting *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971)); *State v. Thomas*, 259 N.C. App. 198, 209, 814 S.E.2d 835, 842 (2018) (citation omitted); *see also State v. Tann*, 57 N.C. App. 527, 530-31, 291 S.E.2d 824, 827 (1982). The law of this state does not require that a defendant instigate a fight to be considered an aggressor. *State v. Lee*, 258 N.C. App. 122, 126, 811 S.E.2d 233, 237 (2018). Instead, even if Defendant's opponent initiates a fight, a Defendant "who provokes, engages in, or continues an argument which leads to serious injury or death may be found to be the aggressor." *Id.* at 126-27, 811 S.E.2d at 237. To determine which party was the aggressor, courts consider a variety of factors "including the circumstances that precipitated the altercation; the presence or use of weapons; the degree and proportionality of the parties' use of defensive force; the nature and severity of the parties' injuries; or whether there is evidence that one party attempted to abandon the fight." *Corbett*, 269 N.C. App. at 566, 839 S.E.2d at 403.

¶ 23 Applying the above factors to this case, we hold the trial court erred in instructing the jury on the aggressor doctrine. The evidence

demonstrated that Defendant directed Caleb not to come to her home. Despite Defendant's instructions not to come, Caleb arrived at Defendant's home and "burst" through the front door in an angry fashion. Caleb opened the Defendant's bedroom door with such violence that the door banged against the furniture in Defendant's bedroom. Caleb yelled that the Defendant was ruining his life and that he was going to kill her. Caleb initiated a physical altercation with Defendant that continued without pause for two minutes. Defendant's daughter, April, was so frightened by the noise of her mother engaged in this struggle that she feared for her own safety.

¶ 24 As to the presence or use of weapons, we note "[t]he mere fact that a defendant was armed is not evidence that he was the aggressor if he made no unlawful use of his weapon." *Id.* at 569, 839 S.E.2d at 405. Additionally, a "defendant is not required to have a weapon in his possession at all times in order to avoid the necessity of retreating when called upon to defend himself or herself in his or her own home." *Benner*, 2022-NCSC-28, ¶ 26 n.4. Although the evidence demonstrated that Caleb entered the Defendant's home unarmed, upon bursting into Defendant's bedroom, Caleb grabbed Defendant's firearm from her nightstand, took it out of its holster, and pointed it at the Defendant while demanding to see her phone. Even after Caleb threw the Defendant's phone back at her, Caleb continued to have possession of the firearm as he placed the firearm in his pocket and moved towards the bedroom door. After Defendant requested Caleb not to leave her bedroom with the firearm, Caleb relinquished it and Defendant armed herself as a precaution, fearing that Caleb would harm her, her daughter, or her daughter's friend who had stayed the night in the residence.

¶ 25 Moreover, Defendant only armed herself after Caleb threw the firearm down and began pacing around the bedroom with his hands curled up into fists while screaming at the Defendant. When Defendant attempted to leave the bedroom and flee from the altercation, Caleb lunged towards the Defendant and proceeded to kick, push, punch, and shove her. As Defendant was attacked in her own home and feared for the safety of herself and others in her home, Defendant acted in self-defense to repel Caleb's assaults against her. *See id.*, ¶ 29.

¶ 26 It was during this physical altercation that Defendant resisted Caleb's attacks by firing two successive shots at Caleb from six inches away, within two short minutes of when he entered the residence. These facts do not suggest that Defendant "aggressively and willingly" entered into a fight with Caleb. *See Vaughn*, 227 N.C. App. at 203-04, 742 S.E.2d at 279-80 (citation omitted) (holding that evidence was insufficient to support an aggressor instruction where the defendant fled an

altercation with the victim and subsequently armed herself because the evidence did not demonstrate she brought on the original difficulty); *see also State v. Potter*, 295 N.C. 126, 144, 244 S.E.2d 397, 409 (1978); *Tann*, 57 N.C. App. at 530-31, 291 S.E.2d at 827.

¶ 27 While the State contends Dana's testimony indicating Caleb was not a violent person supports the inference Defendant was the aggressor, this argument is fatally flawed because the point in time where aggressor status may attach is temporally connected with the actual use of force. *Mumma*, 372 N.C. at 239 n.2, 827 S.E.2d at 297 n.2. Caleb threatened Defendant on several occasions including texting to her, "[y]ou'll be lucky you don't end up in a ditch," 30 minutes before his death. In the two minutes between Caleb's arrival to Defendant's home and his death, Caleb threw open Defendant's bedroom door, threatened to kill her, and initiated a physical altercation with Defendant.

¶ 28 The State suggests that Defendant's threats to send sexually explicit photographs to Caleb's wife at 11:31 p.m. on the night before the shooting make Defendant the aggressor. However, a period of seven hours passed between the time Defendant threatened to send photographs to Caleb's wife and the time Defendant shot him. The threats of sending sexual photographs to Caleb's wife are insufficient to support a jury instruction on the aggressor doctrine, because these threats were not made *at the time* the self-defense occurred. *Id.* Moreover, we decline to hold that a threat to expose one's extramarital affair constitutes conduct demonstrating an aggressive willfulness to engage in a physical altercation.

¶ 29 The State also relies on *State v. Cannon*, 341 N.C. 79, 459 S.E.2d 238 (1995) to argue that Defendant's act of shooting Caleb in the back necessarily makes Defendant the aggressor. However, the State's reliance on *Cannon* is misplaced. In *Cannon*, the victim came to the defendant's home with the purpose of engaging in an argument. *Id.* at 83, 459 S.E.2d at 241. The defendant was found to be the aggressor because, during their argument, the "victim straightened her car up to start going down the driveway" and

> [w]hen the victim's car was directed down the driveway, defendant was standing about eight feet away, on the passenger side of the victim's car. Both windows in the victim's car were rolled down. Defendant pulled his gun out of his pocket, cocked it, pointed it at the victim, and shot into the car three times.

Id. at 81, 459 S.E.2d at 240. The victim in *Cannon* was actively retreating from the affray, which allowed the defendant the space and time

to intentionally draw his firearm. The unbroken chain of events on the morning of June 13 distinguishes this case from *Cannon*. At 6:28 a.m., Caleb came to the residence against the expressed directive of Defendant, forcefully entered her residence and bedroom, threatened to kill Defendant, extorted her cell phone from her by pointing a firearm at her, assaulted Defendant without provocation by punching, pushing, kicking, and shoving when she attempted to escape from her bedroom with the firearm. Less than two minutes later, after Caleb repeatedly assaulted Defendant and Defendant tried to get away from these attacks, Defendant shot Caleb at close range.

¶ 30 Consistent with our Supreme Court's holding in *State v. Washington*, "the record here discloses no evidence tending to show that the defendant *brought on* the difficulty or was the aggressor, [and] it necessarily follows that the instruction as it relates to the evidence in this case was partially inapplicable, incomplete and misleading." 234 N.C. 531, 535, 67 S.E.2d 498, 501 (1951) (emphasis added). Accordingly, we hold the trial court erred in instructing the jury on the aggressor doctrine because the testimony at trial would not permit a reasonable jury to infer that Defendant aggressively and willingly entered into the fight with Caleb, where she expressly instructed him not to come to her residence, yet Caleb disregarded her instructions and then physically assaulted her. *See Juarez*, 369 N.C. at 358, 794 S.E.2d at 300; *State v. Parks*, 264 N.C. App. 112, 115, 824 S.E.2d 881, 884 (2019); *Jenkins*, 202 N.C. App. at 297, 688 S.E.2d at 105.

¶ 31 Because the trial court committed reversible error in Defendant's case by delivering unsupported jury instructions on the aggressor doctrine, this error entitles Defendant to a new trial. *Corbett*, 269 N.C. App. at 581, 839 S.E.2d at 412; *Vaughn*, 227 N.C. App. at 202, 742 S.E.2d at 278.

B. Exhibits

¶ 32 Our decision to award the Defendant a new trial based on the trial court's error in instructing the jury on the aggressor doctrine makes it unnecessary to address Defendant's argument that the trial court committed plain error in admitting Exhibits 174 and 175 into evidence. On remand for new trial, we urge the trial court to ensure that admitted evidence is not only relevant, but its probative value is not substantially outweighed by the danger of unfair prejudice. *See* N.C. Gen. Stat. § 8C-1, Rule 401, Rule 403 (2020). On remand, we leave this issue to the learned trial judge in recognition that other evidence may be presented at the new trial.

III. Conclusion

¶ 33 For the reasons stated herein, we hold the trial court erred in instructing the jury on the aggressor doctrine. Accordingly, we reverse and remand as Defendant is entitled to a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

Judges INMAN and MURPHY concur in result only.

STATE OF NORTH CAROLINA
v.
ERIC ANTRON INGRAM

No. COA21-687

Filed 19 April 2022

Motor Vehicles—driving while impaired—circumstantial evidence of driving a vehicle—defendant straddling fallen moped

The State presented substantial evidence, even though circumstantial, to allow the jury to draw a reasonable inference that defendant drove a vehicle while impaired pursuant to N.C.G.S. § 20-138.1(a), based on testimony from first responders that defendant was found alone, wearing a helmet, lying in the middle of the road on the double yellow line and straddling the seat of a moped that was lying on its side and on top of one of defendant's legs.

Appeal by Defendant from judgment entered 29 June 2021 by Judge William A. Wood, II, in Rowan County Superior Court. Heard in the Court of Appeals 6 April 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary S. Crawley, for the State-Appellee.

Hynson Law, PLLC, by Warren D. Hynson, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Eric Antron Ingram appeals from judgment entered upon the jury's verdict of guilty of driving while impaired. Defendant argues that the trial court erred by denying his motion to dismiss because the

State presented insufficient evidence that he drove a vehicle, as required by N.C. Gen. Stat. § 20-138.1(a). Because the State presented circumstantial evidence sufficient to establish that Defendant drove a moped on the morning in question, there was no error in the trial court's denial of Defendant's motion to dismiss.

I. Background

¶ 2 On 2 August 2017, Defendant was cited for driving a moped while impaired. Defendant was found guilty following a bench trial in district court and appealed to superior court, where he was tried before a jury.

¶ 3 The evidence at trial tended to show the following: on the morning of 2 August 2017, Chief Benjamin Grubb of the Spencer Fire Department responded to a call for a "motorcycle wreck" on a "pretty well-traveled stretch of roadway" in Spencer. Grubb estimated that firefighters arrived at the scene "within five minutes of the initial call." Upon arriving, Grubb saw Defendant in the road on a moped that was lying on its side on top of the double yellow line. According to Grubb, Defendant was wearing a helmet and "sitting on the seat" of the fallen moped with one of his legs underneath it. Grubb did not see any debris or tire marks in the road, rips in Defendant's clothing, or damage to the moped or Defendant's helmet.

¶ 4 Defendant was unresponsive, his eyes were closed, and he was not talking or moving when the firefighters first approached him. They "[s]tarted shaking" Defendant and "got him to wake up a little bit." Defendant stated that he was not injured; Grubb did not observe any injuries on him. Grubb described Defendant as "lethargic at first" but explained that he "woke up more" as the firefighters continued speaking with him. Grubb could smell a strong odor of alcohol "once [Defendant] got up and started talking[.]" The firefighters were able to "pick the moped up off of" Defendant but Grubb could not recall if the moped was hot to the touch or if there were keys in it.

¶ 5 Officer Tyler Honeycutt of the Spencer Police Department arrived at the scene shortly after the firefighters. When Honeycutt approached, he observed the firefighters "in the process of picking the moped up" and saw that one of Defendant's legs was partially underneath the moped. Like Grubb, Honeycutt did not see any debris or tire marks in the road, rips in Defendant's clothing, damage to the moped or Defendant's helmet, or injuries to Defendant's person. Honeycutt could not recall if there were keys in the moped.

¶ 6 Honeycutt began speaking with Defendant once Defendant stood up. Honeycutt "detected a strong odor of alcohol" coming from Defendant

and noticed that Defendant had "[b]loodshot, glassy -- red, glassy eyes also." According to Honeycutt, Defendant "stated that he had drank earlier" and "said it was a couple of beverages earlier in the morning."

¶ 7 Honeycutt had Defendant perform a "walk and turn" test, which requires the subject to take nine steps along a straight line, turn around, and complete nine more steps along the line. Defendant interrupted Honeycutt's instructions and began the test early, despite being told not to do so. After Honeycutt fully explained the test, Defendant attempted to walk the straight line but started over. On his second attempt, Defendant "made it to nine steps, but stepped off the line, was swaying, unable to keep heel-to-toe." Honeycutt also had Defendant perform a "one-legged stand," which requires the subject to "raise their foot approximately six inches off the ground with their toes pointed out," "[k]eep their arms by their side and look towards their foot," and count. During the one-legged stand, Defendant "began to sway and . . . attempt to use his arms for balance." Honeycutt formed the opinion that Defendant had consumed a sufficient amount of an impairing substance to appreciably impair his mental or physical faculties or both.

¶ 8 Following Defendant's refusal to perform an Intoxilyzer breath test, Honeycutt obtained a warrant for a blood sample. Honeycutt testified that once at the hospital, Defendant "advised that he would be stupid willingly giving blood" and claimed that "someone laid [the moped] on top of him." Honeycutt requested that a sample of Defendant's blood, which was drawn by a nurse, be tested by the State Crime Lab.

¶ 9 Danielle O'Connell, a forensic scientist in the toxicology section of the State Crime Lab, tested Defendant's sample and determined that his blood ethanol concentration was 0.29 grams of alcohol per 100 milliliters.

¶ 10 The trial court denied Defendant's motion to dismiss at the close of the State's evidence. Defendant did not present evidence and the trial court denied Defendant's renewed motion to dismiss. The jury found Defendant guilty of driving while impaired and the trial court sentenced Defendant to a term of 15 months in the Misdemeanant Confinement Program. Defendant gave notice of appeal in open court.

II. Discussion

¶ 11 Defendant argues that the trial court erred by denying his motion to dismiss. We review the denial of a motion to dismiss for insufficient evidence de novo. *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016). Upon a motion to dismiss, "the question for the [c]ourt is

whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances.

Fritsch, 351 N.C. at 378-79, 526 S.E.2d at 455 (quotation marks and citations omitted).

¶ 12 N.C. Gen. Stat. § 20-138.1(a) provides that

> [a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
>
> (3) With any amount of a Schedule I controlled substance, as listed in [N.C. Gen. Stat. §] 90-89, or its metabolites in his blood or urine.

N.C. Gen. Stat. § 20-138.1(a) (2017).

¶ 13 Defendant does not dispute the sufficiency of the evidence that he was on a highway, street, or public vehicular area within this state; that he was "under the influence of an impairing substance"; or that he had "consumed sufficient alcohol that he ha[d] . . . an alcohol concentration of 0.08 or more." *Id.* Defendant challenges only the sufficiency of the evidence that he drove the moped. "A person 'drives' within the meaning of the statute if he is 'in actual physical control of a vehicle which is in motion or which has the engine running.' " *State v. Hoque*, 269 N.C. App. 347, 353, 837 S.E.2d 464, 470-71 (2020) (quoting N.C. Gen. Stat. § 20-4.01(7) and (25)).

¶ 14 No witness testified to seeing Defendant in physical control of the moped while it was in motion or its engine was running. Nonetheless, the State presented sufficient circumstantial evidence to establish that Defendant drove the moped. Two first responders testified that Defendant was found alone, wearing a helmet, lying on the double yellow line in the middle of a road and mounted on the seat of the fallen moped while it rested on top of one of his legs. There was no testimony that any other person who might have driven the moped was at the scene of the accident. Viewing this evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference, as we must, this evidence is sufficient to establish that Defendant was in actual physical control of the moped while it was in motion or had the engine running. *See id.*

¶ 15 Defendant emphasizes that he was not injured, there was no debris and were no tire marks in the road, there was no evident damage to the moped or his helmet, the moped was not running when Defendant was found, and there was no evidence that the moped was hot to the touch or that a key was in the moped or on Defendant's person. These points are appropriately addressed to the jury, which is charged with weighing whether the evidence proved Defendant's guilt beyond a reasonable doubt. They do not, however, foreclose the reasonable inference from the State's evidence that Defendant had recently driven the moped. *See State v. Campbell*, 359 N.C. 644, 682, 617 S.E.2d 1, 24 (2005) ("If the evidence supports a reasonable inference of defendant's guilt based on the circumstances, then it is for the jurors to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." (quotation marks, citations, and brackets omitted)).

¶ 16 Defendant also contends that this case is "squarely controlled" by *State v. Ray*, in which this Court held that the circumstantial evidence was insufficient to establish the defendant drove a crashed car. 54 N.C.

App. 473, 475, 283 S.E.2d 823, 825 (1981). In *Ray*, the only evidence the defendant drove the car was that the defendant was found "approximately halfway in the front seat, between the driver and passenger area in the front seat." *Id.* at 473, 283 S.E.2d at 824. There was no evidence that "the car had been operated recently," was "in motion at the time the officer observed the defendant," was owned by the defendant, had its motor running when the officer arrived, or that "the defendant was seen driving the car at some point immediately prior." *Id.* at 475, 283 S.E.2d at 825.

¶ 17 Contrary to Defendant's assertion, *Ray* is readily distinguishable. First, this case concerns a moped, not a multiple-occupant car as in *Ray*. Furthermore, the uncontradicted evidence was that Defendant was alone at the scene and was wearing a helmet, lying in the middle of a road, and not merely near the moped but straddling the seat of the fallen moped that was lying on top of one of his legs. This evidence amply supports the inference that Defendant drove the moped.

III. Conclusion

¶ 18 Because the State presented sufficient evidence of each element of the offense of driving while impaired, the trial court did not err by denying Defendant's motion to dismiss.

NO ERROR.

Judges ARROWOOD and JACKSON concur.

STATE v. WILLIAMSON

[283 N.C. App. 91, 2022-NCCOA-265]

STATE OF NORTH CAROLINA
v.
ROCKY KURT WILLIAMSON, DEFENDANT

No. COA16-631

Filed 19 April 2022

1. Homicide—second-degree—malice—knowingly driving while impaired—reckless driving

The trial court properly denied defendant's motion to dismiss a second-degree murder charge because the State presented substantial evidence that defendant acted with malice where he knowingly drove while impaired (after and while consuming alcohol over the course of several hours), drove recklessly while two passengers sat in the vehicle with him, and crashed the vehicle after falling asleep at the wheel, causing the death of one passenger. Defendant's history of impaired driving convictions tended to show that defendant was aware of the potentially fatal consequences of his driving leading up to the crash.

2. Constitutional Law—right against self-incrimination—invoked on cross-examination—direct testimony stricken—proper

At an evidentiary hearing on defendant's motion for appropriate relief (MAR) in a murder prosecution, where defendant alleged that a material witness had recanted his trial testimony (incriminating defendant) as false, the witness testified to that effect on direct examination but invoked his Fifth Amendment right against self-incrimination on cross-examination, and where the witness failed to appear at a subsequent hearing to answer the State's cross-examination questions, the trial court did not err by denying defendant's MAR and striking the witness's direct testimony in full without first issuing a material witness order compelling the witness to testify on cross-examination. Where a witness's assertion of the testimonial privilege prevents inquiry into matters about which he testified on direct examination, the trial court—to alleviate the "substantial danger of prejudice"—can either require the witness to answer the questions or strike all or part of the witness's direct testimony.

Appeal by Defendant from judgment entered 8 October 2015 by Judge Tanya T. Wallace and order entered 14 May 2020 by Judge Robert F. Floyd, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 15 December 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Glover & Petersen, P.A., by James R. Glover, for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant Rocky Kurt Williamson ("Defendant") appeals from a judgment following a jury verdict finding him guilty of second-degree murder and aggravated felony death by vehicle. On appeal, Defendant contends that the evidence presented was insufficient to permit a reasonable juror to find beyond a reasonable doubt that Defendant engaged in the reckless conduct required to establish malice for a conviction of second-degree murder. By petition for writ of certiorari, which this Court granted, Defendant also argues the trial court erred in denying his motion for appropriate relief by striking a witness's testimony in full without first issuing a material witness order compelling the witness to appear for further questioning and without informing the witness that he had waived his testimonial privilege against self-incrimination and was required to answer further questions on the subject of his direct testimony under penalty of contempt. After careful review, we hold Defendant's trial was free from error and affirm the trial court's order denying Defendant's motion for appropriate relief.

I. FACTUAL & PROCEDURAL HISTORY

¶ 2 Evidence presented at trial tends to show the following:

¶ 3 On 4 July 2012, Defendant, Fred Jacobs ("Mr. Jacobs"), and Dakota Hammonds ("Mr. Hammonds"), Mr. Jacobs' fifteen-year-old relative, were out driving late at night. Defendant and Mr. Jacobs were in the front seat and Mr. Hammonds was in the back seat. Both Defendant and Mr. Jacobs had been drinking throughout the night, at Fourth of July celebrations earlier in the evening and from a twelve-pack of beer they purchased while they drove. Around 3:30 a.m. the group visited Charles Anthony Carr ("Mr. Carr") at his house. Defendant got out of the car and spoke with Mr. Carr for a few minutes before the group left and began driving again. At about 4:00 a.m., the car veered off the road and crashed. Mr. Jacobs was the only one wearing a seatbelt; Defendant and Mr. Hammonds were flung from the car in the crash and seriously injured. Mr. Hammonds was airlifted to the hospital, where he was declared dead later that morning.

¶ 4 Defendant was indicted for six offenses on 5 July 2012: (1) second-degree murder; (2) aggravated felony death by vehicle; (3) felony death by vehicle; (4) reckless driving; (5) driving while impaired ("DWI"); and (6) operating a motor vehicle while not having a driver's license. The case came on for trial 21 September 2015.

¶ 5 The central issue at trial was the identity of the driver of the vehicle at the time of the fatal wreck. Mr. Jacobs testified Defendant was driving. Defendant testified that Mr. Jacobs was driving and that he did not remember the crash. Mr. Carr served as the only other witness and testified that he saw Mr. Jacobs in the passenger seat and Mr. Hammonds in the backseat when Defendant came to speak with him in front of his house that night.

¶ 6 On 8 October 2015, the jury found Defendant guilty of second-degree murder, aggravated felony death by vehicle, DWI, reckless driving, and operating a motor vehicle without a valid operator's license. The trial court consolidated Defendant's second-degree murder and aggravated felony death by vehicle convictions into one judgment and sentenced Defendant to 180 to 228 months in prison. The trial court arrested judgment on Defendant's other charges. Defendant filed written notice of appeal.

¶ 7 With his appeal, Defendant also filed a motion for appropriate relief alleging that Mr. Carr had recanted his trial testimony as false. We granted Defendant's motion, vacated his convictions based on the motion, and ordered a new trial. As a result, we did not resolve Defendant's original appeal.

¶ 8 Our Supreme Court then reviewed and vacated the order of this Court, concluding the matter should be remanded to the trial court for an evidentiary hearing. We then remanded the motion to the trial court for that purpose.

¶ 9 The trial court conducted an evidentiary hearing on Defendant's motion for appropriate relief in three sessions over more than a year's time, on 7 June 2018, 7 February 2019, and 29 October 2019.

¶ 10 On 7 June 2018, Mr. Carr appeared and voluntarily testified that at Defendant's trial, he had falsely testified that: (1) he saw Mr. Jacobs and Mr. Hammonds on 5 July 2012; (2) he saw Mr. Jacobs sitting in the passenger side of the vehicle; and (3) he saw Mr. Hammonds sitting in the back seat on the driver's side. The trial court then advised Mr. Carr he was potentially facing criminal and contempt charges for perjury. After

it became clear that Mr. Carr had not consulted with an attorney, the trial judge adjourned the hearing to allow Mr. Carr to obtain representation.

¶ 11 On 7 February 2019, Mr. Carr again appeared but invoked the Fifth Amendment to refuse to testify in response to virtually all of the trial prosecutor's questions on cross-examination. The prosecutor objected to Mr. Carr asserting his privilege against self-incrimination after he testified on direct examination, so the trial court again adjourned the hearing to determine whether Mr. Carr had waived his right to assert his privilege.

¶ 12 On 29 October 2019, Mr. Carr did not appear. The trial court held that he had waived his privilege against self-incrimination by testifying on direct examination at the first hearing and struck his testimony in full because he had not appeared in court to answer questions on cross-examination.

¶ 13 On 14 May 2020, the trial court entered an order denying Defendant's motion for appropriate relief. Defendant filed a petition for writ of certiorari requesting our review of the order denying the motion for appropriate relief along with a motion to reinstate his original appeal. This Court ordered Defendant's appeal reinstated and granted his petition.

II. ANALYSIS

A. Merits of Defendant's Original Appeal

¶ 14 **[1]** Defendant asserts the trial court erred by failing to dismiss the charge of second-degree murder when Defendant moved to dismiss all charges at the close of all evidence at trial. Specifically, Defendant contends that the evidence, considered in the light most favorable to the State, was only sufficient to establish culpable negligence for a conviction of involuntary manslaughter and was insufficient to establish malice, which is an essential element of second-degree murder. We disagree.

¶ 15 Our standard of review on appeal is well-established:

> Upon the defendant's motion to dismiss, the question for the court is whether substantial evidence was introduced of each element of the offense charged and that the defendant was the perpetrator. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . . The court is to consider the evidence in the light most favorable to the State in ruling on a motion to dismiss. The State is entitled to every reasonable intendment and inference to be

> drawn from the evidence; contradictions and discrepancies do not warrant dismissal—they are for the jury to resolve.

State v. Alston, 310 N.C. 399, 404, 312 S.E.2d 470, 473 (1984) (quotation marks and citation omitted).

¶ 16 Involuntary manslaughter is the "unlawful and unintentional killing of another human being, *without malice*, which proximately results from . . . an act or omission constituting culpable negligence." *State v. Wallace*, 309 N.C. 141, 145, 305 S.E.2d 548, 551 (1983) (emphasis added). Second-degree murder, on the other hand, is "(1) the unlawful killing, (2) of another human being, (3) *with malice*, but (4) without premeditation and deliberation." *State v. Banks*, 191 N.C. App. 743, 751, 664 S.E.2d 355, 361 (2008) (emphasis added). To prove malice for second-degree murder, by reckless driving, in particular, the State does not need to demonstrate Defendant had a specific intent to kill, but it must show "that [the] defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind." *State v. Miller*, 142 N.C. App. 435, 441, 543 S.E.2d 201, 205 (2001) (citation omitted).

¶ 17 This Court has recognized that evidence of knowingly driving while impaired, whether by alcohol or an illegal substance—particularly when combined with evidence of reckless driving or behavior—may constitute sufficient evidence to prove malice for a second-degree murder charge. *See, e.g.*, *State v. Grooms*, 230 N.C. App. 56, 67-68, 748 S.E.2d 162, 169-70 (2013) (holding substantial evidence of malice when the defendant knowingly consumed multiple impairing substances, swerved off the road prior to the collision, failed to brake, failed to call 911, did not aid the two victims he struck, and registered a 0.16 BAC at the time of the accident); *State v. Davis*, 197 N.C. App. 738, 743, 678 S.E.2d 385, 389 (2009), *aff'd in part*, *rev'd in part*, 364 N.C. 297, 698 S.E.2d 65 (2010) (holding sufficient evidence of malice where the defendant consumed nine to twelve beers in a two-hour period, ran over a road sign, weaved side to side until he ran off the road, crashed into the victim's truck without attempting to brake, and registered a 0.13 BAC).

¶ 18 Evidence introduced at trial, especially testimony by Mr. Jones, established that Defendant drove after consuming alcohol and while he consumed alcohol over the course of several hours and that he was impaired. At one point while driving, Defendant engaged the emergency break, locking the back tires and causing the car to swerve. Defendant was driving at the time the vehicle veered off the road and crashed.

Before the crash, Defendant fell asleep at the wheel as the car approached a bend in the road, drifted off the curve, suddenly woke, overcorrected, and crashed the vehicle.

¶ 19 Defendant's blood-alcohol level was 0.16 when police tested him after the crash, and an expert witness testified that based on the time lapse before testing, it could have been as high as 0.20 at the time of the crash. Similar to the defendants in *State v. Grooms*, 230 N.C. App. 56, 748 S.E.2d 162 (2013), and *State v. Davis*, 197 N.C. App. 738, 678 S.E.2d 385 (2009), Defendant knowingly consumed alcohol before and while driving beyond the point of impairment, drove recklessly, and had knowledge of the potentially fatal consequences of his driving, particularly in light of his history of impaired driving convictions.

¶ 20 Viewing the evidence in the light most favorable to the State, we hold the State presented substantial evidence of Defendant's malice, his "intent to perform the act of driving in such a reckless manner as reflect[ed] knowledge that injury or death would likely result," *Miller*, 142 N.C. App. at 441, 543 S.E.2d at 205, and the charge of second-degree murder was appropriately submitted to the jury for its consideration. We hold the trial court did not err in denying Defendant's motion to dismiss this charge.

B. Order Denying Defendant's Motion for Appropriate Relief

¶ 21 **[2]** Defendant claims that the trial court erred in denying Defendant's motion for appropriate relief because it struck a witness's testimony in whole without first issuing a material witness order compelling the witness to appear. This argument is without merit.

¶ 22 Defendant contends that this appeal is subject to *de novo* review, while the State argues abuse of discretion is the proper standard. The State is correct that, as a general matter, a denial of a motion for appropriate relief is subject to review for abuse of discretion. *State v. Watson*, 258 N.C. App. 347, 353-54, 812 S.E.2d 392, 397 (2018) (citing *State v. Elliot*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006)). However, we review the trial court's conclusions of law in an order denying a motion for appropriate relief *de novo*. *Id.* (citing *State v. Martin*, 244 N.C. App. 727, 734, 781 S.E.2d 339, 344 (2016)). If the issue raised by a defendant's challenge to the trial court's decision to deny his post-conviction motion is primarily legal rather than factual in nature, this Court uses a *de novo* standard of review in evaluating a defendant's challenge to the trial court's order. *Id.*

¶ 23 At an evidentiary hearing, the defendant "bears the burden of proving by a preponderance of the evidence every fact essential to support

the motion." *State v. Garner*, 136 N.C. App. 1, 13, 523 S.E.2d 689, 698 (1990). The trial court may grant a defendant a new trial on the basis of recanted testimony if: "(1) the trial court is reasonably well satisfied that the testimony given by a material witness is false, and (2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial." *State v. Britt*, 320 N.C. 705, 715, 360 S.E.2d 660, 665 (1987), *superseded by statute on other grounds as stated in State v. Defoe*, 364 N.C. 29, 33, 691 S.E.2d 1, 4 (2010).

¶ 24 The Fifth Amendment of the United States Constitution and Article I, Section 23 of the North Carolina Constitution provide that a witness cannot be compelled to give self-incriminating evidence. U.S. Const. amend. V; N.C. Const., art. I, § 23. The Sixth Amendment of the United States Constitution and Article I, Section 23 of the North Carolina Constitution provide that a criminal defendant has the right to confront witnesses against him, which includes the right to test the truth of those witnesses' testimony by cross-examination. U.S. Const. amend. VI; N.C. Const., art. I, § 23; *see also State v. Ray*, 336 N.C. 463, 468, 444 S.E.2d 918, 922 (1994). When these rights conflict, "[t]he issue thus becomes whether [the] defendant's right to confront witnesses through cross-examination was unreasonably limited by [the witness's] assertion of the testimonial privilege." *Ray*, 336 N.C. at 469, 444 S.E.2d at 922.

¶ 25 In *State v. Ray*, 336 N.C. 463, 444 S.E.2d 918 (1994), our Supreme Court distinguished between cases where the "assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination." *Id.* at 470, 444 S.E.2d at 923 (quoting *United States v. Cardillo*, 316 F.2d 606, 611 (2d Cir. 1963)). If the witness invokes the privilege in response to questions regarding collateral matters, there is little danger of prejudice to a defendant, but if the questions pertain to details of the direct examination, there may be a substantial danger of prejudice when a defendant is unable to confront the witness. *Id.* In the latter instance, "the witness's testimony should be stricken in whole or in part." *Id.* In other words, the essential question is "whether [the] defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness' direct testimony." *Id.* at 471, 444 S.E.2d at 924.

¶ 26 When the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination, to alleviate the substantial danger of prejudice, the trial court must either require the witness to answer the questions, or strike all or part of the witness's

direct testimony after allowing the assertion of the testimonial privilege. *Id.* at 472, 444 S.E.2d at 924.

¶ 27 Defendant argues the trial court was not authorized to either compel the witness to answer questions or to strike the testimony after allowing the assertion of the privilege. Instead, Defendant contends, the trial court was required to first compel the witness to testify on cross-examination and only then, if the witness continued to refuse to answer questions, could the trial court strike the prior testimony. The trial court did not compel Mr. Carr to testify, and Mr. Carr never returned to hearings to learn he had waived his privilege.

¶ 28 The trial court determined that Mr. Carr was a material witness at Defendant's trial. Mr. Carr voluntarily testified that his trial testimony was false without asserting his Fifth Amendment privilege. After it became clear Mr. Carr had not consulted with an attorney regarding this testimony, the trial court set a second hearing date to allow Mr. Carr to seek counsel. At the second hearing, Mr. Carr asserted his Fifth Amendment privilege on cross-examination. Mr. Carr failed to return to testify for the third hearing date. The trial court then found that Mr. Carr had waived his privilege by testifying during the first hearing and that his failure to reappear and undergo cross-examination substantially prejudiced the State's ability to present evidence and testimony in support of its position against Defendant's motion. The trial court struck Mr. Carr's testimony that his trial testimony was false in its entirety.

¶ 29 We are bound by our Supreme Court's decision in *Ray*, which held that the trial court should *either* require the witness to answer the questions, *or* strike all or part of the witness's direct testimony after allowing the assertion of the testimonial privilege. *Ray*, 336 N.C. at 472, 444 S.E.2d at 924.

¶ 30 "[W]hether all or a part of the testimony should be stricken, must depend upon the discretion of the trial judge exercised in the light of the particular circumstances." *Cardillo*, 316 F.2d at 613. Defendant has not suggested the trial court should have only partially stricken Mr. Carr's testimony or challenged the trial court's exercise of its discretion in this regard, so he has abandoned that argument. *See* N.C. R. App. P. 28(a) (2022) ("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.").

¶ 31 Other than Mr. Carr's testimony, Defendant presented no evidence to support his motion for appropriate relief. Because Defendant failed to meet his burden of proof, *Garner*, 136 N.C. App. at 13, 523 S.E.2d at 698,

we hold the trial court properly denied his motion for appropriate relief and affirm the trial court's order.

III. CONCLUSION

¶ 32 For the reasons set forth above, we hold Defendant's trial was free from error, and we affirm the trial court's denial of Defendant's motion for appropriate relief.

NO ERROR; AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

BRIAN R. TURNER, PLAINTIFF
v.
LINDSEY OAKLEY (NOW LEGGE), DEFENDANT

No. COA21-274

Filed 19 April 2022

1. Child Custody and Support—subject matter jurisdiction—modification of custody order—pending motion

The trial court had subject matter jurisdiction to enter an order modifying custody of plaintiff-father's and defendant-mother's child where, despite plaintiff's argument to the contrary, plaintiff's custody motion was still pending after a series of intervening temporary custody orders. Even if plaintiff's motion was no longer technically pending, the absence of a motion did not divest the trial court of jurisdiction to modify custody where the parties had apprised the court of new facts unknown at the time of the original custody order.

2. Child Custody and Support—findings of fact—doctor's testimony—parent's major depressive disorder—described as cured

In a child custody case, the appellate court rejected plaintiff-father's challenge to the trial court's finding that defendant-mother's doctor had "described defendant as cured" from her major depressive disorder where the finding was supported by the doctor's testimony that defendant's depressive disorder was in remission to the point that she was "essentially ... cured so to speak" and that her prognosis was excellent, notwithstanding plaintiff's argument that defendant could not be considered cured since she was still taking

medicine for the disorder. Further, the trial court acted within its discretion in affording substantial weight to the doctor's testimony.

3. Child Custody and Support—substantial change in circumstances—child's best interests—findings—parent's mental health crisis

In a child custody case, the trial court properly found a nexus between the substantial change in circumstances and the child's welfare and properly examined whether modification was in the child's best interests where the court made findings concerning defendant-mother's mental health difficulties following her brother's sudden death (which affected her ability to care for her son), her improvement upon hospitalization and treatment, her successful visitation with her son, and her continued employment and flexible work schedule.

4. Child Custody and Support—allegations of child abuse—written findings—isolated spanking or yelling—no serious emotional damage or serious physical injury

In a child custody case, the trial court was not required to make written findings regarding allegations of child abuse where plaintiff-father neither made allegations of child abuse in his custody motion nor introduced any evidence that isolated incidents of spanking or yelling created serious emotional damage, serious physical injury, or substantial risk of serious injury to the child.

5. Child Custody and Support—primary custody to mother—abuse of discretion analysis—reasoned decision

The trial court did not abuse its discretion in a child custody case by granting primary custody to defendant-mother and by reducing plaintiff-father's visitation time where its reasoned decision properly considered the evidence as shown by its findings—including that defendant had experienced a mental health crisis that affected her ability to parent, defendant had received treatment and her mental health issues were resolved, defendant had successful visitation with the son, and plaintiff had ongoing difficulties co-parenting the son.

Appeal by Plaintiff from orders entered 31 July 2020 and 17 August 2020 by Judge Lee W. Gavin in Randolph County District Court. Heard in the Court of Appeals 25 January 2022.

Lake Tillery Law, by Brooke M. Crump, for Plaintiff-Appellant.

Cathy R. Stroupe for Defendant-Appellee.

COLLINS, Judge.

¶ 1 This appeal stems from Plaintiff's August 2018 motion to modify custody of the parties' son, Matthew.[1] Plaintiff argues that the trial court lacked jurisdiction to enter an order modifying custody, made a finding of fact not supported by substantial evidence, failed to find a nexus between the substantial change in circumstances and Matthew's welfare, failed to make sufficient findings concerning evidence of child abuse, and abused its discretion. After careful review, we affirm.

I. Background

¶ 2 The parties are the parents of Matthew, a minor child born in March 2010. The parties were never married.

¶ 3 On 15 April 2013, Plaintiff filed a complaint in Rockingham County District Court seeking primary custody of Matthew. On 26 November 2013, the district court entered an order granting primary custody to Defendant and secondary custody to Plaintiff ("2013 Custody Order"). This order awarded the parties physical custody of Matthew as follows: Plaintiff had physical custody on "all weekends that [Defendant] must work"; Defendant had physical custody the weekend immediately following; and Plaintiff had physical custody "for the next two successive weekends immediately following[.]" The 2013 Custody Order also included a holiday schedule granting each party physical custody "for as close to equal time [as] is practical," and a provision permitting each party custody for vacation purposes upon advance notice.

¶ 4 On 10 August 2018, Plaintiff filed an Ex Parte Motion for Emergency Custody and Modification of Prior Order on Custody ("Custody Motion") seeking temporary and permanent custody of Matthew. Plaintiff alleged there had been a substantial and material change in circumstances affecting Matthew's welfare since the entry of the 2013 Custody Order as follows:

> a. Since the school year ended, [Matthew] has primarily resided with Plaintiff.
>
> b. On March 29, 2018, Defendant called Plaintiff in a rage and said that she couldn't do anything for [Matthew] while screaming at [Matthew]

1. We use a pseudonym to protect the identity of the minor.

to go live with [D]efendant if that's what [Matthew] wanted.

c. [Matthew] has expressed concern that Defendant does not have time for him during the school week due to her busy schedule in the evenings including going to work and school, whereas she has enrolled in school on four different occasions.

d. Defendant has not been keeping up with [Matthew's] homework and has trouble communicating with teachers.

e. Defendant currently has [Matthew] in therapy due to the strained relationship between Defendant and [Matthew].

f. The current visitation schedule is not in the best interest of [Matthew] due to Defendant's current mental state, Defendant's threats to [Matthew], and Defendant's strained relationship with [Matthew].

g. Plaintiff has married and [Matthew] has a strong familial bond with both Plaintiff and Plaintiff's wife.

h. Modifying the schedule to give specific visitation times for Defendant's visitations, and giving Plaintiff primary custody, will promote consistency and stability for [Matthew], which is in the best interests of [Matthew].

¶ 5 The trial court granted Plaintiff emergency full custody of Matthew by an ex parte order. Following a hearing on 29 August 2018, the trial court entered an order on 14 December 2018 granting Plaintiff "temporary primary physical and legal custody" of Matthew and awarding Defendant "supervised visitation at a time, location, frequency, and duration mutually agreed upon by the parties" ("Initial Emergency Custody Order").

¶ 6 Defendant moved the court on 11 January 2019 to establish a visitation schedule ("Visitation Motion"). Defendant alleged that Plaintiff had "systematically denied" her requests for visitation under the Initial Emergency Custody Order and refused to communicate with Defendant.

¶ 7 On 8 February 2019, the trial court entered a Temporary Memorandum of Judgment/Order ("First Memorandum Order") incorporating the

parties' agreement to permit Defendant certain supervised visitation with Matthew in person and by phone. On 5 March 2019, the trial court entered a Temporary Order adjusting the time at which Defendant was to have telephone visitation with Matthew.

¶ 8 The trial court entered an additional Temporary Memorandum of Judgment/Order on 5 April 2019 ("Second Memorandum Order"), containing another agreement by the parties to permit Defendant supervised visitation with Matthew in person and by phone. The Second Memorandum Order also provided that "[t]his matter is temporary in nature, entered without prejudice to either party" and ordered the case be transferred to Randolph County District Court. On 9 May 2019, the Rockingham County District Court entered a Temporary Order containing the same terms as the Second Memorandum Order.

¶ 9 Defendant responded to Plaintiff's Custody Motion on 9 May 2019. The Randolph County District Court received the case file on 16 July 2019 and noticed a hearing on Plaintiff's Custody Motion. The trial court heard Plaintiff's motion on 8 November 2019, 18 February 2020, and 7 July 2020.

¶ 10 On 31 July 2020, the trial court entered a Temporary Order directing Plaintiff to bring Matthew to Defendant's home that evening, pending entry of a final order ("July 2020 Temporary Order"). Plaintiff filed a notice of appeal from the July 2020 Temporary Order.[2]

¶ 11 The trial court entered a Custody Order on 17 August 2020 ("August 2020 Custody Order") which included the following pertinent findings of fact:

> 5. That a Court Order which included provisions for child custody of [Matthew] was entered on or about November 26, 2013, in Rockingham County, North Carolina District Court . . . . In said Order, Defendant was granted primary custody, control, and tuition of [Matthew], with Plaintiff exercising certain visitation. . . .
>
> 6. That thereafter, Defendant relocated to Guilford County, North Carolina and continued to be the primary caregiver of [Matthew].

2. Plaintiff raised no arguments concerning the July 2020 Temporary Order in his brief.

7. That Defendant's brother died unexpectedly in an automobile accident in 2017. Defendant and her brother were very close and Defendant had a hard time dealing with his death.

8. That on August 8, 2018, Defendant was to pick up [Matthew] following summer visitation with Plaintiff. Defendant was under continued stress from dealing with her brother's death and was dealing with anxiety and depression. She had suffered panic attacks for the two weeks prior to August 8, 2018. Defendant had concerns about her ability to care for [Matthew], and out of that concern, Defendant asked Plaintiff's wife to keep [Matthew]. Plaintiff's wife testified that Defendant had developed a trust with Plaintiff's wife and Plaintiff's wife agreed to keep [Matthew].

9. That after speaking with Plaintiff's wife on August 8, 2018, Defendant voluntarily committed herself at Wesley Long Hospital, Greensboro, North Carolina. Contrary to the testimony of Plaintiff's wife that they did not learn of the hospitalization until the next week, the Defendant's husband informed the Plaintiff on August 9th of Defendant's hospitalization. Defendant was released from Wesley Long Hospital on August 16, 2018.

10. That on August 10, 2018, Plaintiff obtained an *ex parte* custody Order in Rockingham County District Court. A return hearing was held on August 29, 2018. At the hearing, the Court entered [the Initial Emergency Custody Order] granting Plaintiff temporary custody and allowing Defendant supervised visitation to be mutually agreed upon by the parties.

11. Following the August 29, 2018 hearing Defendant was in a state of shock at losing custody of [Matthew]. She was assessed by Dr. Alexander Eksir ("Dr. Eksir"), a board-certified licensed psychiatrist, who diagnosed her with a severe episode of depression with psychotic symptoms. Defendant voluntarily admitted herself to Moses Cone Hospital on August 31, 2018 and was discharged on September 5, 2018. Upon her discharge, Defendant was stable and substantially improved.

12. That Defendant has followed up with Dr. Eksir who described Defendant as a model patient. Dr. Eksir testified that Defendant suffered a major depressive disorder that is in remission. Dr. Eksir described Defendant as cured. He testified that she is down to earth, involved and engaged with no impairment. He has no concerns that Defendant is a danger to herself or anyone else. She had no problem with the birth of her second child. Dr. Eksir has no concern about children being in Defendant's care.

13. That notwithstanding the fact that the [Initial Emergency Custody Order] provided for Defendant to have supervised visitation with [Matthew], Plaintiff allowed Defendant to have unsupervised visits with [Matthew] during Thanksgiving 2018 and at Defendant's home for Christmas 2018. These visits went very well.

14. That Defendant asked Plaintiff many times for expanded visits and a visitation schedule which Plaintiff refused. That Plaintiff filed [the Visitation Motion] on January 11, 2019 asking the (Rockingham County, North Carolina) Court to set a visitation schedule. The parties were in Court on February 8, 2019 but the Court was unable to conduct a full hearing on Defendant's motion. The parties reached [the First Memorandum Order] for a supervised visitation schedule, under which Defendant was to have supervised visitation every Friday and Saturday in Guilford County, North Carolina.

15. That Defendant noticed the matter back on for a review of the [Initial Emergency Custody Order] in Rockingham County District Court and the matter was set for hearing on April 5, 2019.

16. That the parties returned to (Rockingham County, North Carolina) Court on April 5, 2019 for the Court to conduct a hearing and review of the[Initial Emergency Custody Order]. Again, the Court was unable to conduct a full hearing on said review and an oral motion was made to change venue to Randolph County, North Carolina since neither party now lived

> in Rockingham County, North Carolina. [The Second Memorandum Order] was entered under which, after two (2) Saturday visitations, Defendant was to exercise supervised visitation every Sunday from 1:00 p.m. to 5:00 p.m. at Freedom Park, Liberty, Randolph County, North Carolina. The (oral) change of venue was then granted and the matter was transferred to Randolph County, North Carolina.
>
> 17. That since April 5, 2019, except for very limited exceptions, Plaintiff has only allowed Defendant supervised visitation with [Matthew] at Freedom Park, no matter the weather or the fact that Defendant had given birth to another child, and that child should not be in the open elements for four hours.
>
> 18. That Plaintiff's main complaint regarding the visitation between Defendant and [Matthew] was that the half-siblings were competitive with each other during said visitation, and that Defendant should only be the person visiting with [Matthew], despite the fact that [Matthew] had a step-father and half-siblings that only saw him 4 hours each week. That despite repeated requests from Defendant, the Plaintiff refuses to allow any expanded visitation between Defendant and [Matthew] and no good cause has been shown for such refusal.
>
> 19. That the paternal grandmother, who supervised most of the visits between Defendant and [Matthew], testified that the visits went very well, that [Matthew] is very bonded to the Defendant, that he loves his mother, and that the only concern she expressed was that [Matthew] would not get "one-on-one" attention because there are other children in Defendant's home.
>
> 20. That Defendant remains gainfully employed with Moses Cone Hospital and that her work schedule allows her to be home all but 5-7 days per month.

¶ 12 Based upon the foregoing findings of fact, the trial court concluded that "since the entry of the [2013 Custody Order] there has been a substantial change of circumstances that affect[s] the general welfare of" Matthew. The trial court further concluded that "it is in the best interest of [Matthew] that the [2013 Custody Order] be modified and that the

parties shall have joint legal custody of" Matthew and it "is in the best interest, safety and general welfare of [Matthew that his] primary care, custody and control be placed with the Defendant, with Plaintiff exercising certain visitation with [Matthew] as more fully stated in the decretal portion of this Order." The trial court granted the parties joint legal custody and Defendant primary physical custody. The trial court awarded Plaintiff visitation with Matthew as follows: (1) three weekends of each month, from 5 p.m. Friday until 7 p.m. Sunday; (2) a 30-day period during the school summer recess; (3) Father's Day, a portion of Matthew's birthday, and every other Christmas, Thanksgiving, and Easter holiday; and (4) other periods as the parties agree. Plaintiff gave notice of appeal from the August 2020 Custody Order.

II. Discussion

A. Trial Court's Jurisdiction to Enter the August 2020 Custody Order

¶ 13 **[1]** Plaintiff argues that the trial court lacked jurisdiction to enter the August 2020 Custody Order. Though Plaintiff did not raise this argument before the trial court, the issue of subject matter jurisdiction may be raised for the first time on appeal. *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006). We review this issue de novo. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

¶ 14 An existing order "for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-13.7(a) (2020). "[T]he jurisdiction of the court entering [a child custody] decree continues as long as the minor child whose custody is the subject of the decree remains within its jurisdiction." *Stanback v. Stanback*, 287 N.C. 448, 456, 215 S.E.2d 30, 36 (1975) (citations omitted).

¶ 15 Plaintiff asserts that the trial court was deprived of jurisdiction to enter the August 2020 Custody Order because his Custody Motion was no longer pending. Plaintiff contends that the trial court "overlooked the fact that multiple orders had been entered since Plaintiff filed" his Custody Motion.

¶ 16 Contrary to Plaintiff's assertion, until the August 2020 Custody Order, none of the trial court's orders finally resolved Plaintiff's claim for permanent custody in his Custody Motion. The 10 August 2018 ex parte order granted "emergency full custody" to Plaintiff and set the matter for a review hearing. The Initial Emergency Custody Order granted Plaintiff only "temporary primary physical and legal custody,"

with Defendant's visitation to be "mutually agreed upon by the parties." Following Defendant's Visitation Motion, the trial court entered the First Memorandum Order which set a schedule of visitation between Defendant and Matthew. The subsequent 5 March 2019 Temporary Order merely adjusted the time at which Defendant was to have telephone visitation with Matthew. This order noted that it embodied only a "temporary agreement as to custody and visitation, pending further hearing and/or disposition by the Court." The Second Memorandum Order set a new schedule of in-person and telephonic visits between Defendant and Matthew and expressly specified that it was "temporary in nature, entered without prejudice to either party." The 9 May 2019 Temporary Order contained these same terms. Defendant filed a response to Plaintiff's Custody Motion on 9 May 2019 and the trial court listed Plaintiff's Custody Motion as one of the matters for hearing on three consecutive notices of hearing. At the beginning of the 8 November 2019 hearing, Counsel for Plaintiff answered affirmatively when the trial court inquired, "So you have a motion to modify, correct?"

¶ 17 Moreover, even if Plaintiff's Custody Motion was no longer technically pending, "the absence of a motion to modify . . . does not divest the district court of jurisdiction to act under the purview of" the modification provision in N.C. Gen. Stat. § 50-13.7(a). *Catawba Cnty. ex rel. Rackley v. Loggins*, 370 N.C. 83, 94, 804 S.E.2d 474, 482 (2017). "A primary purpose of a requirement to file a motion in order to modify" is to "make the court aware of important new facts unknown to the court at the time of the prior custody decree." *Id.* at 96, 804 S.E.2d at 483 (quotation marks and citation omitted). Where the conduct of the parties satisfies this purpose, no motion is required. *Summerville v. Summerville*, 259 N.C. App. 228, 241, 814 S.E.2d 887, 897 (2018). In the present case the parties amply apprised the trial court of new facts unknown at the time of the 2013 Custody Order: Plaintiff filed the Custody Motion, Defendant filed a response, and the parties appeared for multiple hearings during which the trial court heard testimony.

¶ 18 The trial court was not deprived of jurisdiction to modify custody of Matthew and the August 2020 Custody Order is not void for lack of jurisdiction.

B. Substantive Challenges to the August 2020 Custody Order

¶ 19 Plaintiff also raises several substantive challenges to the August 2020 Custody Order. A "trial court's examination of whether to modify an existing child custody order is twofold." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003).

> The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If . . . the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

Id.

¶ 20 "In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 13, 707 S.E.2d at 733 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). We review a trial court's decision in a child custody case for an abuse of discretion. *Id.* An abuse of discretion occurs only where "the court's decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Barton v. Sutton*, 152 N.C. App. 706, 710, 568 S.E.2d 264, 266 (2002) (quotation marks and citation omitted).

1. Finding Concerning Dr. Eksir's Testimony

¶ 21 **[2]** Plaintiff challenges the trial court's finding that "Dr. Eksir described Defendant as cured."

¶ 22 Dr. Eksir testified that when Defendant was discharged in the fall of 2018, her condition was not yet resolved but was stable and "substantially improved." Dr. Eksir explained that at a follow-up appointment, Defendant's condition was sufficiently improved to taper her off of some of the medication she had been prescribed during her hospitalization. Dr. Eksir testified that Defendant's major depressive disorder was in remission and defined "remission" as the point

> when medication that's provided or whatever treatment has provided full reconstitution of a person's mood such that they're able to function and behave and act and are existing without any ongoing

> symptoms of their psychiatric illness. It's essentially like, you know, cured so to speak.

According to Dr. Eksir, Defendant maintained stability after her discharge from the hospital and her prognosis was "excellent." Dr. Eksir's testimony concerning Defendant's improvement is substantial evidence in support of the trial court's finding that Dr. Eksir "described Defendant as cured."

¶ 23 Plaintiff emphasizes that none of the medical records read at the hearing state that Defendant was "cured" and contends that "it is common knowledge that if you have to take medicine for something, then you are not 'cured.' " These arguments are misplaced because the trial court only found that Dr. Eksir "described Defendant as cured," a finding sufficiently supported by Dr. Eksir's testimony.

¶ 24 Without challenging any specific finding, Plaintiff also contends that the trial court gave "far too much weight" to Dr. Eksir's testimony concerning Defendant's current mental status. Plaintiff suggests that Dr. Eksir's testimony warranted less weight "considering that Dr. Eksir only sees the Defendant approximately every three months." This argument is unavailing because

> [a] trial judge passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. Issues of witness credibility are to be resolved by the trial judge. It is clear beyond the need for multiple citation that the trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attaches to the evidence. . . . [I]t is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.

Phelps v. Phelps, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) (quotation marks, brackets, and citations omitted). Plaintiff's argument is overruled.

2. Nexus Between Change in Circumstances and Matthew's Welfare

¶ 25 **[3]** Plaintiff also argues that the trial court erred by failing to find a nexus between the substantial change in circumstances and Matthew's welfare and by failing to examine whether modification was in Matthew's best interests. We disagree.

¶ 26 "Unless the effect of the [substantial change in circumstances] on the children is 'self-evident,' the trial court must find sufficient evidence of a nexus between the change in circumstances and the welfare of the children." *Stephens v. Stephens*, 213 N.C. App. 495, 499, 715 S.E.2d 168, 172 (2011) (citing *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255-56).

¶ 27 The trial court made findings concerning Defendant's mental health difficulties, her improvement upon hospitalization and treatment, her successful visitation with Matthew, and her continued employment and flexible work schedule. The trial court's findings[3] show that Defendant's mental health crisis initially affected not only her ability to care for herself, but her ability to care for Matthew. The findings further show that Defendant improved following hospitalization and treatment and consequently has been able to exercise successful visitation with Matthew. Based upon these findings, the trial court concluded that there had been a substantial change in circumstances that affected Matthew's welfare since entry of the 2013 Custody Order. The trial court then concluded that it was in Matthew's best interests to modify the 2013 Custody Order to award joint custody to the parties, with primary custody to Defendant.

¶ 28 The trial court complied with its duty to determine whether there was a substantial change in circumstances, whether that change in circumstances affected Matthew's welfare, and whether modification of custody was in Matthew's best interests, *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253, and its findings reflect "sufficient evidence of a nexus between the change in circumstances and the welfare of" Matthew, *Stephens*, 213 N.C. App. at 499, 715 S.E.2d at 172.

3. Evidence of Child Abuse

¶ 29 **[4]** Plaintiff next argues that the trial court failed to make written findings concerning "allegations of child abuse" and "expert testimony . . . presented regarding the psychological abuse of" Matthew.

¶ 30 When determining the best interests of a child, the trial court

> shall consider all relevant factors including acts of domestic violence between the parties, the safety of the

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3. In his principal brief, Plaintiff challenges only the trial court's finding that "Dr. Eksir described Defendant as cured." The remaining unchallenged findings of fact are binding on appeal, *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991), regardless of Plaintiff's belated attempt to challenge multiple additional findings in his reply brief, *see McLean v. Spaulding*, 273 N.C. App. 434, 441, 849 S.E.2d 73, 79 (2020) ("Under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, where a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue via reply brief.").

> child, and the safety of either party from domestic violence by the other party. An order for custody must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child.

N.C. Gen. Stat. § 50-13.2(a) (2020). "Any evidence of child abuse is of the utmost concern in determining whether granting custody to a particular party will best promote the interest and welfare of the child," and the trial court is obligated "to resolve any evidence of [abuse] in its findings of fact." *Dixon v. Dixon*, 67 N.C. App. 73, 78-79, 312 S.E.2d 669, 673 (1984).

¶ 31 In *Scott v. Scott*, the defendant argued that the trial court erred by failing to make detailed findings regarding child abuse. 157 N.C. App. 382, 387, 579 S.E.2d 431, 435 (2003). There was evidence that the plaintiff spanked the child, but there was "also evidence that the spanking did not inflict serious injury." *Id.* Additionally, the defendant "made no attempt to seek medical attention for the [c]hild, and there was no evidence that the spanking left more than temporary red marks." *Id.* This Court held that this evidence did not obligate the trial court to make specific findings concerning abuse. *Id.* (citing N.C. Gen. Stat. § 7B-101).

¶ 32 Here, though Plaintiff did not allege abuse in his Custody Motion, Plaintiff contends he introduced evidence of physical and psychological abuse. However, as in *Scott*, Plaintiff has not introduced evidence that the isolated incidents of spanking or yelling he identified either "created serious emotional damage to [Matthew] . . . evidenced by [Matthew's] severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others," N.C. Gen. Stat. § 7B-101(1)(e) (2020), or evidence of any "serious physical injury" or "substantial risk of serious physical injury," N.C. Gen. Stat. § 7B -101(1)(a), (b) (2020). Nor was there evidence that Plaintiff sought treatment for Matthew. To the contrary, Plaintiff testified that he did not have Matthew in therapy and he never thought Matthew needed to see a psychiatrist. Plaintiff points to Dr. Eksir's testimony, but Dr. Eksir merely gave a general definition of emotional abuse and confirmed that emotional abuse can occur in a parent-child relationship. The evidence presented at the hearing did not require the trial court to make specific written findings concerning abuse.

4. Abuse of Discretion

¶ 33 **[5]** Plaintiff argues that the trial court abused its discretion by not granting primary custody to Plaintiff. Plaintiff also contends that there

are "no reasons supporting Plaintiff having even less visitation time with [Matthew] than he did prior to the two years he had exclusive care, custody and control of [Matthew]." We disagree.

¶ 34 Both the 2013 Custody Order and the August 2020 Custody Order granted the parties joint custody and awarded primary custody to Defendant. The 2013 Custody Order awarded Plaintiff physical custody of Matthew from 5 p.m. Thursday to 5 p.m. Sunday on "all weekends that [Defendant] must work," Defendant would have physical custody the following weekend, and Plaintiff would again "exercise secondary physical custody of his son for the next two successive weekends[.]" The August 2020 Custody Order awarded Plaintiff visitation on the first, second, and fourth weekend of each month from 5 p.m. Friday to 7 p.m. Sunday. Each order permitted Plaintiff to have vacation time with Matthew upon written notice and established holiday visitation schedules providing for approximately equal visitation between the parties.

¶ 35 The trial court's decision to adopt the custody arrangement in the August 2020 Custody Order was not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *Barton*, 152 N.C. App. at 710, 568 S.E.2d at 266 (quotation marks and citation omitted). The trial court's findings of fact reflect that Defendant experienced a mental health crisis in 2018 which adversely affected her ability to care for Matthew. Defendant took steps to address her mental health issues, including undergoing two voluntary commitments and engaging in extensive psychiatric treatment, upon which she significantly improved. Defendant subsequently had successful visitation with Matthew and remained gainfully employed.

¶ 36 The trial court's findings also reflect that Plaintiff had ongoing difficulties in co-parenting Matthew. The Initial Emergency Custody Order provided that "Defendant shall have supervised visitation at a time, location, frequency, and duration mutually agreed upon by the parties." The trial court found, however, that "Defendant asked Plaintiff many times for expanded visits and a visitation schedule which Plaintiff refused." The trial court further found that after entry of the Second Memorandum Order, "except for very limited exceptions, Plaintiff . . . only allowed Defendant supervised visitation with Matthew [outdoors] at Freedom Park, no matter the weather or the fact that Defendant had given birth to another child, and that child should not be in the open elements for four hours." The trial court also found that Plaintiff's "main complaint regarding the visitation between Defendant and [Matthew] was that the half-siblings were competitive with each other" and Plaintiff desired for Defendant to be the only person visiting with Matthew, "despite the

fact that [Matthew] had a step-father and half-siblings that only saw him 4 hours each week."

¶ 37 In light of these findings, the trial court did not abuse its discretion by entering the August 2020 Custody Order.[4]

III. Conclusion

¶ 38 The trial court had jurisdiction to modify the 2013 Custody Order, did not fail to find a nexus between the change in circumstances and Matthew's welfare, did not fail to address evidence of abuse, and did not abuse its discretion. We thus affirm the August 2020 Custody Order.

AFFIRMED.

Judges GORE and JACKSON concur.

4. Plaintiff notes that in the August 2020 Custody Order, the trial court stated that "it is in the best interest and general welfare of [Matthew] that the Order entered on August 29, 2018, be modified as hereinbelow memorialized." No order was entered in this case on that date. However, where the trial court otherwise consistently referred to modification of the 2013 Custody Order, this singular erroneous reference does not demonstrate that the trial court abused its discretion.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 APRIL 2022)

DAVIDSON v. DAVIDSON 2022-NCCOA-267 No. 21-72	Iredell (15CVD981)	Remanded.
HITCHCOCK v. RUPERT 2022-NCCOA-268 No. 21-458	Brunswick (20CVD500482)	Affirmed
IN RE C.A.M. 2022-NCCOA-269 No. 21-592	New Hanover (20JA64)	Affirmed
IN RE C.L. 2022-NCCOA-270 No. 21-560	Yadkin (20JA28) (20JA29) (20JA30) (20JA31)	Affirmed
IN RE L.B. 2022-NCCOA-271 No. 21-559	Cleveland (20JA37) (20JA38) (20JA39)	Affirmed in part, Vacated in part and Remanded
IN RE S.B. 2022-NCCOA-272 No. 21-532	Orange (19JT37) (19JT38)	Affirmed
IN RE S.F.D. 2022-NCCOA-273 No. 21-631	Graham (14JA24)	Vacated and Remanded
IN RE T.S. 2022-NCCOA-274 No. 21-342	Mecklenburg (20SPC51891)	Vacated and Remanded
KEAN v. KEAN 2022-NCCOA-275 No. 21-102	Iredell (19CVS2577)	Affirmed
KLAPP v. BUCK 2022-NCCOA-276 No. 21-494	Mecklenburg (19CVS18168)	Reversed and Remanded
SE. CAISSONS, LLC v. CHOATE CONSTR. CO. 2022-NCCOA-277 No. 21-223	Forsyth (15CVS668)	Affirmed

STATE v. ADAMS 2022-NCCOA-278 No. 21-504	Guilford (20CRS67932)	No Error
W. 4TH, LLC v. BROWN 2022-NCCOA-279 No. 21-362	Durham (20CVS1731)	Affirmed

APPALACHIAN MATERIALS, LLC v. WATAUGA CNTY.

[283 N.C. App. 117, 2022-NCCOA-280]

APPALACHIAN MATERIALS, LLC, PETITIONER
v.
WATAUGA COUNTY, A NORTH CAROLINA COUNTY, RESPONDENT
AND
TERRY COVELL, SHARON COVELL, AND BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, INC., D/B/A HIGH COUNTRY WATCH, INTERVENORS

No. COA21-117

Filed 3 May 2022

Appeal and Error—zoning permit application—denial previously appealed—trial court followed mandate of appellate court—order reversed not vacated

In a case involving a county's denial of a permit application for an asphalt plant, where the trial court entered an order upholding the county's decision and the Court of Appeals reversed the order rather than vacating it, the trial court had no choice on remand but to order the county to issue the permit. Although the county had denied the permit on multiple bases, the trial court's order—which was overturned on appeal—affirmed the denial on only one basis, and the county had not sought appellate review of the other bases upon which the permit was denied.

Appeal by Respondent from order entered 31 August 2020 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 16 November 2021.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for Petitioner-Appellee.

Di Santi Watson Capua Wilson & Garrett, PLLC, by Chelsea Bell Garrett, for Respondent-Appellant.

DILLON, Judge.

¶ 1 This matter concerns the denial by the Respondent Watauga County (the "County") of an application submitted by Petitioner Appalachian Materials, LLC, for a permit to build an asphalt plant. This appeal is the second in this matter. The opinion in the first appeal can be found at *Appalachian Materials, LLC v. Watauga County*, 262 N.C. App. 156, 822 S.E.2d 57 (2018) (hereinafter "*Appalachian I*").

¶ 2 In the first appeal, we held that the trial court erred by affirming the County's denial of the permit based on *one* of the grounds relied upon

by the County in its decision. The issue in this second appeal concerns whether Judge Gavenus on remand erred by ordering the issuance of the permit without considering the County's *other* grounds for denying the permit, grounds which were not previously considered by the trial court or by our Court in the first appeal.

I. Background

¶ 3 In 2015, Petitioner applied for a permit to construct an asphalt plant. That same year, the County denied the permit *on several grounds*. In 2017, the Superior Court affirmed the County's decision on the ground that the proposed plant would be too close to an educational facility, without considering the merit of the other grounds.

¶ 4 In the first appeal, Petitioner contended that the nearby building was not an "educational facility" within the meaning of the applicable ordinance. The County contended that the Superior Court ruled correctly but, otherwise, did not exercise its right under Rule 10(c) of our Rules of Appellate Procedure to ask our Court to consider the other grounds upon which the County initially denied the permit.

¶ 5 In any event, we agreed with Petitioner that the nearby building was *not* an educational facility and, therefore, that its permit application should not have been denied on that basis. In our mandate, we "reversed" the Superior Court order and remanded the matter "for proceedings not inconsistent with this opinion." Our Supreme Court subsequently denied discretionary review. *Appalachian Materials, LLC v. Watauga Cty.*, 372 N.C. 108, 824 S.E.2d 419 (2019) (mem.).

¶ 6 On remand, Judge Gavenus refused to consider the County's other grounds for denying the permit, concluding that he was compelled to order the issuance of the permit based on our mandate in *Appalachian I*. The County timely appealed.

II. Analysis

¶ 7 The County argues that Judge Gavenus erred by ordering the issuance of the permit without first considering the alternate grounds it relied upon in denying Petitioner's application which were never considered in the first appeal.

¶ 8 It is true that our Supreme Court has explained that an appellee does not waive future consideration of alternative legal grounds by failing to ask our Court to consider them under Rule 10(c), disavowing a contrary holding of our Court:

> [W]e disavow that holding in order to avoid confusion in subsequent cases. Simply put, nothing in the relevant provisions of the North Carolina Rules of Appellate Procedure or any of our prior cases requires an appellee to challenge legal decisions that the trial court declined to make on the grounds that the case could be fully resolved on some other basis on appeal pursuant to Rule 10(c) of the North Carolina Rules of Appellate Procedure at the risk of losing the right to assert those claims at a later time.

City of Asheville v. State, 369 N.C. 80, 87 n. 11, 794 S.E.2d 759, 766 n. 11 (2016).

¶ 9 But our Supreme Court has also held that a trial court is compelled to follow the mandate of our Court. *See In re S.M.M.*, 374 N.C. 911, 914, 845 S.E.2d 8, 11 (2020) ("It is well established that the mandate of an appellate court is binding upon the trial court and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered." (internal quotation marks and brackets omitted)).

¶ 10 And we construe our mandate in *Appalachian I* to direct the Superior Court to order the issuance of the permit. For instance, just prior to the Conclusion section, we expressly held that the Superior Court erred in affirming the County's denial:

> Accordingly, we hold that the trial court erred in affirming the Board's decision to uphold the denial of Appalachian's permit application.

Appalachian I, 262 N.C. App. at 164, 822 S.E.2d at 63. We could have held that the Superior Court merely erred by agreeing with the County that the nearby facility was an educational facility, thus allowing the court on remand to consider the County's other grounds for denying the application. But we did not. Also, we ended our opinion with the word "REVERSE" rather than "VACATE". *See*, *e.g.*, *Carolina Mulching Co. v. Raleigh-Wilmington Inv'rs II*, *LLC*, 272 N.C. App. 240, 250, 846 S.E.2d 540, 547 (2020) (Dillon, J., dissenting) (discussing the difference between "vacate" and "reverse"), *aff'd*, 378 N.C. 100, 2021-NCSC-79. In sum, our mandate that the court on remand act "consistent with [our] opinion," an opinion which held that the court had previously erred in affirming the denial of the permit, and that we were reversing (rather than vacating) the trial court's order, expresses our intent that on remand the Superior Court was to direct the County to issue the permit.

¶ 11 It may be that our mandate in *Appalachian I* was too sweeping based on the language quoted above from our Supreme Court's *City of Asheville* opinion. But our prior mandate is the law of the case. The County could have asked us to reconsider our mandate in the first appeal. The County could have presented this issue in its petition to our Supreme Court for discretionary review. But the County did neither.[1]

¶ 12 We, therefore, conclude that the Superior Court had no choice but to order the issuance of the permit based on our mandate in *Appalachian I*.

AFFIRMED.

Judges MURPHY and GORE concur.

GARY K. FORTE, Employee, Plaintiff
v.
THE GOODYEAR TIRE & RUBBER COMPANY, Employer, LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

No. COA20-904

Filed 3 May 2022

1. Workers' Compensation—reconsideration of evidence by Full Commission—"good ground"—no requirement to expressly state

In an issue of first impression, the Full Commission was not required to explicitly state that it found "good ground" (N.C.G.S. § 97-85(a)) or to explain its reasoning before it reconsidered the evidence before the deputy commissioner, received further evidence, and amended the deputy commissioner's opinion and award in a workers' compensation case. Since the determination was discretionary, the Commission was presumed to have found good cause before proceeding as it did in the absence of any evidence to the contrary.

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1. The County's petition to our Supreme Court for discretionary review of *Appalachian I* only presents the issue whether we were correct on the definition of "educational facility."

2. Workers' Compensation—compensable workplace injury—employee's testimony—credibility determination

The Full Commission properly carried out its role in assessing the credibility of and weight to be given to plaintiff's testimony in a workers' compensation case when it concluded that testimony from plaintiff, a roll changer at a tire company, was inconsistent and therefore not credible, and that plaintiff did not sustain a compensable workplace injury by accident. The findings, including those which noted a lack of corroborating evidence to support plaintiff's testimony, were supported by at least some competent evidence and did not demonstrate that the Commission placed an impermissible requirement on plaintiff.

Appeal by plaintiff from opinion and award entered 8 October 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 2022.

Law Offices of Kathleen G. Sumner, *by Kathleen G. Sumner & David P. Stewart and Gervasi Law*, *by Jay A. Gervasi, Jr.*, *for plaintiff-appellant.*

Hedrick Gardner Kincheloe & Garofalo LLP, *by M. Duane Jones & Jennifer I. Mitchell*, *for defendant-appellees.*

DIETZ, Judge.

¶ 1 Plaintiff Gary Forte appeals an opinion and award from the Industrial Commission rejecting his workers' compensation claim.

¶ 2 On appeal, Forte asserts an argument that appears to be a question of first impression in our State's appellate courts. Under N.C. Gen. Stat. § 97-85, the Full Commission may reconsider the evidence before the deputy commissioner, receive further evidence, and amend the deputy commissioner's award "if good ground be shown" to do so.

¶ 3 Forte argues that the Full Commission's opinion and award in this case did not expressly state that the Commission found any good grounds to reconsider the evidence and alter the award of the deputy commissioner, nor did the Commission expressly state what it determined those good grounds to be.

¶ 4 As explained below, we reject this argument. Consistent with how our case law handles discretionary "good cause" analyses in other contexts,

we hold that the Commission need not expressly state that it found good grounds and need not expressly identify the good grounds on which it relied in its discretionary decision. When the Commission's opinion and award is silent on this issue, we will presume the Commission found the necessary good grounds if there is a basis in the record to support that finding in the Commission's sound discretion.

¶ 5 Forte also asserts a series of challenges to the Commission's findings of fact. Under the narrow standard of review applicable to fact finding by the Commission, we reject these arguments. The Commission's findings—including, most importantly, its determination that Forte's own testimony was not credible—are supported by at least some competent evidence in the record and those findings, in turn, support the Commission's conclusions of law. We therefore affirm the Commission's opinion and award.

Facts and Procedural History

¶ 6 Forte worked for nearly a decade as a roll changer for Goodyear Tire, a position that involves handling heavy cassettes filled with rubber. Forte testified that, while at work on 1 June 2015, a truck driver unexpectedly stacked cassettes directly behind him in his normal work area and, as he moved to handle a cassette in front of him, he twisted his left leg and felt immediate pain in his left knee.

¶ 7 The next day, Forte visited an urgent care facility. Medical records from the visit indicate that Forte "experienced symptoms for one week and denied a fall, twisting event, or direct blow." Two days later, Forte visited his primary care physician and reported pain that "started three days ago." Those records did not indicate that the pain resulted from a workplace injury.

¶ 8 Two weeks later, Forte visited an orthopedic specialist. The medical notes from this visit indicate that Forte stated his knee "becoming painful 2 weeks ago for no reason."

¶ 9 After a motor vehicle accident on 20 June 2015, Forte returned to the orthopedic specialist and a medical note from that visit indicates that Forte "did not recall any acute injury or trauma but his left knee pain began acutely" four weeks earlier. His treating orthopedic specialist performed surgery on this knee on 21 August 2015 to address a meniscal derangement.

¶ 10 In September 2015, Forte reported the alleged workplace injury to his employer for the first time. Forte later testified that he did not

immediately report his workplace injury because he "didn't consider that as an accident":

> "[W]hen my knee messed up I could recall it but like I said I didn't . . . have what you would call an actually – somebody hit me with a forklift or whatever so I didn't consider that as an accident."

Forte later filed a workers' compensation claim and Defendants denied the claim. At a hearing before the deputy industrial commissioner, the Commission received testimony from Forte and Ashely Flantos, Goodyear's workers' compensation manager. The Commission also received deposition transcripts from Forte's two treating physicians.

¶ 11 The deputy commissioner issued an opinion and award finding Forte to be a "compelling and credible witness." The deputy commissioner found that "the greater weight of the evidence supports the testimony of Plaintiff regarding the twisting accident and injury to his knee." The deputy commissioner concluded that Forte "sustained a compensable injury by accident to his left knee arising out of and within the course of his employment" and was entitled to workers' compensation benefits.

¶ 12 Defendants timely filed a notice of appeal with the Full Commission. After a hearing, the Full Commission issued an opinion and award finding that Forte did not sustain a workplace injury by accident. The Full Commission found that Forte's testimony was not credible based on Forte's inconsistent reports to medical providers, "which did not include an account of a traumatic workplace event"; the vagueness of his testimony concerning motor vehicle accidents before and after the alleged injury; and his failure to report the workplace injury until three months after he claimed it occurred. Forte timely appealed the Commission's opinion and award to this Court.

Analysis

I. Good grounds to reconsider evidence and amend award

¶ 13 **[1]** Forte first challenges the Full Commission's decision to reconsider the evidence, make fact findings different from those found by the deputy commissioner, and change the award without expressly stating that the Full Commission determined there were good grounds to do so.

¶ 14 In a workers' compensation case, the Full Commission may reconsider the evidence before the deputy commissioner, receive further evidence, and amend the deputy commissioner's award "if good ground be shown" to do so. N.C. Gen. Stat. § 97-85(a). Whether this "good ground"

standard is satisfied "is a matter within the sound discretion of the full Commission, and the full Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of that discretion." *Crump v. Indep. Nissan*, 112 N.C. App. 587, 589, 436 S.E.2d 589, 592 (1993). This is consistent with how our case law handles discretionary "good cause" analyses in other contexts.

¶ 15 The parties acknowledge that our State's appellate courts have never addressed whether the Full Commission must make an express finding that good grounds exist, or expressly state the reasoning for that determination. Ordinarily, when a trial court has discretion to act upon a showing of good cause and makes no express findings, "we presume the trial judge found the necessary 'good cause' " and examine whether the record supports that finding. *State v. Roache*, 358 N.C. 243, 274, 595 S.E.2d 381, 402 (2004) (citation omitted).

¶ 16 We see no reason to create a different rule for this discretionary decision of the Full Commission. The Full Commission indicated that it heard the case and entered its opinion and award "pursuant to N.C. Gen. Stat. § 97-85." Moreover, there is no indication in the record that the Full Commission acted under any misapprehension of the law when assessing its authority to reconsider the deputy commissioner's findings. Accordingly, we presume the Full Commission found the necessary good grounds to reconsider the evidence and change the resulting award.

¶ 17 Our review on appeal is limited to examining whether this implied finding of good grounds was a manifest abuse of discretion. *Crump*, 112 N.C. App. at 589, 436 S.E.2d at 592. In light of the Commission's findings and conclusions, discussed in more detail below, we hold that the Commission's determination that good grounds existed was well within the Commission's sound discretion. We therefore reject Forte's argument.

II. Competent evidence to support the award

¶ 18 **[2]** Forte next argues that the Full Commission erred by requiring him to present corroborating evidence to support his otherwise competent testimony.

¶ 19 To establish a compensable injury in a workers' compensation case, "the plaintiff must introduce competent evidence to support the inference that an accident caused the injury in question." *Cody v. Snider Lumber Co.*, 328 N.C. 67, 70, 399 S.E.2d 104, 106 (1991). When the Commission finds and concludes that the employee did not sustain a compensable workplace injury, our review "is limited to a determination of (1) whether the Commission's findings of fact are supported by any

competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132–33, 535 S.E.2d 602, 604 (2000).

¶ 20 "A finding of fact is conclusive and binding on appeal so long as there is some evidence of substance which directly or by reasonable inference tends to support the findings, even though there is evidence that would have supported a finding to the contrary." *Byrd v. Ecofibers, Inc.*, 182 N.C. App. 728, 730–31, 645 S.E.2d 80, 82 (2007) (cleaned up). "In weighing the evidence, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and the Commission may reject entirely any testimony which it disbelieves." *Hedrick v. PPG Indus.*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856 (1997).

¶ 21 Here, the Commission made findings about Forte's own testimony that referenced a lack of corroborating evidence. For example, the Commission found that Forte testified about a coworker who witnessed the accident, but did not offer any testimony from that coworker. Similarly, the Commission found that Forte testified that he went to the employer's medical clinic after the accident and spoke to a nurse about his injury. But the Commission again found that Forte did not offer any testimony from the nurse or any evidence that corroborated this visit to the clinic.

¶ 22 Forte contends that these findings show the "Commission required Forte to present corroborating testimony to support his own credible testimony." That is not a fair reading of the Commission's findings. The Commission ultimately found that Forte's testimony was not credible. The Commission's references to the lack of any corroborating evidence in its findings were part of the Commission's explanation for why, in light of inconsistencies in Forte's testimony, the Commission chose not to credit his testimony concerning the alleged accident.

¶ 23 Forte next argues that the Commission relied on "incompetent, unsupported, and inadmissible allegations of defense counsel" during Forte's cross-examination to support the Commission's findings. In that cross-examination, defense counsel asked Forte a series of questions about alleged motor vehicle accidents that occurred both before and after the alleged workplace injury. Defendants correctly point out that Forte never objected to those questions. But more importantly, the Commission did not rely on those questions, or Forte's answers, as substantive evidence of these motor vehicle accidents. The Commission's references to this testimony were part of a lengthy series of findings

demonstrating why the Commission chose not to credit Forte's testimony because it was inconsistent and raised questions about Forte's ability to recall events during that time frame.

¶ 24 As noted above, it is the Commission's role to assess credibility of witnesses and the weight to be given to witness testimony. *Hedrick*, 126 N.C. App. at 357, 484 S.E.2d at 856. The Commission's findings show that it properly weighed Forte's testimony based on competent evidence and ultimately found key portions of that testimony not credible. That credibility determination is left to the Commission and not one this Court can review on appeal. *Id.*

¶ 25 Finally, Forte argues that the Commission "misrepresented" the expert testimony regarding causation. Having determined that the Commission properly found that Forte did not sustain a workplace injury by accident, we need not address this argument. In any event, Forte's challenge to this portion of the Commission's findings is likewise meritless. Forte argues that the experts initially testified that his workplace accident caused his injury and only began to equivocate after defense counsel presented them "with matters not in evidence in cross examination." But again, Forte did not object to this questioning during cross-examination. More importantly, the Commission did not misrepresent the experts' testimony. During cross-examination, the experts acknowledged that they could not say with certainty that the alleged workplace injury was the cause of the medical conditions for which they treated Forte. The Commission accurately recounted that testimony in its findings.

¶ 26 In sum, we hold that the Commission's findings of fact are supported by at least some competent evidence in the record, including the Commission's determination not to credit Forte's own testimony, and that those findings, in turn, support the Commission's conclusions of law. We therefore affirm the Commission's opinion and award.

Conclusion

¶ 27 We affirm the Commission's opinion and award.

AFFIRMED.

Judges INMAN and HAMPSON concur.

IN RE A.W.

[283 N.C. App. 127, 2022-NCCOA-282]

IN RE A.W. & C.W., MINOR JUVENILES

No. COA21-634

Filed 3 May 2022

1. Evidence—expert testimony—diagnosis of sexual abuse—abuse, neglect, and dependency proceeding

In an abuse, neglect, and dependency proceeding, the trial court did not abuse its discretion by allowing a child medical examiner's expert testimony diagnosing respondent-father's eldest daughter as a victim of sexual abuse, where the examiner testified that she based her diagnosis on physical evidence from her medical examination of the daughter that was consistent with the daughter's disclosures of sexual abuse by respondent-father. The examiner's subsequent testimony—that even without the physical evidence, she would have reached the same diagnosis—constituted improper bolstering of the daughter's credibility; nevertheless, the trial court did not commit prejudicial error in allowing the testimony where the doctor later reiterated that she relied on the physical evidence in reaching her diagnosis, and therefore respondent-father could not overcome the presumption that the trial court had disregarded the improper testimony.

2. Appeal and Error—abandonment of issues—admissibility of evidence—only one ground challenged on appeal

After the trial court ceased reunification efforts with respondent-father in an abuse, neglect, and dependency case, which centered on allegations that respondent-father had sexually abused his two minor daughters, respondent-father failed to show on appeal that the court erred by allowing a child medical examiner's reports (detailing her interviews and physical examinations of both daughters) into evidence. The trial court allowed the reports under the medical records and business records exceptions to the hearsay rule, but respondent-father only challenged the records' admissibility under the medical records exception and therefore waived under Appellate Rule 28(a) any argument challenging the other ground of admissibility.

Appeal by Respondent from order entered 18 June 2021 by Judge Marcus A. Shields in Guilford County District Court. Heard in the Court of Appeals 5 April 2022.

Mercedes O. Chut for Petitioner-Appellee Guilford County Department of Health and Human Services.

Mary McCullers Reece for Respondent-Appellant Father.

Parker Poe Adams & Bernstein LLP, by Eimile Stokes Whelan and Daniel E. Peterson, for guardian ad litem.

GRIFFIN, Judge.

¶ 1 Respondent-Appellant Father appeals from the trial court's orders adjudicating each of his minor daughters, A.W. ("Ann") and C.W. ("Carol")[1], to be abused, neglected, and dependent juveniles and ceasing reunification efforts with Father. Father contends the trial court erred by allowing a child medical examiner to provide unsupported expert testimony that Carol was "in fact" sexually abused by Father, and that the trial court erred by denying his motion to exclude the child medical examiner's written report as inadmissible hearsay. We find no error, and affirm the trial court's order.

I. Factual and Procedural Background

¶ 2 This case concerns repeated occurrences of alleged sexual abuse of two minor juveniles, Carol and Ann, by Father. At the time of the hearing in this case, Carol was seventeen years old and Ann was fifteen years old. Evidence presented at the adjudication hearing tended to show as follows:

¶ 3 In or around November 2019, Carol confided in her sister, Ann, that she had been sexually assaulted by Father. Carol had awoken at around 3:00 a.m. one night because Father was in her bed behind her. Father asked if he could lie with Carol, "started to rub [her] vagina with his fingers" for "maybe a minute", then "asked if he [could] put his penis inside." Father "proceeded to try and penetrate" Carol, but she "was tightening up her body so that [Father] couldn't actually penetrate [her]." After some time, Father stopped trying and left the room.

¶ 4 Ann told Carol that she had been similarly abused by Father on more than one occasion. Carol and Ann decided to tell Father's then-girlfriend, Ms. Smith. Ms. Smith helped the girls report their experiences to law enforcement. On 12 December 2019, an officer with the Greensboro Police

1. We use pseudonyms to protect the anonymity of the juveniles and for ease of reading. N.C. R. App. P. 42(b).

Department went to Ms. Smith's home in response to a call regarding "sex offenses." The officer interviewed Carol and Ann and made a report of their statements. That same day, Guilford County Department of Health and Human Services received a report "alleging that [Father] had sexually abused [Carol] and [Ann]." Carol and Ann each reported prior accounts of sexual abuse by Father.

¶ 5 Carol first reported sexual abuse by Father in 2013, resulting in an investigation by law enforcement and Columbus County Department of Social Services. When she was nine years old, Carol told Father's girlfriend about how Father tried "to stick his penis in [her] vagina and how he would touch [her] vagina with his fingers." Father's girlfriend "call[ed] the police and that's when the investigation started." Carol underwent a child medical examination ("CME") as part of the investigation. Carol ultimately recanted these allegations due to pressure from some of her uncles and Father's girlfriend.

¶ 6 In 2016, Carol was diagnosed with a sexually transmitted disease at the age of twelve. Carol lived with Father at the time. Father "made [Carol] go on birth control" even though she was not voluntarily sexually active at that time. On at least one occasion, Father asked Carol to text him "vagina pics and [her] boobs." Carol did not send Father any pictures. Father also had Carol watch pornographic movies with him on their television at home.

¶ 7 Ann reported two prior incidents of abuse. The first time occurred at the children's grandparent's house before the girls went to bed. Ann gave Father a hug, and "felt his hand go down a little" and touch her lower back underneath her shirt. Father asked Ann if he could touch her and if she would "tell on [her] dad if he did anything bad." The second incident occurred in the home of one of Father's former girlfriends. Ann awoke one night because Father was "on [her] bed and he like had his hand on [her] boob." Ann "pushed [her] hand to the side a little and [she] acted like [she] was fixing to cry." Father then "walked out of the room like nothing ever happened."

¶ 8 On 2 January 2020, Dr. Esther Smith, a child medical examiner with the Cone Health Advocacy Medical Clinic, conducted CMEs on Carol and Ann. The CME consisted of forensic interviews and a physical examination. Ann did not allow Dr. Smith to physically examine her from the waist down.

¶ 9 During Carol's physical exam, Dr. Smith found "a small triangular piece" of skin that "sort of looked like a tissue tag" in Carol's genital area. The tissue "appeared to have . . . a divot behind it as if that tissue

had detached from the tissue behind it." Dr. Smith had a "difficult call to decide" whether the tissue tag was Carol's "normal anatomy" or "evidence of a healed trauma." Dr. Smith reached out to the doctor who had performed Carol's CME in 2013 and was able to compare her findings with medical records collected from that CME. "[T]here did not appear to be a tissue tag present in 2013 relative to what [Dr. Smith] was seeing in 2020."

¶ 10 Dr. Smith spoke with the police officer and social worker involved in the case. Dr. Smith also reviewed each girl's forensic interview and prior medical records. Dr. Smith produced written reports recording her CMEs of Carol and Ann (the "CME Reports"), incorporating her own findings as well as the materials she reviewed. The CME Reports were offered into evidence during the adjudicatory hearing. Father objected to admission of both CME Reports "based on hearsay and it being prejudicial to [Father]" arguing the reports were "riddled with hearsay from other people." The trial court overruled Father's objection, "based upon [the] business record exception as well as for purposes [of] medical diagnosis and note[d] that the probative value would outweigh any prejudicial effects."

¶ 11 Dr. Smith testified that Carol's statements were "consistent with what the physical evidence presented." Based upon the "totality of the information that [she] had", Dr. Smith testified that her expert opinion with respect to Carol was a "final diagnosis" that Carol had been a "victim of child sexual abuse." Father objected to Dr. Smith's opinion, arguing that her diagnosis was based upon insufficient physical evidence of abuse. The trial court overruled Father's objection.

¶ 12 Dr. Smith also testified that she had diagnosed Ann as a "suspected victim of child sexual abuse." Father objected to Dr. Smith's diagnosis of Ann because "there was no physical evidence of any sexual abuse during [Ann's] CME." The trial court sustained Father's objection and did not consider Dr. Smith's opinion with respect to Ann.

¶ 13 Following the adjudicatory hearing, the trial court entered a written order adjudicating Carol and Anne to be abused, neglected, and dependent juveniles. The court held a dispositional hearing, then entered a written order ceasing reunification efforts with Father and suspending all visitation with Father. Father timely appeals.

II. Analysis

¶ 14 Father argues that Dr. Smith's expert opinion with respect to Carol was not supported by sufficient evidence, and that Dr. Smith's CME Reports contained inadmissible hearsay. We address each argument.

A. Expert Opinion on Sexual Abuse

¶ 15 **[1]** Father contends "[t]he trial court erred by considering Dr. Smith's diagnosis of child sexual abuse where the diagnosis was based on Carol's disclosures rather than physical evidence." Because Dr. Smith "deemed [Carol's] disclosures to be the most important part of making her diagnosis", Father argues Dr. Smith's opinion lacked proper foundation to be admissible during Carol's abuse, neglect, and dependency adjudication.

¶ 16 We review a trial court's decision regarding the admissibility of expert testimony for an abuse of discretion, to assess whether the expert witness's qualifications and the expert testimony's relevance and reliability were shown by sufficient evidence as required under Rule 702 of the North Carolina Rules of Evidence. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). Expert testimony should be admitted only where "the testimony is based on the special expertise of the expert, who because of his [or her] expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Warden*, 376 N.C. 503, 506–07, 852 S.E.2d 184, 187–88 (2020) (citation and internal quotation marks omitted). "Whether sufficient evidence supports expert testimony pertaining to sexual abuse is a highly fact-specific inquiry." *State v. Chandler*, 364 N.C. 313, 318–19, 697 S.E.2d 327, 331 (2010) (citation omitted). "Different fact patterns may yield different results." *Id.*

¶ 17 In the context of criminal prosecution, our Courts have held that "[a]n expert's opinion that sexual abuse did in fact occur is admissible when there is physical evidence supporting a diagnosis of sexual abuse." *State v. Betts*, 377 N.C. 519, 2021-NCSC-68, ¶ 13 (citation omitted). Ordinarily, though, "the trial court should not admit expert opinion that sexual abuse has in fact occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266–67, 559 S.E.2d 788, 789 (2002). (citations omitted). "[A]n expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Id.* "Moreover, even when physical evidence of abuse existed and was the basis of an expert's opinion, where the expert added that she would have determined a child to be sexually abused on the basis of the child's story alone even had there been no physical evidence, we found *this additional testimony* inadmissible." *State v. Towe*, 366 N.C. 56, 61–62, 732 S.E.2d 564, 567 (2012) (emphasis added) (citation omitted). "Thus, an expert witness's 'definitive diagnosis of sexual abuse' is inadmissible unless it is based upon 'supporting physical evidence of the abuse.' " *Warden*, 376 N.C. at 507, 852 S.E.2d at 188 (citations omitted).

¶ 18 However, in the context of abuse, neglect, and dependency proceedings, this Court has distinguished the impact of improper expert testimony pertaining to child sexual abuse during a jury trial and the same or similar testimony in a bench trial:

> In a bench trial, the court is presumed to disregard incompetent evidence. Where there is competent evidence to support the court's findings, the admission of incompetent evidence is not prejudicial.
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> . . .
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> The mere admission by the trial court of incompetent evidence over proper objection does not require reversal on appeal. Rather, the appellant must also show that the incompetent evidence caused some prejudice. In the context of a bench trial, an appellant must show that the court relied on the incompetent evidence in making its findings.
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> . . .
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> In a jury trial, the distinction between an expert witness' testifying (a) that sexual abuse in fact occurred or (b) that a victim has symptoms consistent with sexual abuse is critical. A jury could well be improperly swayed by the expert's endorsement of the victim's credibility. In a bench trial, however, we can presume, unless an appellant shows otherwise, that the trial court understood the distinction and did not improperly rely upon an expert witness' assessment of credibility. *Cf. Stancil*, 355 N.C. at 266, 559 S.E.2d at 789 (limiting its holding to "sexual offense prosecution[s]").

In re Morales, 159 N.C. App. 429, 433–34, 583 S.E.2d 692, 694–95 (2003) (some citations and internal marks omitted).

¶ 19 Father cites repeatedly to our Supreme Court's decision in *State v. Stancil* and this Court's decision in *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179 (2001). *Stancil* and *Grover* each rely on the rule that an expert witness may not testify that sexual abuse occurred "in fact" absent some physical evidence supporting that diagnosis. *Stancil*, 355 N.C. at 266–67, 559 S.E.2d at 789; *State v. Grover*, 142 N.C. App. at 419, 543 S.E.2d at 183–84.

¶ 20 However, in addition to their criminal context, each case is otherwise distinguishable from the present case. In *Stancil*, our Supreme Court found error where the trial court allowed an expert to testify to her opinion that "the victim was *in fact* sexually assaulted" even though a "thorough examination and a series of tests revealed no physical evidence of sexual abuse." *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789. In *Grover*, this Court held that the expert testimony of two experts each "lacked a proper foundation and should not have been admitted" where they each testified that the child was a victim of sexual abuse, but their expert opinions were based solely on the child's disclosures and no physical evidence of sexual abuse. *Grover*, 142 N.C. App. at 418–19, 543 S.E.2d at 183 (citations omitted).

¶ 21 In the present case, Dr. Smith testified:

> [DR. SMITH:] In general the child's disclosures are going to be the most important aspect of making a diagnosis. And, understanding again the circumstances of those disclosures. . . . And, then if there is any physical evidence, trying to decipher whether that is consistent with what the child is saying.
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> . . .
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> I was trying to decide am I going to call [the tissue tag] abnormal or am I gonna call this inconclusive or am I gonna call it consistent with the disclosures that she's made. And, it's a gray area so it[']s not - like I said it[']s not diagnostic. But, it[']s certainly consistent with what she had said.
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> . . .
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> But, the fact that it was there now but didn't appear to have been there before seems like consistent with her disclosure that there was still new episodes of sexual abuse happening since after that first CME.
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> . . .
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> [DHHS:] Were the child's statements in this situation with [Carol] consistent with what the physical evidence presented?
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> [DR. SMITH:] Yes.
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> [DHHS:] So, what was your final diagnosis of [Carol]?

> [DR. SMITH:] My final diagnosis in relation to the alleged maltreatment was that I had enough information to make a diagnosis of victim of child sexual abuse.

¶ 22 On cross-examination, Dr. Smith further testified:

> [DR. SMITH:] [A]m I highly concerned and would a normal exam even without this skin tag have changed my diagnosis? It would not. Even if she had had a completely normal exam I would still likely have come to the same diagnosis based on the totality of the information that I had.
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> [DEFENSE:] So, you didn't rely on the physical - from what you just said. The physical evidence of sexual abuse does not make a difference in your –
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> [DR. SMITH:] I would still have - no. That's not accurate. I would still have relied on it. But I may have used the word suspected instead of just remove the word suspected all together and been more highly concerning.

¶ 23 Dr. Smith's testimony confirms that, contrary to *Stancil* and *Grover*, there was some physical evidence present in this case which caused Dr. Smith to suspect that Carol had been a victim of child sexual abuse. Dr. Smith was concerned by the presence of the tissue tag in Carol's genital area, and her concerns were strengthened by the fact that this tissue tag had not been present during Carol's earlier, 2013 CME. Dr. Smith testified that the physical evidence was consistent with Carol's disclosures of sexual abuse by Father, and that led her to conclude that Carol was a "victim of child sexual abuse."

¶ 24 Father specifically directs our attention to Dr. Smith's testimony on cross-examination that "[e]ven if [Carol] had had a completely normal exam I would still likely have come to the same diagnosis based on the totality of the information that I had." Dr. Smith testified on cross-examination that a normal physical examination without the presence of the tissue tag would not have changed her diagnosis. This additional statement by Dr. Smith was inadmissible bolstering of Carol's credibility. *Towe*, 366 N.C. at 61–62, 732 S.E.2d at 567.

¶ 25 However, it was not prejudicial error for the trial court to allow this testimony. Father cannot now object to testimony that was first elicited by his own counsel's questioning. *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) ("Statements elicited by a defendant on

cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." (citations omitted)). Further, Dr. Smith subsequently reiterated that she nonetheless did rely on the physical evidence in reaching her diagnosis. Given Dr. Smith's clarification and her thorough testimony during direct examination, Father is unable to overcome the presumption that the trial court, acting as finder of fact, did not improperly consider Dr. Smith's additional bolstering. *Morales*, 159 N.C. App. at 433–34, 583 S.E.2d at 695 ("In a bench trial, however, we can presume, unless an appellant shows otherwise, that the trial court understood the distinction and did not improperly rely upon an expert witness' assessment of credibility.").

¶ 26 Father contends the physical evidence in this case was insufficient to support admission of Dr. Smith's diagnosis because Dr. Smith was unable to confidently determine that the tissue tag was evidence of sexual abuse. To this end, Father compares the evidence in this case to the strength of the physical evidence at issue in in *State v. Ryan*, 223 N.C. App. 325, 734 S.E.2d 598 (2012). In *Ryan*, an expert witness testified to her opinion that the child's accounts were "consistent with sexual abuse" and her conclusion that the child had been "sexually assaulted," based upon the child's accounts and because she "observed a deep notch in the child's hymen, which she testified was highly suggestive of vaginal penetration." *Id.* at 329, 332–33, 734 S.E.2d at 601, 603. Here, Dr. Smith was unable to determinatively say whether Carol's tissue tag was or was not a direct result of sexual abuse, but did testify that the tissue tag was physical evidence which could indicate sexual abuse. We agree that the expert's testimony in *Ryan* was distinguishable in degree from the testimony given in this case, but we do not find this distinction material. The testimony in Ryan likely carried more weight than the evidence in this case, but the trial court's determination was one of admissibility, not of weight.

¶ 27 The trial court did not abuse its discretion and commit prejudicial error in allowing Dr. Smith's expert testimony diagnosing Carol as a "victim of child sexual abuse."

B. Hearsay in Abuse Adjudication

¶ 28 **[2]** Father argues the "[t]rial court erred in admitting and considering the CME[Report]s, including Carol and Ann's statements to the forensic interviewer, where it was not clear that the statements were for purposes of medical diagnosis." Specifically, Father contends that the CME Reports were inadmissible hearsay, and the trial court erroneously found that the CME Reports were admissible during the adjudicatory

hearing as medical records obtained for the purpose of diagnosis under Rule 803(4) of the North Carolina Rules of Evidence.

¶ 29 "Where the juvenile is alleged to be abused, neglected, or dependent, the rules of evidence in civil cases shall apply." N.C. Gen. Stat. § 7B-804 (2021). " '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 evidence is not admissible unless it falls into an exception described by another statute or rule of evidence. N.C. Gen. Stat. § 8C–1, Rule 802 (2021). Under Rule 803(4), a statement is excepted from hearsay if it was "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." N.C. Gen. Stat. § 8C–1, Rule 803(4) (2021). Likewise, under Rule 803(6), a business record may be excepted from hearsay where it was "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" record. N.C. Gen. Stat. § 8C-1, 803(6) (2021).

¶ 30 Here, the trial court found that the CME Reports were admissible as statements for medical diagnosis under Rule 803(4) and business records under Rule 803(6). Father challenges only the trial court's determination under Rule 803(4). Therefore, even if we determine that the CME Reports do not satisfy our standards of admissibility under Rule 803(4), Father has failed to show that the CME Reports lacked admissibility as a record regularly made by Dr. Smith under Rule 803(6). *See* N.C. R. App. P. 28(a) ("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."). Because at least one unchallenged ground for admissibility remains, we hold the trial court did not err in admitting the CME Reports into evidence.

III. Conclusion

¶ 31 The trial court did not err by allowing Smith to testify regarding her diagnosis of Carol because her opinion was supported by physical evidence. Further, Father has not shown that the trial court erred by admitting the CME Reports as exceptions to hearsay. The trial court's order is affirmed.

AFFIRMED.

Judges MURPHY and GORE concur.

IN RE PURPORTED WILL OF MOORE

[283 N.C. App. 137, 2022-NCCOA-283]

IN THE MATTER OF THE PURPORTED WILL OF JOHN MARK MOORE, DECEASED

No. COA21-441

Filed 3 May 2022

Wills—caveat proceeding—standing—subject matter jurisdiction—purported biological child—statutory conditions

Because a will caveator who purported to be the decedent's biological child failed to meet the statutory conditions allowing children born out of wedlock to take from a putative father through intestate succession pursuant to N.C.G.S. § 29-19(b) (the defaulted admission that the caveator was the decedent's only biological child was insufficient to establish the caveator's right to take through intestate succession), and because there was no allegation or evidence of any different will under which the caveator would take, the caveator was not a person legally interested in the decedent's estate; therefore, she lacked standing to bring the claim, and the trial court lacked subject matter jurisdiction over the proceedings.

Appeal by Propounder from orders entered 20 April 2021 by Judge Keith O. Gregory and 10 May 2021 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 9 March 2022.

Robinson, Bradshaw & Hinson, P.A., by Matthew W. Sawchak, Ethan R. White, and Brendan P. Biffany, for Alfreda Matthews, Propounder-Appellant.

Buzzard Law Firm, by Robert A. Buzzard and Tracy Berry, for Diana McDougald, Caveator-Appellee.

COLLINS, Judge.

¶ 1 Propounder Alfreda Matthews appeals from orders granting summary judgment and denying relief from judgment regarding a caveat to the will of decedent, John Mark Moore. Matthews argues that the trial court lacked subject matter jurisdiction over the proceedings because Caveator Diana McDougald lacks standing. Because McDougald is not a person with a legal interest in Moore's estate, she lacks standing. Because standing is a prerequisite to subject matter jurisdiction, the trial court lacked jurisdiction over the proceedings. We accordingly vacate the trial court's orders and remand for dismissal of McDougald's caveat.

I. Background

¶ 2 Moore executed a will in late 2018, naming Matthews, his sister, as his Executor. The will devised Moore's real and personal property to Matthews for life, and then to his niece, Matthews's daughter, upon Matthew's death. Moore passed away on 30 January 2019.

¶ 3 Matthews initiated probate proceedings on 14 June 2019 in the superior court division before the clerk of court. Moore's will was probated in common form and Letters Testamentary were issued to Matthews. McDougald filed a caveat to the will on 16 July 2019, alleging that she is Moore's "only biological child" and that his will is invalid because (1) it "was not witnessed by two witnesses as required by [North Carolina] law" and (2) it was "procured by [Matthews'] undue influence." The assistant clerk of superior court ordered the proceeding transferred to superior court.

¶ 4 On 19 August 2020, while Matthews was proceeding pro se, McDougald served Matthews with discovery requests, including requests for admission. Matthews retained counsel in October 2020, after the 21 September 2020 discovery deadline had expired. Matthews never responded to the discovery requests.

¶ 5 On 25 November 2020, McDougald filed a motion for summary judgment, arguing that because Matthews had failed to respond, all requests for admissions were deemed admitted, including admissions that "Diana McDougald is the biological daughter of John Mark Moore" and "Diana McDougald is the only biological child of John Mark Moore." In opposition to McDougald's motion for summary judgment, Matthews submitted an affidavit denying McDougald's alleged relationship to Moore, as well as McDougald's birth certificate that did not list a father. Because the discovery deadline had passed and Matthews had failed to respond to the discovery requests, the trial court determined the requests for admissions should be deemed admitted. After concluding that no issue of material fact exists, the trial court granted summary judgment for McDougald. Matthews moved for relief from judgment; her motion was denied. Matthews timely filed this appeal.

II. Discussion

¶ 6 Matthews argues that the trial court lacked subject matter jurisdiction over the proceedings because McDougald is not a person legally interested in Moore's estate, and therefore McDougald lacks standing to file a will caveat in this matter. We agree.

A. Standard of Review

¶ 7 "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, and is a question of law which this Court reviews de novo." *Cherry v. Wiesner*, 245 N.C. App. 339, 345, 781 S.E.2d 871, 876 (2016) (citation and quotation marks omitted). "[T]he issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court sua sponte." *Carpenter v. Carpenter*, 245 N.C. App. 1, 8, 781 S.E.2d 828, 835 (2016) (citation and quotation marks omitted). "The party invoking jurisdiction has the burden of establishing standing." *Templeton v. Town of Boone*, 208 N.C. App. 50, 53, 701 S.E.2d 709, 712 (2010).

B. Standing

¶ 8 "Standing to sue means simply that the party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140, 544 S.E.2d 821, 824 (2001) (citations and quotation marks omitted). The parties in a caveat proceeding "are limited classes of persons specified by the statute who are given a right to participate in the determination of probate of testamentary script." *In re Ashley*, 23 N.C. App. 176, 181, 208 S.E.2d 398, 401 (1974).

¶ 9 According to the applicable statute, any person "interested in the estate" may file a caveat within three years after the will is submitted for probate. N.C. Gen. Stat. § 31-32(a) (2020). A person interested in the estate "has a direct pecuniary interest in the estate of the alleged testator which will be defeated or impaired if the instrument in question is held to be a valid will." *In re Estate of Phillips*, 251 N.C. App. 99, 105, 795 S.E.2d 273, 279 (2016) (citation omitted). Two categories of people meet this criteria and consequently have standing to bring a caveat: (i) those who would take under a different will, and (ii) those who would take under the intestacy statutes. *Id.*; *see also In re Will of Bunch*, 86 N.C. App. 463, 464, 358 S.E.2d 118, 118-19 (1987).

¶ 10 McDougald does not allege, and no evidence in the record shows, that Moore had a prior will. Accordingly, McDougald could only be legally interested in Moore's estate if she qualified to take from Moore through intestate succession. *See Phillips*, 251 N.C. App. at 105, 705 S.E.2d at 279.

¶ 11 North Carolina General Statute § 29-15 governs the shares of persons, other than a surviving spouse, who survive the intestate and take upon intestacy, including natural, legitimate children. N.C. Gen. Stat. § 29-15 (2020). In North Carolina, "[a]bsent a statute to the contrary,"

a child born out of wedlock "has no right to inherit" from her putative father. *Helms v. Young-Woodard*, 104 N.C. App. 746, 749, 411 S.E.2d 184, 185 (1991).

¶ 12 North Carolina General Statute § 29-19(b) provides that a child born out of wedlock may take from a putative father only if one of the following conditions has been satisfied:

> (1) Any person who has been finally adjudged to be the father of the child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;
>
> (2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of the child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.
>
> (3) A person who died prior to or within one year after the birth of the child and who can be established to have been the father of the child by DNA testing.

N.C. Gen. Stat. § 29-19(b) (2020). If a person is born out of wedlock, and none of these statutory conditions is satisfied, she has no legal right to take from her putative father through intestate succession. *See id.*; *see also Hayes v. Dixon*, 83 N.C. App. 52, 54, 348 S.E.2d 609, 610 (1986).

¶ 13 In this case, McDougald alleged in her caveat that she is "the biological daughter of the Decedent and the only biological child of the Decedent." Furthermore, the record contains the following requests for admissions, which were deemed admitted by Matthews: "1. Admit that Diana McDougald is the biological daughter of John Mark Moore. . . . 2. Admit that Diana McDougald is the only biological child of John Mark Moore." However, the record contains no pleading and no evidence that Moore and McDougald's mother were married to each other when McDougald was born or that any of the conditions in N.C. Gen. Stat. § 29-19(b) have been satisfied.

¶ 14 The record contains evidence to the contrary. McDougald's birth certificate lists no father. The Family History Affidavit filed by Matthews with Moore's will asserts that Moore was never married. In Matthews' affidavit in opposition to summary judgment she averred:

> C. The Plaintiff/Caveator is not the biological daughter of the decedent. The natural mother of the Plaintiff/Caveator and the Decedent were not married at the time of the Plaintiff/Caveator's birth as the attached copy of the birth certificate of the Plaintiff/Caveator does not indicate the name of the natural father of the Plaintiff/Caveator.
>
> D. The Decedent did not establish paternity through an affidavit of parentage or in any court action during his lifetime.
>
> E. The Decedent never married the natural mother of the Plaintiff/Caveator after the child (Plaintiff/Caveator) was born.

¶ 15 Because McDougald's status as Moore's biological child is not sufficient, standing alone, to establish McDougald's right to take from Moore through intestate succession, McDougald is not a party legally interested in Moore's estate. As she is not a party who can assert a legal interest, even with the defaulted admissions, she has failed to establish standing to bring this caveat. As she has failed to establish standing to bring this caveat, the trial court lacked subject matter jurisdiction over the proceedings.

¶ 16 Relying on *Phillips*, McDougald argues that she need only be a "potential beneficiary" to challenge Moore's will. While McDougald correctly states the law, she has failed to establish that she is a potential beneficiary. In *Phillips*, in response to a caveat, the propounder introduced evidence of a prior will, that in addition to the will in question, did not list the caveator as a beneficiary. *Phillips*, 251 N.C. App. at 101, 795 S.E.2d at 276. Even though both wills would need to have been adjudged invalid for the caveator to take, the court found that she had standing because she had a right to take intestate as an heir. *Id.* at 106, 795 S.E.2d at 279-80. This made the caveator a "potential beneficiary" regardless of whether she would ultimately receive part of the deceased's estate. *Id.*

¶ 17 Here, McDougald has not alleged or introduced evidence to show that she could take under a different will than the one propounded by Matthews. Moreover, unlike the caveator in *Phillips*, McDougald has not shown under the statute that she could take from Moore through intestate succession. N.C. Gen. Stat. § 29-19(b). McDougald has thus not shown that she is a "potential beneficiary."

¶ 18 McDougald also argues that the court had subject matter jurisdiction because there are other potential heirs. However, while the court

may have subject matter jurisdiction over will caveats generally, "standing relates not to the power of the court but to the right of the party to have the court adjudicate a particular dispute." *Cherry*, 245 N.C. App. at 346, 781 S.E.2d at 876. As McDougald failed to establish standing to bring this claim on her own behalf, the court lacked subject matter jurisdiction over her particular dispute in this case. *Cf. Hauser v. Hauser*, 252 N.C. App. 10, 17, 796 S.E.2d 391, 395 (2017) (determining that plaintiff did not have standing to bring suit on behalf of her mother despite diluted inheritance because plaintiff was not interested in the judgment).

¶ 19 In light of our holding, we do not address Matthews' remaining arguments.

III. Conclusion

¶ 20 Because McDougald is not a person legally interested in Moore's estate, she failed to establish standing. Because standing is a prerequisite to subject matter jurisdiction, the trial court lacked jurisdiction over the proceedings. We accordingly vacate the trial court's orders and remand for dismissal of McDougald's caveat.

VACATED AND REMANDED FOR DISMISSAL.

Judges DIETZ and TYSON concur.

IN RE PUBLIC RECORDS REQUEST TO DHHS IN CONNECTION WITH THE DEATH OF JOHN NEVILLE

No. COA21-495

Filed 3 May 2022

Public Records—public records request—temporary protective order sought by the State—subject matter jurisdiction—no summons—no authority to initiate the action

After the trial court dissolved a temporary protective order (TPO)—requested by the District Attorney—preventing a coalition of media companies from accessing documents relating to the State's investigation of a local inmate's death, the State's appeal from the trial court's decision was dismissed for lack of subject matter jurisdiction. The underlying TPO proceeding had two jurisdictional defects: first, the District Attorney did not issue a summons notifying the media coalition of its request for the TPO as required under Civil Procedure Rule 4(a); and second, the State lacked authority to bring the action in the first place where the N.C. Public Records Act only permits the party requesting public records to initiate judicial action seeking enforcement of its request.

Judge MURPHY concurring with the exception of paragraphs 14-16.

Appeal by the State from order entered 12 February 2021 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 8 March 2022.

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

Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, Hugh Stevens, C. Amanda Martin, and Elizabeth J. Soja, for appellee-media coalition.

ARROWOOD, Judge.

¶ 1 The State appeals from an order dissolving a temporary protective order that kept a coalition of media companies from accessing documents relating to the State's investigation of the death of an inmate in

Forsyth County. For the following reasons, we dismiss this appeal and remand to the trial court with instruction.

I. Background

¶ 2 On 4 December 2019, John Neville ("Neville"), an inmate at the Forsyth County Law Enforcement Detention Center, died while in custody. The North Carolina State Bureau of Investigation (the "SBI") undertook the investigation into Neville's death. The SBI ultimately charged six defendants with involuntary manslaughter.

¶ 3 In the summer of 2020, the SBI provided a copy of its investigative files into Neville's death to Dr. Patrick Lantz, a county medical examiner and pathologist at Wake Forest Baptist Health. Around the same time, the North Carolina Department of Health and Human Services (the "DHHS") received voluntary public records requests from reporters with The News & Observer for all documents in the DHHS's possession relating to Neville's death. At that time, the six involuntary manslaughter charges were still pending.

¶ 4 On 28 January 2021, the DHHS sent an email to the Forsyth County District Attorney's Office ("District Attorney") communicating its intent to turn over the records it had relating to Neville's death, including portions of the SBI investigative file.

¶ 5 On 29 January 2021, the District Attorney filed an "Objection to the Release of the Records by DHHS" and a "Request for Temporary Protective Order" in Forsyth County Superior Court. The District Attorney claimed that "the records at issue contain the complete investigative file of" the SBI, including "investigative notes, interviews, . . . personnel information[,] . . . Neville's medical records, the Forsyth County Detention Center internal investigation and report, and related officer statements[.]" The District Attorney also claimed that the records included many items that were "not otherwise subject to public disclosure while criminal cases involving them are still pending" and that they "contain[ed] information[ ] the release of which would violate HIPAA/HITECH and numerous statutes."

¶ 6 The trial court granted the temporary protective order on the same day. The trial court also ordered for a hearing "on the potential release of these records" for 8 February 2021.

¶ 7 On 4 February 2021, a coalition of media companies (the "media coalition")—which included The News & Observer, WRAL-TV, ABC 11, WXII-TC, WUNC-FM, The Winston-Salem Journal, The News & Record, and WGHP-TV Fox8—filed a Motion for Access and a Motion to Dismiss.

The media coalition claimed that "[n]either Movants nor their counsel was given any advance notice of the proceeding or opportunity to be heard prior to the *ex parte* entry of the 'Temporary Protective Order' on 29 January 2021." It further claimed that "the Forsyth District Attorney's office has no standing or authorization to bring an action to prevent another public agency from producing public records in response to public records requests made pursuant to the North Carolina Public Records Law or otherwise."

¶ 8 The matter came on for hearing in Forsyth County Superior Court, Judge Hall presiding, on 8 February 2021. Appearing at the hearing in support of the Request for Temporary Protective Order were Forsyth County District Attorney James O'Neill and Assistant District Attorney Elisabeth F. Dresel; counsel for the media coalition appeared in opposition to the District Attorney's request. Also present were the attorneys representing the six persons charged with Neville's death.

¶ 9 The District Attorney introduced the SBI's "Investigative File Dissemination Request" as its exhibit. The District Attorney contended that this document indicated that "the SBI was sharing these records at the medical examiner's request for the purposes of their joint ongoing investigation" and that sharing the records with the media coalition could potentially prejudice the SBI's case. Conversely, the media coalition argued that, because the SBI had turned over its files to the medical examiner, a non-custodial law enforcement agency, those files now constituted public records under *News & Observer Pub. Co., Inc. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992).

¶ 10 In a written order filed 12 February 2021, the trial court dissolved the temporary protective order and allowed the media coalition's motion to dismiss. Namely, the trial court concluded:

> [T]he subject law enforcement investigative files, having been provided by the law enforcement agencies to the Medical Examiner, a public agency for purposes of the Public Records Act, became public records pursuant to all existing North Carolina case authority, and are thus not subject to the protections afforded by N.C.G.S. § 132-1.4[.]

¶ 11 The District Attorney filed written notice of appeal on the same day.[1] This appeal is now being prosecuted by the Attorney General's Office on behalf the State.

1. The District Attorney also petitioned the trial court to stay its dismissal and dissolution of the temporary protective order, which led to a hearing held on 25 February 2021.

II. Discussion

¶ 12 On appeal, the State argues that the trial court "misapprehended the applicable law in concluding the law enforcement records at issue became public records when provided to the medical examiner[,]" and that "the trial court abused its discretion in failing to determine whether the interests of justice would be served by extending its temporary protective order."

¶ 13 In turn, the media coalition argues, in pertinent part, that the State's appeal should be dismissed for lack of subject matter jurisdiction, because "the Record does not contain any summons issued to or served upon [the DHHS,] . . . the criminal defendants asserted to be in support of the [State's] Objection, or any of the appellees . . . as required by N.C. Gen. Stat. § 1-394 and N.C. Gen. Stat. § 1A-1, Rule 4(a)"; and because the State has no authority to "initiate a public records dispute in the form of an Objection[,]" as it is in the sole province of the public records requester to initiate a proceeding on that matter. We agree with the media coalition.

A. Procedural Impropriety

¶ 14 A temporary protective order is, under our General Statutes, a special proceeding. *Compare* N.C. Gen. Stat. § 1-2 (2021) ("An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense.") *with* N.C. Gen. Stat. § 1-3 (2021) ("Every other remedy is a special proceeding.").

¶ 15 Under our General Statutes,

> [s]pecial proceedings against adverse parties shall be commenced as is prescribed for civil actions. The summons shall notify the defendant or defendants to appear and answer the complaint or petition of the plaintiff within 10 days after its service upon the defendant or defendants, and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint or petition, within

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The trial court took the matter under advisement until 3 March 2021. On 3 March 2021, the trial court "continue[d] the stay . . . to allow either the [media] Coalition to make its Public Records Act lawsuit, and/or the State to pursue the appeal, and/or one of the criminal defendants or the State to make a motion in the criminal matter."

> the time specified, the plaintiff will apply to the court for the relief demanded in the complaint or petition.

N.C. Gen. Stat. § 1-394 (2021).

¶ 16 Our Rules of Civil Procedure "govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C. Gen. Stat. § 1A-1, Rule 1 (2021). Accordingly, upon the filing of a special proceeding such as this, "summons shall be issued forthwith[.]" N.C. Gen. Stat. § 1A-1, Rule 4(a). This matter was in fact assigned a Special Proceeding file number when it was filed.

¶ 17 Here, when the District Attorney filed its Objection and Request for Temporary Protective Order to keep the media coalition from accessing any files relating to Neville's death, neither The News & Observer, who filed the original voluntary public records request, nor any other member of the media coalition was named as a party or was notified to appear and answer. Although counsel for the DHHS is shown as having been served a copy of the District Attorney's Objection, no summons was issued, nor was the DHHS named as party to the action. In fact, the Record is devoid of any summons commencing the matter whatsoever.

¶ 18 Thus, the District Attorney's Objection and Request for Temporary Protective Order was not initiated in accordance with our Rules of Civil Procedure, and therefore our Courts do not have jurisdiction to consider the matter.

B. Lack of Authority

¶ 19 Under our General Statutes,

> [a]ny person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court shall have jurisdiction to issue such orders if the person has complied with G.S. 7A-38.3E. Actions brought pursuant to this section shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

N.C. Gen. Stat. § 132-9(a) (2021).

¶ 20 Previously, in *McCormick v. Hanson Aggregates Southeast, Inc.*, this Court addressed the issue of whether it was proper for a city attorney to file a complaint "seeking a declaratory judgment from the trial court that certain documents [the] defendant sought to obtain via a public records request . . . were not subject to disclosure." 164 N.C. App. 459, 461, 596 S.E.2d 431, 432, *writ denied*, *disc. review denied*, *appeal dismissed*, 359 N.C. 69, 603 S.E.2d 131 (2004). Citing N.C. Gen. Stat. § 132-9, we concluded that "the Public Records Act does not appear to allow a government entity to bring a declaratory judgment action; only the person making the public records request is entitled to initiate judicial action to seek enforcement of its request." *Id.* at 464, 596 S.E.2d at 434 (citation omitted). Accordingly, we held "that the use of a declaratory judgment action in the instant case was improper." *Id.*

¶ 21 We later relied on this excerpt from *McCormick* when deciding *City of Burlington v. Boney Publishers, Inc.*, in which we also held that "use of a declaratory judgment action under the Public Records Act was improper . . . ." 166 N.C. App. 186, 192, 600 S.E.2d 872, 876 (2004).

¶ 22 The same must be said here. Under our precedent and N.C. Gen. Stat. § 132-9, it was improper for the District Attorney in the case *sub judice* to file a request for temporary protective order to keep the media coalition from accessing the records. This is an additional jurisdictional defect on the face of this action.

III. Conclusion

¶ 23 Because the District Attorney failed to follow the requirements of the Rules of Civil Procedure in filing its Objection and Request for Temporary Protective Order, and because no authority exists to provide the trial court jurisdiction over the relief sought by the District Attorney, we dismiss this appeal. We do not reach the underlying issue as to whether the documents at issue are public records within the meaning of the Public Records Act, and leave that issue to be determined in a subsequent proceeding brought pursuant to the provisions of the Act. This matter is remanded with instructions for the trial court to dismiss the underlying proceeding for lack of jurisdiction.

DISMISSED AND REMANDED.

Judge GRIFFIN concurs.

Judge MURPHY concurs with the exception of paragraphs 14-16.

IN RE S.R.

[283 N.C. App. 149, 2022-NCCOA-285]

IN THE MATTER OF S.R.

No. COA21-633

Filed 3 May 2022

1. Termination of Parental Rights—findings of fact—sufficiency of evidence

The trial court's order denying a mother's petition to terminate her ex-husband's parental rights in their daughter was affirmed where the court's findings of fact—with three exceptions—were supported by clear, cogent, and convincing evidence. Notably, the court found that the father threatened to kill himself before the child was born but was neither threatening nor combative toward the mother during the incident; after the parties' divorce, the mother actively thwarted the father's attempts to have a relationship with their daughter; and, although the father frequently contacted the mother to ask about their daughter, the mother only responded when it benefitted her and mostly ignored him as part of an agenda to establish grounds for terminating his parental rights.

2. Termination of Parental Rights—grounds for termination—failure to pay child support—evidentiary support—termination still within court's discretion

The trial court's order denying a mother's petition to terminate her ex-husband's parental rights in their daughter was affirmed after the court concluded that grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(4)(willful failure to pay child support) did not exist where the father regularly paid child support until the mother changed the payment collection method (evidence indicated that the mother was trying to create a scenario where she could file for termination of the father's parental rights). The trial court's failure to include a finding that a child support order was in effect at the time the petition was filed was harmless where, although the mother produced evidence that would have supported such a finding (and therefore a conclusion that grounds for termination existed), the ultimate conclusion about whether to terminate the father's parental rights was within the court's discretion.

Appeal by petitioner from Order entered 8 June 2021 by Judge Caroline S. Burnette in Granville County District Court. Heard in the Court of Appeals 8 March 2022.

Edward Eldred for petitioner-appellant.

Lisa Anne Wagner for respondent-appellee.

GORE, Judge.

¶ 1 Petitioner Tiffany Roberto, Sarah's[1] mother, appeals from an order entered declining to terminate respondent Bruce Savard's, Sarah's father, parental rights. We affirm.

I. Background

¶ 2 Ms. Roberto and Mr. Savard were married and during that marriage they had a child, Sarah, who was born on 23 April 2014. The day before Sarah was born, an incident occurred between Ms. Roberto and Mr. Savard. During this incident, Mr. Savard was holding a gun and threatened to kill himself. Ms. Roberto called a friend, Joe Roberto, who arrived at her and Mr. Savard's home, talked to Mr. Savard, and eventually was able to take the firearm away from Mr. Savard. After Joe Roberto arrived, Mr. Savard went inside the home and laid down on the couch.

¶ 3 Shortly after Sarah's birth, in June 2014, Ms. Roberto sought out and received an *ex parte* domestic violence protective order ("DVPO") against Mr. Savard. Following the entry of the DVPO Mr. Savard and Ms. Roberto separated. Mr. Savard, who was an active duty member of the United States Marines at the time, went back to living on the military base. Ms. Roberto moved out of the home she shared with Mr. Savard and moved into a spare room in Joe Roberto's home. Ms. Roberto and Mr. Savard were divorced on 8 June 2016. Ms. Roberto and Joe Roberto were married on 22 November 2016.

¶ 4 Following the entry of the DVPO in 2014, Ms. Roberto petitioned for child support and medical insurance coverage. An Order was entered requiring Mr. Savard to pay child support and provide medical insurance for Sarah. Mr. Savard left military service approximately one month after the Order requiring he pay child support was entered. In the time immediately following his service in the military Mr. Savard attended trade school. During his time in school Mr. Savard was unable to pay child support. However, once he became gainfully employed Mr. Savard began paying child support through garnishment from his wages. Sometime around the end of 2018, Ms. Roberto moved to have child support payments removed from North Carolina Centralized Collections and require

1. A pseudonym is used to protect the identity of the juvenile.

Mr. Savard to pay child support upon his own volition. Once Mr. Savard no longer had the ability to provide child support through garnishment of his wages child support payments stopped.

¶ 5 On 13 October 2017, Mr. Savard filed a Motion seeking to amend child custody, child support, and seeking temporary visitation. As a part of that proceeding, Mr. Savard did not timely respond to Ms. Roberto's request for discovery. As a result, the trial court in that matter dismissed Mr. Savard's Motion.

¶ 6 On 22 June 2020, Ms. Roberto petitioned to terminate Mr. Savard's parental rights. Ms. Roberto alleged that grounds exist to terminate Mr. Savard's parental rights pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1), (4), and (7) for neglect of the juvenile, failure to pay child support, and willful abandonment of the juvenile. Mr. Savard filed his Answer to Ms. Roberto's Petition on 10 September 2020. The matter was heard before the trial court on 28 January 2021 and 18 March 2021. Following the hearing, in an Order entered 8 June 2021, the trial court denied Ms. Roberto's Petition, concluding grounds did not exist to terminate Mr. Savard's parental rights. Ms. Roberto entered timely Notice of Appeal on 7 July 2021.

II. Standard of Review

¶ 7 A termination of parental rights proceeding involves two separate analytical phases: an adjudication stage and a dispositional stage. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). A different standard of review applies to each phase. The present case did not proceed past the adjudication stage, thus, our discussion only regards the adjudication stage.

¶ 8 "At the adjudication stage, the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). "The standard for review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent, and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984).

III. Termination of Parental Rights

¶ 9 On appeal, Ms. Roberto argues that (1) certain findings of fact are not supported by clear, cogent, and convincing evidence and (2) that the conclusion of law that no grounds for termination of parental rights exist is not supported by the findings of fact. We address these arguments in turn.

A. Findings of Fact

¶ 10 **[1]** In her argument on appeal, Ms. Roberto argues that findings of fact 12, 13, 15, 25, 27, 29, 30, and 36 are not supported by clear, cogent, and convincing evidence.

¶ 11 "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019). "It is the trial court's duty, however, to consider the evidence and pass upon the credibility of the witnesses and this Court will not reweigh the evidence." *In re L.H.*, 378 N.C. 625, 636, 2021-NCSC-110, ¶ 16 (internal citation omitted).

¶ 12 We discuss each challenged finding in turn (the specific portions of each finding which are challenged are noted in italics).

1. Finding of Fact 12

¶ 13 Finding of fact 12 states:

> The day before [Sarah] was born, Mr. Savard had a mental health break and threatened to kill himself. Ms. Roberto immediately called Joe who arrived at the home. When he arrived at the home, Ms. Roberto jumped into his car. Mr. Savard was in the front doorway with a gun in his hand. *He was not threatening or combative.* Joe got him into the house, took the gun and found the shotgun he bought Mr. Savard as a Christmas present and removed them from the home.

¶ 14 Ms. Roberto asserts that the evidence cannot sustain the finding that Mr. Savard "was not threatening or combative" with Ms. Roberto the day before Sarah was born.

¶ 15 At the termination of parental rights hearing, Mr. Savard testified that

> [t]he gun was down at my side, finger straight and off the trigger, and I said "Does it look like I'm serious now?" And when I realized that I was holding the gun, I broke out into tears, and I had set the firearm on the dresser that was right next to the front door, and I had laid down on the couch crying my eyes out, and Joe [Roberto], he had came in, took the gun, and said "If you would pointed that at us, I would have shot you and killed you."

Mr. Savard testified that he was contemplating suicide and never pointed the gun at Ms. Roberto.

¶ 16 In contrast, Joe Roberto testified that, "[Mr. Savard] had followed her outside holding a handgun [up], yelling to her, 'Do you think I'm serious now,' or 'Does it look like I'm serious?' " Joe Roberto testified that after talking to Mr. Savard, he put the handgun down, went inside the house, and laid face down on the couch." Ms. Roberto did not testify about this incident.

¶ 17 Additionally, the DVPO Ms. Roberto received against Mr. Savard stated that in April 2014, Mr. Savard "loaded [a] handgun [and] cocked it and said 'Do I look serious now?' " Finally, progress notes from Mr. Savard's mental health treatment state that on 23 April 2014, in response to an argument with Ms. Roberto, Mr. Savard "pulled out a gun."

¶ 18 Ms. Roberto asks us to reweigh this evidence and conclude that Mr. Savard was threatening or combative during the incident in question. However, it is not this Court's role to assess the evidence and, where there is conflicting evidence, assign weight or credibility to the evidence; that role is reserved for the finder of fact, in this case the trial court. *See In re L.H.*, 378 N.C. at 636, 2021-NCSC-110, ¶ 16.

¶ 19 Our review of the record reveals that the trial court assigned more weight to Mr. Savard's account of the incident at the root of finding of fact 12. Mr. Savard's account of the incident reveals that, even though he was holding a firearm, his finger was not on the trigger of the firearm, the firearm remained at his side and was not pointed at anyone, and his statement, "Does it look like I am serious now?" pertained to Mr. Savard's threat to take his own life. The trial court clearly took this evidence to show that Mr. Savard was not threatening or combative towards Ms. Roberto. Thus, we conclude that finding of fact 12 is supported by clear, cogent, and convincing evidence.

2. Finding of Fact 13

¶ 20 Finding of fact 13 states:

> The day after [Sarah] was born, Mr. Savard's mother drove from Illinois to North Carolina to meet [Sarah] and spend time with her. *While Mr. Savard's mother was in North Carolina, Ms. Roberto had a daily routine of taking the newborn [Sarah] to Joe's house and staying all day. Mr. Savard's mother was only able to spend one day with [Sarah] while she was in North Carolina and that was one afternoon. Ms.*

Roberto has no recollection of this and Mr. Savard's mother's accounts of this week were uncontroverted.

¶ 21 On appeal, Ms. Roberto acknowledges that Mr. Savard's mother testified that Ms. Roberto went to a friend's house all but one day during the visit. However, Ms. Roberto argues that the trial court erred in finding that Mr. Savard's mother's accounts of the week were uncontroverted because "both Ms. Roberto and Joe Roberto testified differently." Ms. Roberto's argument fails to recognize that Ms. Roberto testified that she did not remember leaving the home while Mr. Savard's mother was visiting and Joe Roberto only testified that Ms. Roberto did not spend the entire day at his house each day that week. There was no evidence as to Ms. Roberto's actions during the week Mr. Savard's mother visited aside from the testimony of Mr. Savard's mother. Additionally, the testimony cited by Ms. Roberto is far from sufficient to contradict the testimony of Mr. Savard's mother.

¶ 22 Ms. Roberto's arguments on appeal, at best, support striking the final sentence of finding of fact 13. This would leave the substance of the finding unchanged. The substance of finding of fact 13 is supported by Mr. Savard's mother's testimony. Any conclusion otherwise would require this court to reweigh the evidence. Thus, we conclude that finding of fact 13 is supported by clear, cogent, and convincing evidence.

3. Finding of Fact 15

¶ 23 Finding of fact 15 states:

> Ms. Roberto was granted a permanent one-year domestic violence protective order against Mr. Savard. Ms. Roberto was granted temporary physical and legal custody of [Sarah]. *It was noted in the order that Mr. Savard acted irrationally and aggressively at the hearing*. Mr. Savard was ordered to take a psychological evaluation before requesting mediation for unsupervised visitation. Mr. Savard was allowed supervised visits to be supervised by Ms. Roberto's parents who lived in Sanford, North Carolina.

¶ 24 Ms. Roberto asserts that the DVPO did not state that Mr. Savard acted irrationally and aggressively at the DVPO hearing. This is true. The DVPO states "[Mr. Savard] appears to the Court to be in need of mental health treatment based on Court's observations of defendant in Court as well as witness descriptions of incidents set out above." However, the words "irrationally and aggressively" do not appear anywhere in the

DVPO. Thus, we conclude that the challenged portion of finding of fact 15 is not supported by clear, cogent, and convincing evidence.

4. Finding of Fact 25

¶ 25 Finding of fact 25 states:

> *Mr. Savard was under the impression that he was no longer required to pay child support as Ms. Roberto never informed him that he as [sic] not make payments directly to her after his child support case was closed.*

¶ 26 Our review of the record does not reveal any testimony or evidence that Mr. Savard believed he was no longer required to pay child support. Mr. Savard testified that he had no problem with child support being taken from his paycheck by the child support agency, Ms. Roberto offered to forgive all child support if he relinquished parental rights, and that he is currently willing and able to provide child support. Ms. Roberto testified that when Mr. Savard texted her to ask her where he was supposed to send child support to, she responded ten days later with her mother's address. Thus, we conclude that this finding of fact is not supported by clear, cogent, and convincing evidence.

5. Finding of Fact 27

¶ 27 Finding of fact 27 states:

> In 2017, Mr. Savard hired an attorney to modify the child custody in Onslow county. He hired an attorney. The matter was dismissed. *It is unclear from the record and testimony why it was dismissed; however, it looks like procedural issues.*

¶ 28 Ms. Roberto asserts that contrary to the language of finding of fact 27, it is readily apparent that Mr. Savard's custody action was dismissed because he failed to comply with the trial court's order compelling discovery.

¶ 29 It appears clear to this Court, from the face of the trial court's Order, that Mr. Savard's Motion to Modify Custody and Child Support was dismissed based on Ms. Roberto's Motion to Dismiss for failure to comply with discovery requests, despite Mr. Savard providing the requested information after the time frame designated in the motion to compel expired. Thus, we conclude the challenged portion of finding of fact 27 is not supported by clear, cogent, and convincing evidence.

6. Finding of Fact 29

¶ 30 Finding of fact 29 states:

> *Throughout 2015 – 2019, Mr. Savard sent Ms. Roberto text messages wishing her happy birthday, asking about [Sarah] and asking to talk. The only time Ms. Roberto responded was when she asked Mr. Savard about relinquishing his parental rights.* Ms. Roberto knew how to reach out to Mr. Savard *when it benefited her but ignored him at all other times which also benefited her agenda which was to terminate his parental rights.*

¶ 31 Ms. Roberto primarily focuses on the trial court's use of the word "agenda," arguing that the uncontroverted evidence in the case only established that on at least three occasions Mr. Savard committed acts of violence towards Ms. Roberto. However, the trial court, as finder of fact in a termination of parental rights case, cannot rely solely on uncontroverted evidence. Instead, the trial court must consider all evidence presented and assign credibility to witnesses in its discretion as it makes findings of fact.

¶ 32 Here, the evidence presented at the termination of parental rights hearing shows that Ms. Roberto frequently did not respond to Mr. Savard and primarily responded when it benefited her (i.e., to ask where to send divorce papers, request Mr. Savard relinquish his parental rights, etc.). Additionally, the Guardian ad Litem in the case testified that Ms. Roberto's motive in switching the child support payments from garnishment from Mr. Savard's paychecks through an agency to requiring Mr. Savard to pay on his own was because failure to pay child support is a ground for termination of parental rights. This testimony supports the finding that Ms. Roberto's "agenda" was to terminate Mr. Savard's parental rights. Thus, we conclude that this finding of fact is supported by clear, cogent, and convincing evidence.

7. Finding of Fact 30

¶ 33 Finding of fact 30 states:

> *Ms. Roberto subsequently blocked Mr. Savard on all social media outlets and blocked his telephone number. Mr. Savard had no way to contact [Sarah] or Ms. Roberto which was reliable.*

¶ 34 At the termination of parental rights hearing Mr. Savard testified that he was blocked by Ms. Roberto on Facebook. The Guardian ad Litem

testified that Mr. Savard was blocked by Ms. Roberto on social media and by phone. However, Ms. Roberto testified that she never blocked Mr. Savard's phone. Once again the evidence is conflicting. Even if Ms. Roberto did not block Mr. Savard's phone, we believe the screenshots of the text chain between Mr. Savard and Ms. Roberto, which were entered into evidence, supports the finding that Mr. Savard did not have a reliable method of communicating with Ms. Roberto. Thus, we conclude that this finding is supported by clear, cogent, and convincing evidence.

8. Finding of Fact 36

¶ 35 Finding of fact 36 states:

> While Mr. Savard has not made valiant efforts to forge a relationship with his daughter, *he has made some efforts which has often times been thwarted by Ms. Roberto. Ms. Roberto has actively hindered and essentially precluded Mr. Savard from being part of [Sarah]'s life. Mr. Savard has not shown an intention to give up all parental rights to [Sarah].*

¶ 36 Ms. Roberto's only argument as to the substance of this finding of fact is that she never "thwarted," "actively hindered," or "precluded" Mr. Savard from being a part of Sarah's life. At the hearing, Mr. Savard testified that when he contacted Ms. Roberto asking how Sarah is Ms. Roberto would not tell him, Ms. Roberto tried to bribe him into relinquishing his parental rights, that he went to a psychologist as required by the DVPO to be able to obtain visitation with Sarah, that he has over 200 pictures of Sarah which he had to get through other friends on Facebook because he was blocked by Ms. Roberto, he bought Sarah about $700 in Christmas gifts that he was not able to give to her, and that he just wants to be a part of Sarah's life because he loves her. This testimony when viewed in conjunction with the Guardian ad Litem's testimony that Ms. Roberto purposefully changed the method of collection of child support to set up a scenario where she could file for termination of parental rights supports the finding that Ms. Roberto thwarted Mr. Savard's efforts to be in Sarah's life. Thus, we conclude that this finding is supported by clear, cogent, and convincing evidence.

¶ 37 In summary, we conclude that the challenged portions of finding of fact 15 and 27 and all of finding of fact 25 are not supported by clear, cogent, and convincing evidence. As a result, we will not consider these unsupported findings in our evaluation of Ms. Roberto's additional arguments. However, the challenged findings of fact which we concluded are supported by clear, cogent, and convincing evidence and the

unchallenged findings of fact are binding on this court in our review of the trial court's conclusions of law. *See In re S.C.L.R.*, 378 N.C. 484, 491, 2021-NCSC-101, ¶ 22.

B. Grounds for Termination of Parental Rights

¶ 38 **[2]** In her Petition, Ms. Roberto claimed grounds existed to terminate Mr. Savard's parental rights pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1), (4), and (7). However, following the termination of parental rights hearing, the trial court concluded no grounds existed to terminate Mr. Savard's parental rights.

¶ 39 On appeal, Ms. Roberto argues the trial court erred in concluding that grounds did not exist pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1), (4), and (7). Only one ground is necessary to support a termination of parental rights. *Id.* at 494, 2021-NCSC-101, ¶ 29. Our review of the record makes it clear that the trial court did not err in concluding that Mr. Savard did not neglect Sarah or willfully abandon Sarah. Thus, grounds for termination pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1) and (7) are not present. Ms. Roberto's most compelling argument is that grounds existed to terminate Mr. Savard's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(4), due to failure to pay child support. Thus, we only analyze this ground for termination of parental rights.

¶ 40 Section 7B-1111(a)(4) provides that the trial court may terminate the parental rights upon a finding that

> One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.

N.C. Gen. Stat. § 7B-1111(a)(4) (2020).

¶ 41 A review of this State's appellate opinions analyzing N.C. Gen. Stat. § 7B-1111(a)(4) reveals that in order to establish the existence of grounds to terminate parental rights pursuant to § 7B-1111(a)(4), the party petitioning for termination of parental rights need only show (1) that an order or parental agreement requiring the payment of child support was in effect at the time the petition was filed and (2) that the party whose parental rights were sought to be terminated had not paid child support as required by the order or parental agreement within the

year preceding the entry of the petition. *In re C.L.H.*, 376 N.C. 614, 620, 2021-NCSC-1, ¶ 13.

¶ 42 In *In re C.L.H.*, our Supreme Court concluded that the trial court's findings of fact were insufficient to support the termination of respondent's parental rights based on § 7B-1111(a)(4) because the trial court made no findings of fact that a child support order existed in the year prior to the filing of the petition to terminate respondent's parental rights. *Id.* at 621, 2021-NCSC-1, ¶ 13. Similarly, this Court concluded in *In re I.R.L.* that the trial court's findings were insufficient to support a conclusion that a respondent's parental rights were subject to termination pursuant to § 7B-1111(a)(4), despite both parties testifying that a child support order was entered requiring the respondent to pay child support, because the trial court's order was "devoid of any findings indicating that a child support order existed or that [the f]ather failed to pay support as required by the child support order." *In re I.R.L.*, 263 N.C. App. 481, 486, 823 S.E.2d 902, 906 (2019).

¶ 43 The case *sub judice* is similar to *In re C.L.H.* and *In re I.R.L.* in that the trial court's findings of fact do not support a conclusion that grounds for termination of parental rights pursuant N.C. Gen. Stat. § 7B-1111(a)(4) exist, because the findings of fact do not include a finding that an order existed requiring Mr. Savard to pay child support. The findings of fact only include findings that Mr. Savard paid child support and that Mr. Savard's child support payments stopped after Ms. Roberto elected to stop garnishment of child support from Mr. Savard's paychecks through North Carolina Centralized Collections. Thus, based on the findings of fact made, the trial court's conclusion that no grounds existed to terminate Mr. Savard's parental rights was not erroneous.

¶ 44 However, we note that Ms. Roberto did establish that an order was in effect and that order was entered into evidence at the termination of parental rights hearing. Thus, the record includes evidence that would support a finding of fact that such an order was in effect and a subsequent conclusion that grounds existed to terminate Mr. Savard's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(4).

¶ 45 Nevertheless, it is well settled law that "[t]his Court has consistently held that upon a finding that grounds exist to authorize termination, the trial court is never required to terminate parental rights under any circumstances, but is merely given the discretion to do so." *In re Tyson*, 76 N.C. App. 411, 419, 333 S.E.2d 554, 559 (1985) (citing *In re Pierce*, 67 N.C. App. 257, 312 S.E.2d 900 (1984); *In re Godwin*, 31 N.C. App. 137, 228 S.E.2d 521 (1976)). As a result, we conclude that the trial court

acted within its discretion in electing to not terminate Mr. Savard's parental rights and any error the trial court may have made by failing to make a finding of fact regarding the existence of a child support order and subsequently concluding that grounds did not exist to terminate Mr. Savard's parental rights pursuant N.C. Gen. Stat. § 7B-1111(a)(4) was harmless.

IV. Conclusion

¶ 46 For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges CARPENTER and GRIFFIN concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; DUKE ENERGY PROGRESS, LLC; DUKE ENERGY CAROLINAS, LLC; ACCION GROUP, LLC, APPELLEES
v.
STANLY SOLAR, LLC, APPELLANT

No. COA21-188

Filed 3 May 2022

Utilities—renewable energy program—request for proposals—surety bond posted as security—denial of security refund

An applicant that submitted a late stage proposal for a solar project under the Competitive Procurement of Renewable Energy Program was not entitled to the refund of its proposal security (a $1 million surety bond) under the plain language of the program's Request for Proposals (RFP), which provided different criteria for late stage proposals. Further, the Utilities Commission adequately addressed the applicant's inequitable treatment argument—challenging the program's requirement of a nonrefundable proposal security for certain bids but not others (depending on whether the applicant was affiliated with the energy company)—and its determination that the differential treatment was reasonable under N.C.G.S. § 62-110.8(d) and the Commission's Rule R8-71(d) was afforded deference and affirmed.

Appeal by Appellant from Order entered 20 October 2020 by the North Carolina Utilities Commission. Heard in the Court of Appeals 30 November 2021.

The Allen Law Offices, by Dwight W. Allen, Britton H. Allen, and Brady W. Allen, and Jack Jirak, Deputy General Counsel Duke Energy Corporation, for Appellees Duke Energy Carolinas, LLC and Duke Energy Progress, LLC.

Burns, Day & Presnell, P.A., by James J. Mills and Daniel C. Higgins, for Appellee Accion Group, LLC.

Kilpatrick Townsend Stockton LLP, by Benjamin L. Snowden, for Appellant Stanly Solar, LLC.

GORE, Judge.

¶ 1 Stanly Solar, LLC ("Stanly Solar") appeals from the Order Denying Motion for Return of CPRE Proposal Security ("Order") entered by the North Carolina Utilities Commission ("Commission"). For the following reasons, we affirm the Commission's order.

I. Background

A. Competitive Procurement of Renewable Energy Program

¶ 2 On 27 July 2017, North Carolina Governor Roy Cooper signed into law North Carolina Session Law 2017-192. Session Law 2017-192, in conjunction with the Commission's Rule R8-71 and the Commission's Order Modifying and Approving Joint CPRE Program allowed for the implementation of the Competitive Procurement of Renewable Energy ("CPRE") Program by Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP" and, together with DEC, the "Companies").

¶ 3 The CPRE Program was to be implemented in multiple tranches. As part of Tranche 1 the Companies issued a Request for Proposals ("RFP") for electric generating facilities, subject to a set criterion, from eligible market participants ("MPs") in 2018. MPs for this RFP included third-party renewable developers, the DEC/DEP Proposal Team, and any affiliate of DEC or DEP that elects to submit a proposal. Proposals were due 11 September 2018.

¶ 4 The RFP was administered by an Independent Administrator, the Accion Group, LLC ("Accion"). Accion was responsible for developing and utilizing the CPRE Program Methodology to evaluate all Proposals in accordance with the evaluation process established under Commission Rule R8-71(f)(3)(iii) and ensuring that all Proposals are treated equitably throughout the RFP.

¶ 5 Accion hosted a website ("IA RFP Website") as a base for all RFP communications. Among other things, the IA RFP Website was available to all MPs to provide comments on the RFP process, submit questions concerning the RFP (questions and responses were available to be viewed by all registered persons on the IA RFP Website), and provided a confidential message board to allow MPs to ask project specific questions to Accion without those questions being disclosed to all MPs.

¶ 6 Proposals to the Tranche 1 RFP were due by 11 September 2018. The evaluation process was to be split into two Steps. The full evaluation process of proposals and notification of winning bids was projected to be completed by 25 February 2019, with the contracting period to be completed by 24 April 2019.

¶ 7 If, at the conclusion of Step 1 of the evaluation process, a third-party MP was notified by Accion that their Proposal was selected to move on to Step two of the evaluation process, that MP would be required to post a Proposal Security in the amount of $20/kW, based on the proposed facility's inverter nameplate capacity. The Proposal Security would only be released (i) if the Proposal is eliminated by Accion due to failure to meet any required RFP criteria or action; (ii) if the MP elects to withdraw the Proposal pursuant to Section VI(A) of the RFP; (iii) if the Proposal is not selected as a winning proposal, upon closure of the RFP; or (iv) if the Proposal is selected as a winning Proposal, upon completion of the contracting phase of the RFP, including execution of the applicable contract and posting of security as required in the applicable agreement. The Companies will be entitled to draw on the full amount of the Proposal Security if the MP (a) withdraws its Proposal during Step 2 of the evaluation process; or (b) if the Proposal is selected as a winning Proposal but the MP fails to complete the contracting phase.

¶ 8 Accion evaluated the Proposals in accordance with Commission Rule R8-71(f)(3). Commission Rule R8-71(f)(3) required Accion to perform an initial ranking of Proposals based on economic and noneconomic criteria in evaluation Step 1. Noneconomic criteria considered included facility permitting, financing experience, technical development and operational experience, and historically underutilized businesses. Step 2 of the evaluation process required the T&D Sub-Team to assess the system impact of the Proposals and assign any System Upgrade costs to each Proposal.

¶ 9 If during the Step 2 evaluation process the T&D Sub-Team determined that any required Interconnection Facilities or System Upgrades could not be completed by 1 January 2021, but could be completed by 1 July 2021, the IA was to notify the MP of the projected completion

date of the Interconnection Facilities and System Upgrades, then the MP would have the option to either elect to allow the Proposal to remain in the RFP or withdraw the Proposal. However, if it was determined that any required Interconnection Facilities or System Upgrades could not be completed by 1 July 2021, the IA would remove the Proposal from further consideration.

B. Stanly Solar's Bid

¶ 10 Stanly Solar is a 50 MW solar project under development in Stanly County, North Carolina. Stanly Solar had received a system impact study in December 2017 and was designated as a "Late-Stage Proposal," meaning that it was not included in the Tranche 1 "grouping study" and would solely bear the costs of its own network upgrades.

¶ 11 Stanly Solar submitted a third-party PPA bid into the CPRE. On 6 December 2018, Stanly Solar was notified that it had been selected in Step 1. At that time, it appeared that the project likely would not be able to achieve interconnection by the 1 January 2021 in-service deadline. However, Stanly Solar opted to proceed to Step 2 and posted a $1 million surety bond as Proposal Security on 4 January 2019. Stanly Solar's initial surety bond was rejected for failure to comply with the proper form. Stanly Solar posted a revised surety bond on 5 February 2019, which was accepted. On 10 April 2019, Stanly Solar was notified that it had been selected as a winning bid and would have to sign a PPA or withdraw from the CPRE and forfeit its Proposal Security.

¶ 12 On 7 June 2019, Stanly Solar received a Facilities Study Report which indicated that it would take approximately two years from the start of construction to achieve interconnection. At a construction planning meeting on 21 June 2019, Duke indicated that April 2021 was a likely in-service date for Stanly Solar's Proposal. At no point did Stanly Solar receive notification from the IA during Step 2 that its interconnection date might be later than 1 January 2021. Neither was Stanly Solar provided the option to withdraw during Step 2 of the selection process.

¶ 13 On 26 June 2019, Stanly Solar informed the IA that the Interconnection Facilities and System Upgrades for its proposal would not be completed by 1 January 2021. Stanly Solar then requested to withdraw its proposal and have its Proposal Security returned, pursuant to Section VI(A) of the RFP. Stanly Solar's request was denied on 5 July 2019. The IA's stated justification for the denial was: (1) "The IA has not informed the MP that interconnection cannot be completed by [1 January 2021];" (2) "Duke Transmission has yet to establish a date for completion of associated system upgrades, and, ergo, there has not been a determination that the

system upgrades 'will not be completed until at least July 2021;' " and (3) "Should Duke Transmission fail to complete its responsibilities necessary for the MP to interconnect by the established COD, that would be a contract dispute pursuant to the terms of the PPA and not something to be adjudicated before the fact." On 8 July 2019, Stanly Solar clarified that Duke's Transmission Group had told Stanly Solar that the project would not reach interconnection until at least April 2021. The IA did not respond to Stanly Solar's 8 July 2019 request.

¶ 14 On 11 July 2019, Stanly Solar received a final Interconnection Agreement, which confirmed that the projected in-service date was not until 31 May 2021.

C. Procedural History

¶ 15 On 14 January 2020, Stanly Solar filed a Motion for Return of CPRE Proposal Security with the North Carolina Utilities Commission. Stanly Solar argued it is entitled to return of its Proposal Security because (1) Stanly Solar should have been able to withdraw during Step 2 without forfeiting its Proposal Security; (2) failure to return the Proposal Security will result in inequitable treatment as compared to Duke-sponsored proposals; and (3) refunding Stanly Solar's Proposal Security will not cause harm to any party.

¶ 16 Accion responded to Stanly Solar's Motion for Return of CPRE Proposal Security on 20 February 2020. Accion argued, among other things, that Stanly Solar misconstrues Section VI(A) of the RFP and that the RFP does not entitle Stanly Solar to a return of its Proposal Security under the specific events occurring during Stanly Solar's bid process. The Companies filed a joint response to Stanly Solar's Motion on 24 February 2020. The Companies argued that Section VI(A) does not entitle Stanly Solar to a refund of its Proposal Security and treatment of the Duke-sponsored proposals is consistent with the RFP.

¶ 17 Stanly Solar filed a Reply in Support of Motion for Return of CPRE Proposal Security on 13 March 2020. To which Accion responded on 21 April 2020.

¶ 18 On 20 October 2020, the Commission entered an Order Denying Motion for Return of CPRE Proposal Security. The Commission concluded "that the provisions of Sections II(F) and VI(A) of the Tranche 1 RFP providing for the return of Proposal Security upon withdrawal are inapplicable to Stanly because Stanly, as a Late State Proposal, was not specifically evaluated by the T&D Sub-Team during Step 2." According to the Commission, "the right to withdraw provided in Section VI(A)

is only available to projects that have undergone the Step 2 evaluation by the T&D Sub-Team." Stanly Solar's proposal was not included in the Step 2 grouping study and was not evaluated by the T&D Sub-Team but evaluated in the normal course of the interconnection application process, because it was a Late-Stage Proposal, and thus, a critical element of Section VI(A) is not present. The Commission goes on to point out that Stanly Solar's proposal was instead evaluated under Section VI(C) of the RFP, which is specific to Late State Proposals and does not have a similar withdrawal provision to that found in Section VI(A).

¶ 19 The Commission similarly concluded that Section II(F) of the RFP does not entitle Stanly Solar to receive a refund of their Proposal Security. Section II(F) provides for the Proposal Security to be returned if a proposal is eliminated by the IA for "failure to meet any required RFP criteria or action. Here, the fact that the proposals in-service date was projected to be after the Tranche 1 in-service deadline of 1 January 2021 did not eliminate the proposal. A proposal was only required to be eliminated if the in-service date was projected to be after 1 July 2021. As Stanly Solar states in its Motion, its proposal was projected to have an in-service date of April 2021. Thus, the IA was not required to eliminate Stanly Solar's proposal and the IA in fact notified Stanly Solar that its proposal was selected as a winning bid. Thus, the Commission concluded that Section II(F) does not entitle Stanly Solar to have its Proposal Security returned.

¶ 20 The Commission also concluded that Stanly Solar's motivation behind requesting their Proposal Security be returned was due to an increase in solar panel costs, and not because the projected in-service date was after 1 January 2021, as Stanly Solar's Motion claims. Finally, the Commission concluded "that Duke acted reasonably in requiring the Step 2 Proposal Security with 'the intent . . . to protect integrity of the RFP process by ensuring that projects that are moved into the Step 2 evaluation actually move forward to PPA if selected as a winning project.' " Thus, the Commission concluded that Duke was reasonable in not releasing Stanly Solar's Proposal Security pursuant to the CPRE Tranche 1 and dismissed Stanly Solar's Motion.

¶ 21 Three Commissioners dissented from the Commission's majority opinion. The dissenting Commissioners did not argue that the majority misinterpreted or misapplied the procedures found in the Tranche 1 RFP. However, these Commissioners concluded that the procedures found in the Tranche 1 RFP "created a structural inequity . . . between utility-sponsored proposals and those of market participants such as

Stanly Solar." These Commissioners would allow Stanly Solar's Motion for a return of the CPRE Proposal Security.

¶ 22 On 21 December 2020, Stanly Solar filed Notice of Appeal.

II. Standard of Review

¶ 23 The extent of appellate review of decisions from the North Carolina Utilities Commission is described in the North Carolina General Statutes § 62-94. There the General Assembly has stipulated that "any . . . order made by the Commission under the provisions of [Chapter 62] shall be prima facie just and reasonable." N.C. Gen. Stat. § 62-94(e) (2020).

> The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the 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 upon 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). "In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." N.C. Gen. Stat. § 62-94(c).

¶ 24 "The Commission's findings may not be reversed or modified by a reviewing court merely because the court would have reached a different finding or determination upon the evidence." *State ex rel. Utils. Comm'n v. Carolina Water Serv.*, 225 N.C. App. 120, 125, 738 S.E.2d 187, 191, *disc. rev. denied*, 366 N.C. 580 (2013) (citation omitted); *see also State ex rel. Utils. Comm'n*, *Carolina Power & Light Co. v. Carolina Indus. Grp. for Util. Rates*, 130 N.C. App. 636, 639, 503 S.E.2d 697, 699-700 (1998) ("[W]here there are two reasonably conflicting views of the evidence, the appellate court may not substitute its judgment for that of the Commission.").

III. Discussion

¶ 25 Stanly Solar argues on appeal that the Commission erred in (1) concluding that Stanly Solar could not withdraw from Tranche 1 without forfeiting its Proposal Security; (2) in failing to address Stanly Solar's claim of inequitable treatment in its Order; and (3) in rejecting Stanly Solar's claim that failure to authorize the return of Stanly Solar's Proposal Security would result in inequitable treatment of the Stanly Solar Proposal, in violation of N.C. Gen. Stat. § 62-110.8(d) and Commission Rule R8-71. We will address these arguments in the order they are presented.

A. Withdrawal without Forfeiting Proposal Security

¶ 26 Stanly Solar argues the Commission incorrectly interpreted the terms of the RFP. Stanly Solar contends that the Commission erred in concluding that Section VI(A) does not apply to Late Stage Proposals because Late Stage Proposals are to be evaluated under Section VI(C) of the RFP. According to Stanly, Solar Section VI(A) establishes standards for dealing with the in-service deadline for all projects.

¶ 27 Section VI(A) of the RFP reads in its entirety:

> In the event that the T&D Sub-Team determines during the Step 2 evaluation process that any required Interconnection Facilities or System Upgrades cannot be completed by January 1, 2021, but can be completed by July 1, 2021, the IA will notify the MP of the projected completion date of the Interconnection Facilities and System Upgrades and the MP will have the option to elect to either allow the Proposal to remain in the RFP or withdraw the Proposal from the RFP. If the T&D Sub-Team determines that any required Interconnection Facilities or System Upgrades cannot be completed by July 1, 2021, the IA will remove the Proposal from further consideration. For the avoidance of doubt, the term of all PPAs shall be 20 years from the date of commercial operation as provided for in the PPA.

¶ 28 The plain language of Section VI(A) makes clear that the section's provisions only apply to proposals which the T&D Sub-Team determined during Step 2 of the evaluation process would not meet the in-service deadline because any required Interconnection Facilities or System Upgrades could not be completed by 1 January 2021. The T&D

Sub-Team is a subset of the team that evaluates the proposals submitted under the RFP, which specifically assesses and assigns system upgrade costs to Proposals. During Step 2 of the evaluation process, the T&D Sub-Team was to assess the system impact of the Proposals in the order ranked by the IA and assign any System Upgrade costs attributable to each Proposal. Late State Proposals were not evaluated during a System Impact Grouping Study, and any Proposal which elected to be evaluated as a Late Stage Proposal was deemed to include any cost of Network Upgrades in the MP's PPA price. It is undisputed that Stanly Solar's Proposal was a Late Stage Proposal. As a Late Stage Proposal, Stanly Solar's Proposal was not evaluated by the T&D Sub-Team during Step 2 and, thus, did not fall within the protection of Section VI(A).

¶ 29 A determination by the Commission is considered *prima facie* just and reasonable. *State ex rel. Utils. Comm'n v. Ray*, 236 N.C. 692, 697, 73 S.E.2d 870, 874 (1953). The burden is on the appellant to demonstrate an error of law in the proceedings. *State ex rel. Utils. Comm'n v. Champion Papers, Inc.*, 259 N.C. 449, 456, 130 S.E.2d 890, 895 (1963). "To be arbitrary and capricious, the Commission's order would have to show a lack of fair and careful consideration of the evidence or fail to display a reasoned judgment." *State ex rel. Utils. Comm'n v. Piedmont Nat. Gas Co.*, 346 N.C. 558, 573, 488 S.E.2d 591, 601 (1997) (citation omitted). Based on a review of the whole record, we conclude that Stanly Solar has not sustained its burden of demonstrating either that the Commission's order was unsupported by competent, material, and substantial evidence or that the order failed to display a reasoned judgment. In fact, the Commission's order is directly in line with the plain language of the RFP at issue. Thus, we conclude that the Commission correctly interpreted the RFP.

B. Inequitable Treatment

¶ 30 Stanly Solar next argues that the Commission erred by failing to address Stanly Solar's inequitable treatment argument. Stanly Solar asserts that while the Commission's Order mentions that Stanly Solar's motion made an inequitable treatment argument, the Order fails to address the argument in its discussion and conclusions. Stanly Solar also argues that the Commission erred by rejecting Stanly Solar's claim to have its Proposal Security returned due to inequitable treatment in violation of N.C. Gen. Stat. § 62-110.8(d) and Rule R8-71. We will address these issues together.

¶ 31 According to Stanly Solar, the Commission's failure to address the argument violated N.C. Gen. Stat. § 62-79(a) which requires that all final

order and decisions of the Commission "be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings." Stanly Solar's argument on appeal contends that the Commission only summarized the arguments from Stanly Solar's Motion in its Order and made no findings or conclusions on the issue. We disagree.

¶ 32 Stanly Solar's argument ignores the following portion from the "Discussion and Conclusions" of the Commission's Order:

> Further, the CPRE Program was enacted in part to give utilities more control over purchases from solar facilities than allowed under the federal Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3134 (PURPA). As such, utilities should be allowed to include reasonable guidelines for participation in the CPRE Program. The Commission is persuaded that Duke acted reasonably in requiring the Step 2 Proposal Security with "the intent . . . to protect integrity of the RFP process by ensuring that projects that are moved into the Step 2 evaluation actually move forward to PPA if selected as a winning project." . . . Contrary to Stanly's assertions, the forfeited Proposal Security does not result in a windfall to Duke but is credited to Duke's customers.

We recognize that this portion of the Order does not explicitly use the phrase inequitable treatment. However, this portion comes after the Commission's discussion of Sections II(F) and VI(A) of the RFP concluded, and addresses the heart of Stanly Solar's argument, specifically the charging of a nonrefundable Proposal Security following Step 2 to third-party MP bids and not proposals from entities associated with Duke Energy. The Commission's Order would have been better structured and potentially clearer if the Commission had organized its Order by utilizing subheadings for each argument or expressly stating it was addressing each of Stanly Solar's claims. However, that is not the standard required. The Commission's Order is only required to provide the reviewing court with sufficient information to allow it to determine the controverted questions presented in the proceedings. *State ex rel. Utils. Comm'n v. Conservation Council of N.C.*, 312 N.C. 59, 62, 320 S.E.2d 679, 682 (1984); N.C. Gen. Stat. § 62-79(a). Here, the Commission's Order is sufficient to indicate to this Court that the Commission concluded the decision to charge a nonrefundable Proposal Security to some bids but

not others in Tranche 1 of the RFP, based on the status of the entity making the bid, was reasonable and not inequitable.

¶ 33 The IA was tasked to "develop and publish the methodology used to evaluate responses received pursuant to a competitive procurement solicitation and to ensure that all responses are treated equitably." N.C. Gen. Stat. § 62-110.8(d). Additionally, the Commission's own Rules required the IA to ensure that third-party MPs' Proposals and the electric public utility's Self-developed Proposals are treated equitably. Rule R8-71(d). Stanly Solar argued the IA did not accomplish this.

¶ 34 As discussed above, the Commission concluded that charging a nonrefundable Proposal Security to third-party MPs and not proposals that came from Duke affiliated entities was reasonable. The interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference. *State ex rel. Utils. Comm'n v. Friesian Holdings, LLC*, 2022-NCCOA-32, ¶¶ 18, 38 (citations omitted). We believe the same deference is applicable to an agency' determination a statute was complied with. In this case, the Commission found that the delineation of treatment between third-party MP bids and Duke affiliated bids was reasonable. Stanly Solar argues this treatment was inequitable solely because one subset of bids was charged a nonrefundable Proposal Security and one subset of bids was not. Equitable treatment does not mean the exact same treatment. The Commission found the IA's treatment of the different types of bids reasonable. We see no reason to disturb this decision and give the Commission's decision its due deference.

IV. Conclusion

¶ 35 For the foregoing reasons we affirm the Commission's order.

AFFIRMED.

Chief Judge STROUD and Judge HAMPSON concur.

JOHN DOE 1K, PLAINTIFF
v.
ROMAN CATHOLIC DIOCESE OF CHARLOTTE A/K/A ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NC, DEFENDANT

No. COA21-254

Filed 3 May 2022

Collateral Estoppel and Res Judicata—res judicata—child sexual abuse—prior suit—resulting in final judgment—applicability of SAFE Child Act

Plaintiff's civil claims against a Catholic diocese arising from alleged sexual abuse by a priest when plaintiff was a child were properly dismissed where plaintiff's previous suit alleging similar claims was dismissed with prejudice and that dismissal was affirmed on appeal. Although the legislature subsequently enacted the SAFE Child Act that extended the statute of limitations for child sexual abuse claims, based on the plain language of the Act, since plaintiff's previous suit resulted in a final judgment, all of his new claims were barred by principles of res judicata and could not be revived by the Act alone.

Appeal by Plaintiff-Appellant from order entered 22 January 2021 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 December 2021.

Tin, Fulton, Owen, & Walker, by Sam McGee, for Plaintiff-Appellant.

Troutman Pepper Hamilton Sanders, LLP, by Joshua D. Davey, for Defendant-Appellee.

CARPENTER, Judge.

I. Factual & Procedural Background

¶ 1 Plaintiff-Appellant John Doe 1K ("Plaintiff"), commenced this action against Defendant-Appellee, Roman Catholic Diocese of Charlotte ("Defendant" or "Diocese"), by filing a complaint and issuance of a summons on 28 September 2011 ("the 2011 Complaint"). Plaintiff sued Defendant in Mecklenburg County Superior Court for claims related to alleged sexual abuse committed by a now-deceased priest of the Diocese. The abuse was alleged to have occurred from 1977 to 1978,

when Plaintiff was a teenager. In the 2011 Complaint, Plaintiff brought claims against Defendant for (1) constructive fraud, (2) breach of fiduciary duty, (3) fraud and fraudulent concealment, (4) negligent supervision and retention, (5) civil conspiracy, (6) negligent infliction of emotional distress, (7) intentional infliction of emotional distress as an alternative claim for relief, and (8) equitable estoppel. In 2014, the Mecklenburg County Superior Court granted summary judgment to Defendant on all of Plaintiff's claims, dismissing the claims with prejudice. This Court affirmed the trial court's grant on appeal, further explaining Plaintiff "abandoned" his negligent supervision and retention, civil conspiracy, negligent infliction of emotional distress, and intentional infliction of emotional distress claims. *Doe v. Roman Catholic Diocese of Charlotte*, 242 N.C. App. 538, 775 S.E.2d 918 n.2 (2015).

¶ 2 On 31 October 2019, the North Carolina General Assembly passed the SAFE Child Act, ("S.B. 199") intended to revive claims of childhood sex abuse previously time-barred. *See* SAFE Child Act, N.C. Session Law 2019-245, S.B. 199 (2019); *see also* N.C. Gen. Stat. § 1-17(e) (2019), N.C. Gen. Stat. § 1-52(19) (2019) N.C. Gen. Stat. § 1-56(b) (2019).

¶ 3 On 13 April 2020, Plaintiff filed similar claims against Defendant in a new complaint ("the 2020 Complaint"). The 2020 Complaint asserted claims of (1) assault and battery, (2) intentional infliction of emotional distress, (3) negligence, (4) negligent infliction of emotional distress, (5) breach of fiduciary duty, (6) constructive fraud, and (7) misrepresentation and fraud. On 1 June 2020, Defendant moved to dismiss all of Plaintiff's claims. Plaintiff opposed Defendant's motion to dismiss and moved the Superior Court to transfer the case to Wake County Superior Court for adjudication by a three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1 and N.C. Rule of Civil Procedure 42(b)(4). Defendant opposed Plaintiff's motion to transfer. Judge Carla N. Archie heard oral arguments for the motion to dismiss on 24 September 2020. On 22 January 2021, Defendant's motion to dismiss was granted, and Plaintiff's motion to transfer was denied by order. Plaintiff filed notice of appeal on 15 February 2021.

II. Jurisdiction

¶ 4 The trial court's order granting Defendant's motion to dismiss and denying Plaintiff's motion to transfer is a final judgment and appeal therefore lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b).

III. Issues

¶ 5 The issues before this Court are whether (1) the trial court erred in granting Defendant's motion to dismiss, and (2) the trial court erred

in denying Plaintiff's motion to transfer to a three-judge panel of the Wake County Superior Court.

IV. Standard of Review

¶ 6 This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). This Court also reviews *de novo* any conclusions of law of the lower court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

V. Analysis

A. S.B. 199

¶ 7 This case considers the application of S.B. 199. Several provisions of S.B. 199 are relevant here. Section 4.1 of S.B. 199 extends the statute of limitations to sue "for claims related to sexual abuse suffered while the plaintiff was under 18 years of age." S.B. 199, § 4.1, codified at N.C. Gen. Stat. § 1- 17(d). Under prior law, a plaintiff who suffered sexual abuse while under the age of 18 had to file his claims by the time he turned 21—that is, within three years of turning 18. N.C. Gen. Stat. §§ 1-52(19), 1- 17(a)(1) (2018). After the passage of S.B. 199, a plaintiff may now file his child sexual abuse claims until he turns 28 years old—that is, within 10 years of turning 18. S.B. 199 § 4.1, codified at N.C. Gen. Stat. § 1-17(d); *see also* S.B. 199 § 4.3, codified at N.C. Gen. Stat. § 1-56.

¶ 8 Further, Section 4.1 provides a plaintiff "may file a civil action within two years of the date of a criminal conviction for a related felony sexual offense against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age." S.B. 199 § 4.1, codified at N.C. Gen. Stat. § 1-17(e). Section 4.2(a) of S.B. 199 also amends the statute of repose applicable to child sexual abuse claims. S.B.199, § 4.2(a), codified at N.C. Gen. Stat. § 1-52. Before the passage of S.B.199, N.C. Gen. Stat. § 1-52(16) recognized a ten-year statute of repose on child-sexual-abuse claims, providing that "no cause of action [for personal injury] shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-52(16) (2018). Section 4.2(a) amends this statute of repose by expressly exempting claims related to child sexual abuse from its scope. S.B. 199 § 4.2(a).

¶ 9 Lastly, Section 4.2(b) of S.B. 199 purports to revive certain actions for child sexual abuse for a limited period. Specifically, Section

4.2(b) states, "[e]ffective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under [N.C. Gen. Stat. §] 1-52 as it existed immediately before the enactment of this act." S.B.199, § 4.2(b). Finally, Section 9(c) of S.B. 199 provides that "Part IV of this act," which part includes Sections 4.1 and 4.2, "becomes effective December 1, 2019, and applies to civil actions commenced on or after that date."

B. Defendant's Motion to Dismiss

¶ 10 Plaintiff appeals the trial court's grant of Defendant's motion to dismiss. For the following reasons, we affirm the dismissal granted by the trial court.

¶ 11 S.B. 199 § 4.2(b) states, "[e]ffective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under [N.C. Gen. Stat. §] 1-52 as it existed immediately before the enactment of this act." S.B.199, § 4.2(b) ("the Revival Provision"). Based on the plain language of the Revival Provision, S.B. 199 revives only civil actions for child sexual abuse otherwise time-barred and does not revive civil actions for child sexual abuse barred by disposition of a previous action. Without specific language from the Legislature to the contrary, this Court must observe the principles of the doctrine of *res judicata* as they apply to this case.

¶ 12 "Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citation omitted). "For *res judicata* to apply, a party must show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both the party asserting *res judicata* and the party against whom *res judicata* is asserted were either parties or stand in privity with parties." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413-14, 474 S.E.2d 127, 128 (1996) (quotation omitted). Further, "[t]he doctrine prevents the relitigation of all matters . . . that were or should have been adjudicated in the prior action." *Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880 (quotation omitted).

¶ 13 Taking the elements of *res judicata* one by one, we hold *res judicata* bars Plaintiff's claims, and S.B. 199 as enacted does not serve to revive them. For Plaintiff's claims to be precluded from relitigation by the doctrine of *res judicata*, there must have been (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties

in "the two suits." To address the first element, there was a final judgment on the 2011 Complaint, as the trial court granted summary judgment and dismissed all Plaintiff's claims with prejudice; the trial court's dismissal was subsequently affirmed by this Court. *Doe v. Roman Catholic Diocese of Charlotte*, 242 N.C. App. 538, 775 S.E.2d 918 n.2 (2015).

¶ 14 In addressing the second element, it is important to note Plaintiff's claims in the 2011 Complaint and the 2020 Complaint were not identical. The question to be resolved then, is whether *res judicata* serves to bar all Plaintiff's claims, both new and old, from the Revival Provision. All claims were premised on the same core factual allegations, barring claims brought in the 2020 Complaint identical to those brought in the 2011 Complaint. To the extent new claims were asserted, *res judicata* bars the "assert[ion]" of "a new legal theory" that "should have been adjudicated in the prior action." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986).

> [S]ubsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata*, because the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined, but also as to all matters which could properly have been litigated and determined in the former action or proceeding. A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery[.]

ACC Constr. v. SunTrust Mortg., Inc., 239 N.C. App. 252, 262, 769 S.E.2d 200, 207-08 (2015) (internal citations and quotations omitted). Because it is clear any new claims brought in the 2020 Complaint could have been adjudicated in a prior action, having arisen from the same factual assertions, we hold *res judicata* applies to all claims brought in the 2020 Complaint.

¶ 15 To address the third element, there is no dispute as to the "identity of the parties." The parties are identical between this case and the prior lawsuit. We therefore hold Plaintiff's claims are wholly precluded from relitigation by the doctrine of *res judicata*.

¶ 16 Plaintiff's claims, had they not been dismissed with prejudice in 2014, would have fallen within the Revival Provision of S.B. 199. However, having been summarily dismissed, the final order of Mecklenburg County Superior Court precludes their revival in the absence of some

other procedural tool, such as a grant from the trial court on a motion to set aside judgment pursuant to N.C. R. Civ. P. Rule 60(b)(6), or a specific grant of revival from the Legislature. While such an outcome may not have been the intent of the Legislature in drafting the Revival Provision, this Court is bound by the plain language of S.B. 199. Therefore, we affirm the trial court's grant of Defendant's motion to dismiss.

¶ 17 Because we affirm the trial court's grant of Defendant's motion to dismiss, we do not reach the issue of whether the trial court erred in denying Plaintiff's motion to transfer the constitutional challenge raised by Defendant to a three-judge panel of Wake County Superior Court.

VI. Conclusion

¶ 18 Based on the plain language of S.B. 199, we hold Plaintiff's claims are barred by final disposition of a Superior Court, and not time-barred. Therefore, Plaintiff's claims cannot be revived by S.B.199, § 4.2(b) alone. Accordingly, we affirm the trial court's grant of Defendant's motion to dismiss, and do not reach the issue of whether the trial court erred in denying Plaintiff's motion to transfer.

AFFIRMED.

Judges TYSON and GORE concur.

DOE v. ROMAN CATH. DIOCESE OF CHARLOTTE

[283 N.C. App. 177, 2022-NCCOA-288]

JOHN DOE, PLAINTIFF
v.
ROMAN CATHOLIC DIOCESE OF CHARLOTTE A/K/A ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NC, DEFENDANT

No. COA21-255

Filed 3 May 2022

Collateral Estoppel and Res Judicata—res judicata—child sexual abuse—prior suit—resulting in final judgment—applicability of SAFE Child Act

Plaintiff's claims against a Catholic diocese arising from alleged sexual abuse by a priest when plaintiff was a child were properly dismissed where plaintiff's previous suit alleging similar claims was dismissed with prejudice. Although the legislature subsequently enacted the SAFE Child Act that extended the statute of limitations for child sexual abuse claims, based on the plain language of the Act, since plaintiff's previous suit resulted in a final judgment, all of his new claims were barred by principles of res judicata and could not be revived by the Act alone.

Appeal by Plaintiff-Appellant from order entered 22 January 2021 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 December 2021.

Tin, Fulton, Owen, & Walker, by Sam McGee, for Plaintiff-Appellant.

Troutman Pepper Hamilton Sanders, LLP, by Joshua D. Davey, for Defendant-Appellee.

CARPENTER, Judge.

I. Factual & Procedural Background

¶ 1 Plaintiff-Appellant John Doe ("Plaintiff"), commenced this action against Defendant-Appellee, Roman Catholic Diocese of Charlotte ("Defendant" or "Diocese"), by filing a complaint and issuance of a summons on 28 September 2011 ("the 2011 Complaint"). Plaintiff sued Defendant in Mecklenburg County Superior Court for claims related to alleged sexual abuse committed by a now-deceased priest of the Diocese. The abuse was alleged to have occurred in the year 1984, when Plaintiff was a teenager. In the 2011 Complaint, Plaintiff brought claims

against Defendant for (1) constructive fraud, (2) breach of fiduciary duty, (3) fraud and fraudulent concealment, (4) negligent supervision and retention, (5) civil conspiracy, (6) negligent infliction of emotional distress, (7) intentional infliction of emotional distress as an alternative claim for relief, and (8) equitable estoppel. In 2014, the Mecklenburg County Superior Court granted summary judgment to Defendant on all of Plaintiff's claims, dismissing the claims with prejudice. This Court affirmed the trial court's grant on appeal, further explaining Plaintiff "abandoned" his negligent supervision and retention, civil conspiracy, negligent infliction of emotional distress, and intentional infliction of emotional distress claims. *Doe v. Roman Catholic Diocese of Charlotte*, 242 N.C. App. 538, 775 S.E.2d 918 n.2 (2015).

¶ 2 On 31 October 2019, the North Carolina General Assembly passed the SAFE Child Act, ("S.B. 199") intended to revive claims of childhood sex abuse previously time-barred. *See* SAFE Child Act, N.C. Session Law 2019-245, S.B. 199 (2019); *see also* N.C. Gen. Stat. § 1-17(e) (2019), N.C. Gen. Stat. § 1-52(19) (2019) N.C. Gen. Stat. § 1-56(b) (2019).

¶ 3 On 13 April 2020, Plaintiff filed similar claims against Defendant in a new complaint ("the 2020 Complaint"). The 2020 Complaint asserted claims of (1) assault and battery, (2) intentional infliction of emotional distress, (3) negligence, (4) negligent infliction of emotional distress, (5) breach of fiduciary duty, (6) constructive fraud, and (7) misrepresentation and fraud. On 1 June 2020, Defendant moved to dismiss all of Plaintiff's claims. Plaintiff opposed Defendant's motion to dismiss and moved the Superior Court to transfer the case to Wake County Superior Court for adjudication by a three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1 and N.C. Rule of Civil Procedure 42(b)(4). Defendant opposed Plaintiff's motion to transfer. Judge Carla N. Archie heard oral arguments for the motion to dismiss on 24 September 2020. On 22 January 2021, Defendant's motion to dismiss was granted, and Plaintiff's motion to transfer was denied by order. Plaintiff filed notice of appeal on 15 February 2021.

II. Jurisdiction

¶ 4 The trial court's order granting Defendant's motion to dismiss and denying Plaintiff's motion to transfer is a final judgment and appeal therefore lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b).

III. Issues

¶ 5 The issues before this Court are whether (1) the trial court erred in granting Defendant's motion to dismiss, and (2) the trial court erred

in denying Plaintiff's motion to transfer to a three-judge panel of the Wake County Superior Court.

IV. Standard of Review

¶ 6 This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). This Court also reviews *de novo* any conclusions of law of the lower court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

V. Analysis

A. S.B. 199

¶ 7 This case considers the application of S.B. 199. Several provisions of S.B. 199 are relevant here. Section 4.1 of S.B. 199 extends the statute of limitations to sue "for claims related to sexual abuse suffered while the plaintiff was under 18 years of age." S.B. 199, § 4.1, codified at N.C. Gen. Stat. § 1- 17(d). Under prior law, a plaintiff who suffered sexual abuse while under the age of 18 had to file his claims by the time he turned 21—that is, within three years of turning 18. N.C. Gen. Stat. §§ 1-52(19), 1- 17(a)(1) (2018). After the passage of S.B. 199, a plaintiff may now file his child sexual abuse claims until he turns 28 years old—that is, within 10 years of turning 18. S.B. 199 § 4.1, codified at N.C. Gen. Stat. § 1-17(d); *see also* S.B. 199 § 4.3, codified at N.C. Gen. Stat. § 1-56.

¶ 8 Further, Section 4.1 provides a plaintiff "may file a civil action within two years of the date of a criminal conviction for a related felony sexual offense against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age." S.B. 199 § 4.1, codified at N.C. Gen. Stat. § 1-17(e). Section 4.2(a) of S.B. 199 also amends the statute of repose applicable to child sexual abuse claims. S.B.199, § 4.2(a), codified at N.C. Gen. Stat. § 1-52. Before the passage of S.B.199, N.C. Gen. Stat. § 1-52(16) recognized a ten-year statute of repose on child-sexual-abuse claims, providing that "no cause of action [for personal injury] shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-52(16) (2018). Section 4.2(a) amends this statute of repose by expressly exempting claims related to child sexual abuse from its scope. S.B. 199 § 4.2(a).

¶ 9 Lastly, Section 4.2(b) of S.B. 199 purports to revive certain actions for child sexual abuse for a limited period. Specifically, Section

4.2(b) states, "[e]ffective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under [N.C. Gen. Stat. §] 1-52 as it existed immediately before the enactment of this act." S.B.199, § 4.2(b). Finally, Section 9(c) of S.B. 199 provides that "Part IV of this act," which part includes Sections 4.1 and 4.2, "becomes effective December 1, 2019, and applies to civil actions commenced on or after that date."

B. Defendant's Motion to Dismiss

¶ 10 Plaintiff appeals the trial court's grant of Defendant's motion to dismiss. For the following reasons, we affirm the dismissal granted by the trial court.

¶ 11 S.B. 199 § 4.2(b) states, "[e]ffective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under [N.C. Gen. Stat. §] 1-52 as it existed immediately before the enactment of this act." S.B.199, § 4.2(b) ("the Revival Provision"). Based on the plain language of the Revival Provision, S.B. 199 revives only civil actions for child sexual abuse otherwise time-barred and does not revive civil actions for child sexual abuse barred by disposition of a previous action. Without specific language from the Legislature to the contrary, this Court must observe the principles of the doctrine of *res judicata* as they apply to this case.

¶ 12 "Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citation omitted). "For *res judicata* to apply, a party must show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both the party asserting *res judicata* and the party against whom *res judicata* is asserted were either parties or stand in privity with parties." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413-14, 474 S.E.2d 127, 128 (1996) (quotation omitted). Further, "[t]he doctrine prevents the relitigation of all matters . . . that were or should have been adjudicated in the prior action." *Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880 (quotation omitted).

¶ 13 Taking the elements of *res judicata* one by one, we hold *res judicata* bars Plaintiff's claims, and S.B. 199 as enacted does not serve to revive them. For Plaintiff's claims to be precluded from relitigation by the doctrine of *res judicata*, there must have been (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties

in "the two suits." To address the first element, there was a final judgment on the 2011 Complaint, as the trial court granted summary judgment and dismissed all Plaintiff's claims with prejudice; the trial court's dismissal was subsequently affirmed by this Court. *Doe v. Roman Catholic Diocese of Charlotte*, 242 N.C. App. 538, 775 S.E.2d 918 n.2 (2015).

¶ 14 In addressing the second element, it is important to note Plaintiff's claims in the 2011 Complaint and the 2020 Complaint were not identical. The question to be resolved then, is whether *res judicata* serves to bar all Plaintiff's claims, both new and old, from the Revival Provision. All claims were premised on the same core factual allegations, barring claims brought in the 2020 Complaint identical to those brought in the 2011 Complaint. To the extent new claims were asserted, *res judicata* bars the "assert[ion]" of "a new legal theory" that "should have been adjudicated in the prior action." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986).

> [S]ubsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata*, because the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined, but also as to all matters which could properly have been litigated and determined in the former action or proceeding. A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery[.]

ACC Constr. v. SunTrust Mortg., Inc., 239 N.C. App. 252, 262, 769 S.E.2d 200, 207-08 (2015) (internal citations and quotations omitted). Because it is clear any new claims brought in the 2020 Complaint could have been adjudicated in a prior action, having arisen from the same factual assertions, we hold *res judicata* applies to all claims brought in the 2020 Complaint.

¶ 15 To address the third element, there is no dispute as to the "identity of the parties." The parties are identical between this case and the prior lawsuit. We therefore hold Plaintiff's claims are wholly precluded from relitigation by the doctrine of *res judicata*.

¶ 16 Plaintiff's claims, had they not been dismissed with prejudice in 2014, would have fallen within the Revival Provision of S.B. 199. However, having been summarily dismissed, the final order of Mecklenburg County Superior Court precludes their revival in the absence of some

other procedural tool, such as a grant from the trial court on a motion to set aside judgment pursuant to N.C. R. Civ. P. Rule 60(b)(6), or a specific grant of revival from the Legislature. While such an outcome may not have been the intent of the Legislature in drafting the Revival Provision, this Court is bound by the plain language of S.B. 199. Therefore, we affirm the trial court's grant of Defendant's motion to dismiss.

¶ 17 Because we affirm the trial court's grant of Defendant's motion to dismiss, we do not reach the issue of whether the trial court erred in denying Plaintiff's motion to transfer the constitutional challenge raised by Defendant to a three-judge panel of Wake County Superior Court.

VI. Conclusion

¶ 18 Based on the plain language of S.B. 199, we hold Plaintiff's claims are barred by final disposition of a Superior Court, and not time-barred. Therefore, Plaintiff's claims cannot be revived by S.B.199, § 4.2(b) alone. Accordingly, we affirm the trial court's grant of Defendant's motion to dismiss, and do not reach the issue of whether the trial court erred in denying Plaintiff's motion to transfer.

AFFIRMED.

Judges TYSON and GORE concur.

JOHNSTON v. PYKA

[283 N.C. App. 183, 2022-NCCOA-289]

JAMES A. JOHNSTON AND PHYLLIS M. JOHNSTON, PLAINTIFFS
v.
TIMOTHY PYKA AND JANICE PYKA, DEFENDANTS

No. COA21-452

Filed 3 May 2022

1. Appeal and Error—interlocutory orders—not immediately appealable—N.C.G.S. § 1-278

In a matter involving a contractual dispute over the sale of real property and several landlord-tenant claims, where the trial court resolved the issue of liability as to all claims while reserving the issue of damages for later determination, even though the order was interlocutory and not immediately appealable, the appellate court exercised jurisdiction over the appeal pursuant to N.C.G.S. § 1-278 because the order involved the merits and necessarily affected the judgment.

2. Contracts—real property—alleged roof damage—clear and unambiguous terms

In a matter involving a contractual dispute over the sale of real property and several landlord-tenant claims, where plaintiffs (the tenants under contract to purchase the home) claimed that the home's roof had sustained hail damage entitling them to specific performance of the contract with an adjustment in the sale price for the cost of repairing the roof, the trial court did not err in granting partial summary judgment in favor of defendants (the landlords under contract to sell the home). Pursuant to the clear and unambiguous terms of the Offer to Purchase and Contract agreement, because there were no insurance proceeds to recover for the alleged hail damage, plaintiffs could choose to proceed with the purchase or to walk away—and defendants were under no obligation to pay for repairs to the roof.

3. Landlord and Tenant—implied warranty of habitability—pleadings and forecast of evidence—sufficiency

In a matter involving a contractual dispute over the sale of real property and several landlord-tenant claims, the trial court did not err in dismissing plaintiffs' claims for breach of the implied warranty of habitability where—although plaintiffs were correct that a landlord-tenant relationship existed while defendants continued to accept plaintiffs' rent payments after the expiration of the written lease—plaintiffs failed to plead or forecast any evidence to show

a Chapter 42 violation. Further, there was no indication that defendants received written notice of any needed repairs or whether any condition of the property constituted an emergency.

4. Landlord and Tenant—summary ejectment—subject matter jurisdiction—waiver of statutory argument

In a matter involving a contractual dispute over the sale of real property and several landlord-tenant claims, the superior court had subject matter jurisdiction to order summary ejectment because the superior court division has original jurisdiction over summary ejectment actions. As for plaintiffs' statutory argument, it was not raised before the trial court and therefore was deemed waived.

5. Landlord and Tenant—purchase contract with tenant—tortious interference with contract—fraud—summary judgment

In a matter involving a contractual dispute over the sale of real property and several landlord-tenant claims, the trial court erred by granting partial summary judgment in favor of defendants (the landlords under contract to sell the home) on their counterclaims for tortious interference with contract and fraud. Defendants did not forecast evidence necessary to satisfy any essential element of the tortious interference claim. As for the fraud claim, there was a disputed issue of material fact as to whether the roof was substantially damaged by hail, and there were gaps in the forecast of evidence as to whether defendants were in fact deceived by plaintiffs' (the tenants under contract to purchase the home) alleged false representation.

Appeal by plaintiffs from order entered 21 March 2021 by Judge Gregory R. Hayes in Gaston County Superior Court. Heard in the Court of Appeals 11 January 2022.

John M. Kirby for plaintiffs-appellants.

Thomas B. Kakassy for defendants-appellees.

GORE, Judge.

¶ 1 This matter concerns a contractual dispute over the sale of real property and several landlord/tenant claims. We affirm in part; reverse in part, and remand for further proceedings not inconsistent with this opinion.

I. Factual and Procedural Background

¶ 2 Defendants, Timothy and Janice Pyka, are the owners of a house and lot in Belmont, North Carolina. This house was their former residence, and they made it available for rental in 2013. In their efforts to rent the property out, defendants contracted with Leslie Dale of Re/Max Realty. Defendants relied upon Ms. Dale to find suitable tenants for the property.

¶ 3 At the recommendation of Ms. Dale, defendants entered into a residential rental agreement with plaintiffs James and Phyllis Johnston on 5 December 2013 for the period 5 December 2013 to 31 December 2014. The parties contracted to extend this lease by written agreement on 22 February 2015, for the period 1 January 2015 until 31 January 2016. On 13 January 2016, the parties contracted for another extension of the lease for the period 1 February 2016 to 31 January 2018. Defendants later discovered that Ms. Dale is the sister of plaintiff James Johnston.

¶ 4 In early 2018, plaintiffs inquired about purchasing the home from defendants. Without defendants' knowledge or authorization, Ms. Dale drafted a purported extension of the lease until December 2020. This document was not signed by defendants nor seen by them until after this lawsuit had commenced.

¶ 5 On 2 March 2018, defendants sent plaintiffs a registered letter, confirming their understanding that plaintiffs were not interested in buying the home and asking that they vacate by 2 April 2018. On 6 April 2018, defendants emailed plaintiffs and indicated: an acknowledgement of the month-to-month rental status, to be extended only until 1 June 2018; that the most recent payment was short by $200.00; and that, if plaintiffs were serious in their expressed desire to buy the house, defendants were still willing to sell.

¶ 6 In April 2018, the parties executed a Contract for Purchase of defendants' home. The due diligence period began on 12 April 2018 and extended through 5:00 p.m. on 16 May 2018. Plaintiffs alleged that on or about 15 April 2018, a severe thunderstorm impacted the Belmont, North Carolina region, and the thunderstorm produced hailstones that substantially damaged the property's roof and caused water intrusion issues. On or about 1 May 2018, plaintiffs notified defendants about the storm damage and requested that defendants repair the property.

¶ 7 On or about 8 June 2018, plaintiffs arranged for CSH Inspections to inspect the property, including the hail damage. CSH Inspections prepared a report that detailed their findings. The report noted that water

intrusion had taken place. Defendants alerted their insurance company to the claims of plaintiffs, in addition to notifying an independent roofing company, neither of which found any significant hail damage or other significant damage.

¶ 8 On 18 July 2018, defendants received a letter from plaintiffs that alleged the roof damage triggered "a breach of the existing agreement," and instead of offering to "proceed to closing," threated a lawsuit. Plaintiffs alleged that, as of 23 May 2018, they had performed all conditions precedent and fulfilled all obligations under the Offer to Purchase and Contract, and were ready, willing, and able to complete the transaction. Defendants contend that plaintiffs have refused to complete the transaction and failed to demonstrate that they had the financing, ability, or inclination to ever complete the transaction, despite requests from their attorney for proof of financing.

¶ 9 On 19 February 2019, plaintiffs filed a Complaint that alleged breach of contract, breach of warranty of habitability, unfair and deceptive trade practices, and sought damages and specific performance of the parties' contract for sale of real property.

¶ 10 Defendants filed an Answer and Counterclaims on 11 June 2019. Defendants filed counterclaims for tortious interference with contract, fraud, and summary ejectment. Defendants' contractual counterclaims were based on an assertion that plaintiffs' action was frivolous and had caused defendants to lose money from the sale of the house to other potential purchasers.

¶ 11 The fraud claim was based on an allegation that plaintiffs had represented that the house sustained hail damage. The summary ejectment claim alleged that plaintiffs were tenants at will or trespassers and should be ordered to vacate the premises. Defendants also filed a Third-Party Complaint against Ms. Dale that they later settled.

¶ 12 Following the filing of pleadings and during the pendency of this action, and up until December 2020, plaintiffs paid a monthly amount of rent, $200.00 short of the amount requested by defendants, and defendants have taken that money. On 14 December 2020, defendants refused additional payments and demanded once again that plaintiffs vacate the premises. Defendants have accepted no rent since the last payment of plaintiffs on 1 December 2020.

¶ 13 Defendants filed a Motion for Partial Summary Judgment on the issue of liability, and plaintiffs filed a Motion for Summary Judgment. On 23 March 2021, the trial court granted defendants' Motion for Partial

Summary Judgment on liability and denied plaintiffs' Motion. The trial court reserved the matter of damages owed to defendants for later determination. The trial court dismissed plaintiffs' claims and further ordered plaintiffs to vacate the premises within 30 days. On 15 April 2021, plaintiffs filed written notice of appeal to this Court.

II. Interlocutory Appeal

¶ 14 **[1]** We must first address whether plaintiffs' appeal is premature and subject to dismissal.

¶ 15 In this case, the trial court determined that defendants are entitled to summary judgment on their claims. It entered an Order granting defendant's Motion for Partial Summary Judgment on the issue of liability while reserving the matter of damages for later determination. It also denied plaintiffs' Motion for Summary Judgment and Motion for Injunctive Relief, dismissing plaintiffs' claims in their entirety.

¶ 16 "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995) (citation omitted). "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Bartlett v. Jacobs*, 124 N.C. App. 521, 523-24, 477 S.E.2d 693, 695 (1996) (quotation marks and citation omitted). "Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975) (citations omitted).

¶ 17 Plaintiffs argue this Court has jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b)(3) and 1-277(a), because the trial court's decision affects a substantial right. Specifically, plaintiffs assert their claim for specific performance is intertwined with defendants' pending counterclaims. Plaintiffs contend defendants' counterclaims are based on an argument that plaintiffs were wrongfully in possession of the property, and that plaintiffs' claims prevented defendants from selling the house. On appeal, plaintiffs assert they had a right to purchase the property. It is therefore plaintiffs' contention that, without immediate appeal, there is a possibility of inconsistent verdicts and multiple trials on the same issues.

¶ 18 "[T]he right to avoid a trial is generally not a substantial right, but the right to avoid two trials on the same issue may be." *Page*, 119 N.C.

App. at 735, 460 S.E.2d at 335 (citation omitted). In determining what constitutes a substantial right, "[i]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982) (*purgandum*). "Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citation omitted). "The test is satisfied when overlapping issues of fact between decided claims and those remaining create the possibility of inconsistent verdicts from separate trials." *CBP Res., Inc. v. Mountaire Farms, Inc.*, 134 N.C. App. 169, 172, 517 S.E.2d 151, 154 (1999) (citation omitted).

¶ 19 Here, the trial court resolved the issue of liability as to all claims in this case. Where "the only remaining issue is that of damages[,] . . . there is no danger of inconsistent verdicts. Therefore, no substantial right will be affected pending the trial court's consideration of the remaining issue." *Id.*

¶ 20 Nonetheless, this Court may exercise our supervisory jurisdiction to review a nonappealable interlocutory order. N.C. Gen. Stat. § 1-278 provides: "Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." "Appellate review pursuant to G.S. § 1-278 is proper under the following conditions: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment." *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 641, 535 S.E.2d 55, 59 (2000) (citation omitted). All three conditions must be met. *Id.* at 642, 535 S.E.2d at 59.

¶ 21 Here, plaintiffs immediately objected to the 23 March 2021 Order by appealing it. As previously discussed, an order granting partial summary judgment on the issue of liability while reserving the issue of damages for later determination is interlocutory and not immediately appealable. Finally, the 23 March 2021 Order dismissed all of plaintiffs' claims and resolved the issue of liability for all of defendants' remaining counterclaims. Thus, the Order involved the merits and necessarily affected the judgment because it "substantially decided the primary issues in contention . . . ." *Tinajero v. Balfour Beatty Infrastructure, Inc.*, 233 N.C. App. 748, 758, 758 S.E.2d 169, 176 (2014); *see also Gaunt v. Pittaway*, 139 N.C. App. 778, 783, 534 S.E.2d 660, 663 (2000). Therefore, this Court may exercise jurisdiction over this appeal pursuant to § 1-278.

III. Standard of Review

¶ 22 North Carolina Civil Procedure Rule 56(c) allows summary judgment to be "rendered on the issue of liability alone although there is genuine issue as to the amount of damages." "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) (quotation marks and citation omitted). "Under de novo review, we consider the matter anew and freely substitute our own judgment for that of the lower tribunal." *Barrow v. D.A.N. Joint Venture Props. of N.C., LLC*, 232 N.C. App. 528, 530, 755 S.E.2d 641, 644 (2014) (*purgandum*).

¶ 23 "The moving party has the burden of showing there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Hyman v. Efficiency, Inc.*, 167 N.C. App. 134, 137-38, 605 S.E.2d 254, 257 (2004) (citation omitted). "All inferences are to be drawn against the moving party and in favor of the opposing party. Likewise, on appellate review of an order for summary judgment, the evidence is considered in the light most favorable to the nonmoving party." *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999) (quotation marks and citations omitted).

IV. Breach of Contract

¶ 24 **[2]** Plaintiffs argue the trial court erred in granting partial summary judgment in favor of defendants on plaintiffs' claim for breach of contract. Specifically, plaintiffs contend the trial court misconstrued a critical portion of the Offer to Purchase and Contract for sale of the real property at issue, which expressly allocates risk of loss to the seller in the event of damage by fire or other casualty prior to closing. In plaintiffs' estimation, there is a genuine issue of material fact as to whether the roof sustained hail damage, and if it did, plaintiffs are entitled to specific performance with an adjustment in the sale price for the cost of repairing the roof. We disagree.

¶ 25 "Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution." *State v. Philip Morris USA Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005) (citation omitted).

> Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law; and the court may not ignore or delete any

> of its provisions, nor insert words into it, but must construe the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms.

Martin v. Martin, 26 N.C. App. 506, 508, 216 S.E.2d 456, 457-58 (1975) (citation omitted). "However, it is a fundamental rule of contract construction that the courts construe an ambiguous contract in a manner that gives effect to all of its provisions, if the court is reasonably able to do so." *McKinnon v. CV Indus.*, 213 N.C. App. 328, 334, 713 S.E.2d 495, 500 (2011) (quotation marks and citation omitted).

¶ 26 In our review of the Offer to Purchase and Contract agreement, we note the following provisions are relevant to resolving plaintiffs' risk of loss argument:

> Repair/Improvement Negotiations/Agreement: Buyer acknowledges and understands that unless the parties agree otherwise, THE PROPERTY IS BEING SOLD IN ITS CURRENT CONDITION. Buyer and Seller acknowledge and understand that they may, but are not required to, engage in negotiations for repairs/improvements to the Property. Buyer is advised to make any repair/improvement requests in sufficient time to allow repair/improvement negotiations to be concluded prior to the expiration of the Due Diligence Period. Any agreement that the parties may reach with respect to repairs/improvements shall be considered an obligation of the parties and is an addition to this Contact and as such, must be in writing and signed by the parties in accordance with Paragraph 20.
>
> . . .
>
> CLOSING SHALL CONSTITUTE ACCEPTANCE OF THE PROPERTY IN ITS THEN EXISTING CONDITION UNLESS PROVISION IS OTHERWISE MADE IN WRITING.
>
> . . .
>
> CONDITION OF PROPERTY AT CLOSING: Buyer's obligation to complete the transaction contemplated by this Contract shall be contingent upon the Property being in substantially the same or better condition at

> Closing as on the date of this offer, reasonable wear and tear excepted.
>
> RISK OF LOSS: The risk of loss or damage by fire or other casualty prior to Closing shall be upon Seller. If the improvements on the Property are destroyed or materially damaged prior to Closing, Buyer may terminate this Contract by written notice delivered to Seller or Seller's agent and the Earnest Money Deposit and any Due Diligence Fee shall be refunded to Buyer. In the event Buyer does NOT elect to terminate this Contract, Buyer shall be entitled to receive, in addition to the Property, any of Seller's insurance proceeds payable on account of the damage or destruction applicable to the Property being purchased. Seller is advised not to cancel existing insurance on the Property until after confirming recordation of the deed.

¶ 27 We conclude that the language of the contract is clear and unambiguous. If plaintiffs are dissatisfied with their due diligence inspections, or any other matter regarding material damage to the condition of the property, they may proceed to closing, negotiate repairs, or terminate the contract. If there is material damage to the property—and they do *not* elect to terminate the contract—they have a right to receive any of defendants' insurance proceeds.

¶ 28 Here, any alleged hail damage to the roof of the property is not a genuine issue of material fact precluding summary judgment. The record does not show the existence of any recoverable insurance proceeds, and the parties did not agree upon terms for improvement or repair to the property. Plaintiffs were permitted to walk away from the transaction if they were not satisfied with the condition of the property, and there were no insurance proceeds available to recover. Instead, they filed suit to compel specific performance.

¶ 29 The trial court did not err in concluding plaintiffs are not entitled to specific performance. "If the language is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein." *Hodgin v. Brighton*, 196 N.C. App. 126, 129, 674 S.E.2d 444, 446 (2009) (quotation marks and citations omitted). Partial summary judgment in favor of defendants on plaintiffs' claim for breach of contract was appropriate in this case.

V. Implied Warranty of Habitability

¶ 30 **[3]** Plaintiffs argue the trial court erred in dismissing their claims for breach of the implied warranty of habitability. Defendants respond with two arguments: (1) no landlord-tenant relationship existed at the time of the hearing; and (2) there is no evidence in the record to support plaintiffs' claim for breach of the implied warranty of habitability. We address these arguments as follows.

¶ 31 Pursuant to § 42-42(a)(2), a landlord is required to "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." Additionally, § 42-42(a)(4) provides that a landlord must:

> [m]aintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord provided that notification of needed repairs is made to the landlord in writing by the tenant, except in emergency situations.

¶ 32 First, we note that defendants acknowledge plaintiffs were tenants for a period immediately preceding the commencement of this action. Defendants stated in their affidavit:

> 3. That this house was our former residence, and that we made it available for rental in 2013.
>
> . . .
>
> 6. That, as the Complaint alleges, and after at least two unsuccessful efforts to find suitable renters, we entered into a residential rental agreement with the Plaintiffs on [5 December 2013], for the period [5 December 2013] to [31 December 2014].
>
> . . .
>
> 8. The Complaint alleges, and we agree, that the written rental agreement was extended for another two years, until [31 January 2018].
>
> . . .
>
> 21. Our understanding is that: the contract for purchase in no way entitles the Plaintiffs to be in our house; that the purported lease extension, never being executed, was void from the beginning, and

> the date covered by the extension has passed; that the Plaintiffs were holdovers at best; and that the Plaintiffs have no rights to be in our house.
>
> 22. On [14 December 2020], our present attorney, at our direction, sent the letter attached to this Affidavit, demanding that the Plaintiffs vacate the premises and refusing the acceptance of any further rent.
>
> 23. To date, the Plaintiffs remain in our house.
>
> 24. To date, we have accepted no rent since the last payment of the Plaintiffs on [1 December 2020].

¶ 33 This evidence is sufficient to show that, pursuant to a written lease agreement, plaintiffs were tenants of defendants until the end of 2018. Despite the absence of a valid written lease extension, plaintiffs remained in defendants' house, and defendants accepted payment of rent through the end of 2020. Thus, a landlord-tenant relationship existed for a period preceding the commencement of this action.

¶ 34 Next, defendants contend there is no evidence in the record to support plaintiffs' allegations. We agree.

¶ 35 Under the North Carolina Rules of Civil Procedure, summary judgment will only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." § 1A-1, Rule 56(c). "By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Boudreau v. Baughman*, 322 N.C. 331, 342, 368 S.E.2d 849, 858 (1988) (citation omitted). "All 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." *Id.* at 343, 368 S.E.2d at 858 (citation omitted).

¶ 36 Here, plaintiffs fail to plead or forecast any evidence that would successfully demonstrate a Chapter 42 violation. Plaintiffs' Complaint and Affidavit contain conclusory statements about unspecified electrical issues, violations of zoning ordinances and building code. The averments in plaintiffs' affidavit mirror the those found in their Complaint. Plaintiffs forecast of evidence shows:

> 28. That the Defendants have failed to keep the premises in a fit and habitable condition in:

> a. refusing to repair electrical issues with the Property;
>
> b. failing and refusing to maintain the Property in a habitable condition per zoning ordinance and building code;
>
> c. failing and refusing to make appropriate repairs to the Property's roof as necessary to address the water leaks;
>
> d. failing to address and repair a malfunctioning air conditioning system; and
>
> e. failing to take measures to remove vermin from the Property.
>
> 29. That on numerous occasions, [plaintiffs] complained to the Defendants of these issues, and the Defendants have failed and refused to address or correct the issues.
>
> 30. That instead of the [sic] addressing or correcting the issues, the Defendants responded in retaliation by wrongfully threatening to prematurely terminate our tenancy.

¶ 37 Rule 56(e) provides that an adverse party, when responding to a motion for summary judgment, must set forth specific facts showing that there is a genuine issue for trial. N.C. R. Civ. P. 56(e). No specific facts appear in the record to substantiate a claim that water leaks, a malfunctioning air conditioning system, or vermin presented a triable issue of material fact for a Chapter 42 violation.

¶ 38 Moreover, there is no indication that defendants received written notice of any needed repairs or if the conditions constituted an emergency. *See* § 42-42(a)(4). "Rule 56(e) clearly precludes any party from prevailing against a motion for summary judgment through reliance on such conclusory allegations unsupported by facts." *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 152, 229 S.E.2d 278, 283 (1976). Therefore, the trial court properly allowed defendants' motion for summary judgment on plaintiffs' claim for breach of the implied warranty of habitability.

VI. Summary Ejectment

¶ 39 **[4]** In this case, defendants filed a counterclaim for summary ejectment seeking an order for plaintiffs to vacate the premises. Plaintiffs argue

the trial court lacked jurisdiction to summarily eject them. Plaintiffs also contend they were deprived of the protective provisions within Article 3 of Chapter 42. We disagree.

A. Subject Matter Jurisdiction

¶ 40 We first address plaintiffs' argument that the superior court lacked subject matter jurisdiction to order summary ejectment in this case. The issue of subject matter jurisdiction can be raised at any time, even for the first time on appeal. *Huntley v. Howard Lisk Co.*, 154 N.C. App. 698, 700, 573 S.E.2d 233, 235 (2002) (citation omitted). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

¶ 41 Section 7A-240 provides that, except for the original jurisdiction vested in our Supreme Court,

> original general jurisdiction of all justiciable matters of a civil nature . . . is vested in the aggregate in the superior court division and the district court . . . . Except in respect of proceedings in probate and the administration of decedents' estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division.

§ 7A-240 (2021). In applying this statute to summary ejectment proceedings, this Court held that

> when the legislature created the district court division and gave it concurrent original jurisdiction over all matters except probate and matters of decedents' estates, it did not thereby divest the superior court division of any of its original jurisdiction. Hence, . . . *the superior court division has original jurisdiction over summary ejectment actions*.

E. Carolina Farm Credit, ACA v. Salter, 113 N.C. App. 394, 399, 439 S.E.2d 610, 612 (1994) (emphasis added). Thus, the trial court possessed jurisdiction to rule on summary ejectment in this case.

B. Statutory Argument

¶ 42 Next, we consider whether plaintiffs' argument regarding the proper application of §§ 42-25.6, 42-26-36.3, has been preserved for appellate review. After reviewing the record, including the transcript from the motions hearing held on 15 March 2021, we are unable to identify any

procedural argument regarding summary ejectment raised at the trial level. "Generally, a party may not raise an issue on appeal if that argument was not first raised in the trial court." *Bentley v. Jonathan Piner Constr.*, 254 N.C. App. 362, 367, 802 S.E.2d 161, 164-65 (2017); *see also* N.C. R. App. P. 10(a)(1). "[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (quotation marks and citations omitted). Therefore, we deem this argument waived.

VII. Remaining Counterclaims

¶ 43 **[5]** Plaintiffs argue the trial court erred in granting partial summary judgment in favor of defendants on their claims for, *inter alia*, tortious interference with contract and fraud. Defendants do not respond to this issue.

¶ 44 "[S]ummary judgment is a drastic remedy, one to be approached with caution." *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 696, 220 S.E.2d 361, 367 (1975). It is only 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." § 1A-1, Rule 56(c). "In determining whether a genuine issue of material fact exists, the court must view all material furnished in support of and in opposition to the motion for summary judgment in the light most favorable to the party opposing the motion." *Bradshaw v. McElroy*, 62 N.C. App. 515, 518, 302 S.E.2d 908, 911 (1983) (citation omitted).

¶ 45 To establish a claim for tortious interference with contract, a plaintiff must show:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

Beverage Sys. of the Carolinas, LLC v. Associated Bev. Repair, LLC, 368 N.C. 693, 700, 784 S.E.2d 457, 462 (2016) (citation omitted). Here, an examination of the record reveals that defendants have not forecast evidence necessary to satisfy any essential element of this claim.

¶ 46 As to defendants' claim for fraud, "the following essential elements of actionable fraud are well established: (1) False 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." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974) (citations omitted).

¶ 47 In the pleadings, defendants assert that plaintiffs: (1) falsely represented the roof to be substantially damaged by hail as a pretext for filing this action; (2) knew or should have known this representation was false; and (3) defendants have been damaged in an amount exceeding $25,000.00. Plaintiffs responded that there was substantial hail damage to the residence and furnished an Inspection Report, which indicated a potential structural concern where water entry had taken place. After hearing from both parties' counsel at the motions hearing, the trial court expressly stated that, "during the due diligence period it appears that there may have been some hail damage to the property. And I say, there may have been some hail damage to the property, because that's disputed."

¶ 48 When the evidence is viewed in a light most favorable to the nonmovant, defendants failed to carry their burden on this issue as well. It is not the duty of a trial court hearing a motion for summary judgment to decide an issue of fact, but rather to determine whether a genuine issue as to any material fact exists. *Lee v. Shor*, 10 N.C. App. 231, 233-34, 178 S.E.2d 101, 103 (1970). Regarding the claim for fraud, whether the roof was substantially damaged by hail is a disputed issue of material fact, and there are gaps in the forecast of evidence as to whether defendants were in fact deceived by plaintiffs' alleged false representation. We conclude that defendants are not entitled to summary judgment on this issue.

VIII. Conclusion

¶ 49 For the foregoing reasons, the trial court properly dismissed plaintiffs' claims for breach of contract and breach of the implied warranty of habitability. The superior court has jurisdiction over summary ejectment proceedings. However, plaintiffs failed to raise any objection or argument as to the application of Article 3 of Chapter 42 at the trial level. The trial court erred by granting partial summary judgment in favor of defendants on their claims for tortious interference with contract and fraud. We affirm in part, reverse in part, and remand for further proceedings.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Chief Judge STROUD and Judge TYSON concur.

KLUTTZ-ELLISON v. NOAH'S PLAYLOFT PRESCHOOL

[283 N.C. App. 198, 2022-NCCOA-290]

ROBIN KLUTTZ-ELLISON, EMPLOYEE, PLAINTIFF
v.
NOAH'S PLAYLOFT PRESCHOOL, EMPLOYER, AND ERIE INSURANCE GROUP, CARRIER, DEFENDANTS

No. COA21-356

Filed 3 May 2022

1. Workers' Compensation—motion to submit additional evidence —good grounds—surgery after close of record

In a workers' compensation case, the Full Industrial Commission did not abuse its discretion by allowing plaintiff's motions to submit additional evidence—medical records from plaintiff's knee surgery and an orthopedic surgeon's second deposition—where plaintiff provided the necessary good grounds. Plaintiff had not undergone the knee surgery when the deputy commissioner closed the record, and her motions (filed after her knee surgery) were to allow consideration of new evidence based on the surgical notes. Further, contrary to defendants' argument, plaintiff satisfied her obligation to state with particularity the assignments of error and grounds for review, putting defendants on notice of her argument that her workplace accident materially aggravated the pre-existing condition in her knee.

2. Workers' Compensation—Parsons presumption—not rebutted —compensable knee injury—knee surgery

The Full Industrial Commission did not err by concluding that plaintiff's need for right knee surgery was related to her work accident where the deputy commissioner had concluded—in an award that was not appealed—that plaintiff's right knee injury was compensable because she sustained a material aggravation of her pre-existing condition, thus giving plaintiff the benefit of the presumption that her requested right knee surgery was necessitated by the work accident. Defendants failed to present evidence that the requested surgery was not directly related to the compensable injury.

3. Workers' Compensation—bariatric surgery—direct relation to compensable knee injury—weight loss required for knee surgery

The Industrial Commission did not err in awarding plaintiff compensation for bariatric surgery where her work accident materially

aggravated her preexisting right knee condition, necessitating that she undergo surgery on her knee; before the knee surgery, she had to lose a tremendous amount of weight so that the surgery could be conducted safely and optimally—something she could not do fast enough on her own with her physical limitations.

Appeal by Defendants from Opinion and Award entered 11 March 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 2022.

Shelby, Pethel & Hudson, P.A., by David A. Shelby, for Plaintiff-Appellee.

Hedrick Gardner Kincheloe & Garofalo, PLLC, by M. Duane Jones and Lindsay N. Wikle, for Defendant-Appellants.

JACKSON, Judge.

¶ 1 Noah's Playloft Preschool ("Defendant Noah's Playloft") and Erie Insurance Group ("Defendant Erie") (collectively "Defendants") appeal an Opinion and Award by the North Carolina Industrial Commission. After careful review, we affirm.

I. Background

¶ 2 This worker's compensation case involves one claimant, Robin Kluttz-Ellison ("Plaintiff"), who filed two separate claims following two different workplace accidents. The claims were eventually consolidated for hearing.

5 August 2013 Accident

¶ 3 Plaintiff is the owner and director of Noah's Playloft Preschool, Inc. in Salisbury, North Carolina. In 2010, Plaintiff underwent a total right knee replacement performed by Dr. William Furr. On 5 August 2013, Plaintiff sustained an injury to her left and right knees and left shoulder after falling off a ladder while changing a lightbulb at the preschool. Plaintiff claimed workers' compensation benefits for injuries to her upper left extremity, both knees, both hips, and her neck. Defendants accepted Plaintiff's claim for her left knee injury but denied the compensability of the injuries Plaintiff claimed for her left shoulder and right knee. Defendants did, however, consent to pay for a one-time evaluation of Plaintiff's right knee by Dr. Marcus P. Cook, an orthopedic surgeon.

¶ 4 The disputed claims came on for a full evidentiary hearing before Deputy Commissioner David Mark Hullender on 6 June 2016. Deputy Commissioner Hullender entered an Opinion and Award on 12 December 2016. Based on the testimony of Dr. Furr, who evaluated Plaintiff after the work accident, Deputy Commissioner Hullender found in part that "Dr. Furr opined that there may be some slight loosening of the hardware in Plaintiff's right knee." Deputy Commissioner Hullender concluded that "Plaintiff sustained a material aggravation of her pre-existing right knee condition and left shoulder condition . . . ." Deputy Commissioner Hullender awarded Plaintiff future medical treatment "including, but not limited to, evaluation by [orthopedic surgeon Dr. James Comadoll] for her right knee and left arm issues, possible revision of right knee arthroplasty and further physical therapy to effect a cure or give relief to Plaintiff's right knee and left shoulder pursuant to N.C. Gen. Stat. § 97-25 and § 97-25.1." Defendants subsequently provided Plaintiff with an evaluation by Dr. Comadoll's office on 7 February 2017.

15 May 2015 Accident

¶ 5 On 15 May 2015, Plaintiff tripped and fell over a child's sleeping cot, landing on her knees, and hitting her arm on a wooden cubby while working at the preschool. Plaintiff filed for workers' compensation benefits listing injuries to her right elbow, hand, and lower arm as well as both knees. On 22 March 2016, Plaintiff filed a second claim related to the 15 May 2015 accident, listing injuries to "her left lower arm, elbow, hand and any other injuries causally related." On 2 May 2017, Defendants denied Plaintiff's claim for benefits deriving from carpal tunnel syndrome in her left hand as being unrelated to the 5 August 2013 accident. On 16 June 2017, Defendants filed a second form denying Plaintiff's claim for left carpal tunnel issues as being unrelated to the 15 May 2015 accident.

Consolidation of Claims

¶ 6 On 25 August 2017, Plaintiff requested that her claim for injuries to her left lower arm, elbow, hand, and other causally related injuries stemming from the 15 May 2015 accident be assigning for hearing. On 13 September 2017, Plaintiff requested that her claim for injuries to her left shoulder, both knees, hip, and neck stemming from the 5 August 2013 accident be assigned for hearing, claiming that Defendants had failed to authorize medical treatment recommended by Plaintiff's authorized treating physician. The claims were consolidated for hearing and the matter came on for a full evidentiary hearing before Deputy Commissioner Jesse M. Tillman on 27 April 2018.

¶ 7 At the hearing, Plaintiff testified about the injuries she sustained from the accidents on 5 August 2013 and 15 May 2015 as well as the symptoms she was currently experiencing. Plaintiff also testified that she had tried to lose weight using various diets and methods in the past but had been unsuccessful. Following the hearing, Plaintiff submitted expert witness testimony via deposition of orthopedic surgeon Dr. Thomas Ginn, primary care provider Dr. Ronnie Barrier, bariatric surgeon Dr. Eric Mallico, orthopedic surgeon Dr. William Furr, and orthopedic surgeon Dr. James Comadoll. The record closed on 19 October 2018.

¶ 8 Deputy Commissioner Tillman entered an Opinion and Award on 24 January 2019. Deputy Commissioner Tillman concluded that Plaintiff had not proven that the loosening of hardware in her right knee and therefore the need for revision surgery was caused by the 5 August 2013 and/or the 15 May 2015 accidents. Deputy Commissioner Tillman thus also concluded that Plaintiff's need for bariatric surgery was not causally related to the workplace injuries and denied her claim for medical compensation in the form of weight loss management. On 1 February 2019, Plaintiff appealed to the Full Commission and a hearing was scheduled for 11 June 2019.

¶ 9 On 29 May 2019, Plaintiff underwent right knee surgery performed by orthopedic surgeon Dr. John Masonis. On 10 June 2019, Plaintiff filed a Motion to Submit Additional Evidence to the Full Commission. The Commission continued the hearing to 1 August 2019 and held Plaintiff's motion in abeyance to allow Plaintiff to obtain Dr. Masonis's surgical notes. On 9 July 2019, Plaintiff filed a Motion to Submit Additional Evidence/Motion to Allow Additional Depositions, requesting Plaintiff be allowed to take the deposition of Dr. Masonis and re-take the deposition of Dr. Comadoll. The Commission held this motion in abeyance as well and allowed the parties to be heard at oral argument on 1 August 2019. The Commission granted Plaintiff's motions on 17 September 2019 and the parties conducted a second deposition of Dr. Comadoll on 17 October 2019. Plaintiff also submitted the medical records from her right knee surgery.

¶ 10 On 7 December 2020, the Commission entered an Opinion and Award. The Commission concluded that Plaintiff's right knee condition and resulting medical treatment was compensable and awarded payment for the 29 May 2019 right knee surgery. The Commission concluded that Plaintiff had failed to establish that her need for weight loss treatment was directly related to the 5 August 2013 compensable injury and denied her claim for bariatric surgery.

¶ 11 On 22 December 2020, Plaintiff filed a Motion for Reconsideration and a Motion to Allow Additional Evidence, contending that while the Commission found the emergent requirement for Plaintiff's weight loss was her need for revision of her right knee replacement, the Commission incorrectly concluded that her weight loss treatment was not directly related to her 5 August 2013 compensable injury. Plaintiff also requested that medical records from her gastric bypass surgery, which was performed on 5 November 2018, be admitted. On 29 December 2020, Defendants filed a response, arguing the Opinion and Award should not be amended and Plaintiff could have sought admission of the medical records when the record was reopened by the Commission on 17 September 2019.

¶ 12 On 11 March 2021, without admitting additional evidence, the Commission entered an Amended Opinion and Award, concluding that bariatric surgery was medically necessary for Plaintiff to undergo right knee surgery and awarding Plaintiff payment of medical expenses related to her gastric bypass surgery.

¶ 13 Defendants entered timely notice of appeal on 25 March 2021.

II. Analysis

¶ 14 Defendants' appeal is limited to the Full Commission's award of medical treatment for Plaintiff's right knee and bariatric surgeries.

A. Motions to Add Additional Evidence

¶ 15 **[1]** Defendants argue first that the Commission erred in granting Plaintiff's 10 June 2019 and 9 July 2019 motions to add additional evidence because Plaintiff never provided the necessary good grounds.

¶ 16 "Under our Workers' Compensation Act, 'the Commission is the fact finding body.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123, S.E.2d 608, 613 (1962)). Accordingly, "[t]he Commission has plenary power to receive additional evidence," *Cummins v. BCCI Constr. Enters.*, 149 N.C. App. 180, 183, 560 S.E.2d 369, 371 (2002), "[i]f application is made to the Commission within 15 days from the date when notice of award shall have been given . . . and, if good ground[s] be shown therefor[,]" N.C. Gen. Stat. § 97-85(a) (2021). "[W]hether 'good ground[s] be shown therefore' in any particular case is a matter within the sound discretion of the Commission, and the Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion." *Lynch v. M. B. Kahn Constr. Co.*, 41 N.C. App. 127, 131, 254 S.E.2d 236, 238 (1979). "A trial court may be reversed for abuse

of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

¶ 17 To determine whether the Commission abused its discretion in finding that good grounds existed "to reopen the record for receipt of additional evidence in the form of Plaintiff's medical records regarding her May 29, 2019 revision of her right total knee arthroplasty and deposition testimonies from Dr. Masonis and Dr. Comadoll[,]" we examine the reasons proffered by Plaintiff in her motions to allow additional evidence.

¶ 18 When appealing Deputy Commissioner Tillman's 24 January 2019 Opinion and Award to the Full Commission, Plaintiff appealed Deputy Commissioner Tillman's conclusion that she had failed to prove that the loosening of the hardware in her right knee and the related need for right knee surgery was caused by the 5 August 2013 accident. This conclusion was based in part on Deputy Commissioner Tillman's Finding of Fact 42:

> 42. Dr. Comadoll explained that trauma characteristically would not cause Plaintiff's hardware to loosen. Typically, bone fracture would occur with trauma that causes the loosening of arthroplasty hardware. There is no evidence of bone fracture.

¶ 19 Plaintiff had yet to undergo the right knee surgery performed by Dr. Masonis when Deputy Commissioner Tillman closed the record on 19 October 2018. Accordingly, Plaintiff asserted the following in her 10 June 2019 Motion to Allow Additional Evidence:

> 6. Upon information and belief intra-operative findings made by Dr. Masonis at the time of Plaintiff's revision surgery may have direct implications on the issue of whether Plaintiff's August 5, 2013 injury by accident caused the loosening of Plaintiff's hardware.
>
> 7. Specifically, Dr. Comadoll testified, as the basis for Findings of Fact 42 and 43 that "bone fracture would occur with trauma that causes loosening of arthroplasty hardware." Plaintiff upon information and belief, asserts Dr. Masonis' intraoperative findings may have a direct bearing on whether fractures existed.

¶ 20 In her second motion for additional evidence, filed 9 July 2019, Plaintiff also asserted:

> 4. Plaintiff believes that the necessity for the total knee revision surgery was caused or aggravated by her August 5, 2013 fall at work.
>
> 5. Dr. James Comadoll, who treated Plaintiff for her knee problems prior to Dr. Masonis, has reviewed Plaintiff's recent medical records and has signed an affidavit in reference to that review. Based upon said affidavit, Plaintiff believes Dr. Comadoll's testimony will be materially different based upon the findings and records of Dr. Masonis.

¶ 21 Defendants argue that "no new evidence was produced to justify reopening the evidentiary record" because Dr. Comadoll testified in his second deposition that Dr. Masonis's surgical notes indicated there was no fracturing of Plaintiff's bone, as Dr. Comadoll expected. Even if, as Defendants contend, the additional evidence was not relied upon by Dr. Comadoll in the specific way that Plaintiff suggested it would be in her motions, that does not negate the existence of good grounds to allow Plaintiff to submit the medical records of her right knee surgery and re-depose Dr. Comadoll. Our review of the Commission's ruling does not occur in retrospect, but rather examines the Commission's prospective reasoning for reopening the record. Given the unavailability of Dr. Masonis's surgical notes prior to Deputy Commissioner Tillman issuing an Opinion and Award on 24 January 2019, Plaintiff showed the necessary good grounds to submit additional evidence to the Commission and the Commission's decision to admit the additional evidence was not manifestly unsupported by reason.

¶ 22 Defendants also argue that Plaintiff essentially used Dr. Comadoll's second deposition to "offer[] a new legal theory of out whole cloth, and ask[] Dr. Comadoll to opine on that theory." More particularly, Defendants label Plaintiff's argument that her 5 August 2013 work accident materially aggravated the pre-existing condition in Plaintiff's right knee as the new legal theory. Defendants contend they had no notice of this argument until Plaintiff filed her supplemental brief within 30 days of Dr. Comadoll's deposition as allowed by the Commission's 17 September 2019 order.[1] Defendants argue that Plaintiff did not assert this theory in her motions or properly preserve it in her Form 44 Application for Review to the Commission.

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1. The briefs and supplemental briefs submitted by the parties to the Full Commission do not appear in the Record on Appeal.

¶ 23 Rule 701 of the North Carolina Industrial Commission directs that "appellant shall submit a Form 44 Application for Review stating with particularity all assignments of error and grounds for review . . . ." 11 N.C. Admin. Code 23A.0701(d) (2021). "Grounds for review and assignments of error not set forth in the Form 44 Application for Review are deemed abandoned, and argument thereon shall not be heard before the Full Commission." *Id.* Typically, our Court has held this rule was violated where the appellant failed to submit a Form 44 or to set forth the grounds for appeal with particularity in another document such as a brief, but the Commission nevertheless issued an Opinion and Award. *See Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 744, 619 S.E.2d 907, 910 (2005); *Cooper v. BHT Enters.*, 195 N.C. App. 363, 368-69, 672 S.E.2d 748, 753-54 (2009).

¶ 24 In her Form 44, Plaintiff alleges

> 4. Specifically, Deputy Commissioner Tillman's Finding of Fact Number 35 finding that "The December 12, 2016 Opinion and Award does not conclude that if there is hardware loosening, it was the direct result of the August 5, 2013 incident . . ." is error and contrary to Deputy Hullender's Opinion and Award. Plaintiff contends it was error for Deputy Commissioner Tillman not to find the issue of whether plaintiff's hardware was loose, and that loosening was caused by plaintiff's August 5, 2013 accident was precluded from determination by him and barred from his consideration by *res judicata*.

Deputy Commissioner Tillman's Finding of Fact 35 stated:

> 35. Deputy Commissioner Hullender, in his December 12, 2016 Opinion and Award, found as fact that Dr. Furr stated that he was fearful that Plaintiff suffered some type of trauma around her right knee prosthetic installed before Plaintiff's workplace accident of August 5, 2013 which could have resulted in the loosening of the hardware within the prostheses. The December 12, 2016 Opinion and Award does not conclude that if there is hardware loosening, it was a direct result of the August 5, 2013 incident and refers Plaintiff for further evaluation and treatment of her right knee at the direction of Dr. Comadoll, pursuant to N.C. Gen. Stat. § 97-25[.]

¶ 25 In the 12 December 2016 Opinion and Award, Deputy Commissioner Hullender made several findings about the testimony of Dr. Furr, the orthopedic surgeon who performed Plaintiff's original right knee replacement and evaluated Plaintiff in 2013 and 2014 after her work accident. These findings included the following:

> 40. Dr. Furr stated that in Plaintiff's case he was fearful that she had some type of trauma around her prosthesis, particularly on the tibial component, and the bone scan shows signs of loosening.
>
> 41. Dr. Furr stated that several factors are looked at when determining whether there has been some trauma or *aggravation of a prosthetic by a fall* including bone scans, conditions before and after the reported fall, and other diagnostic testing. Based on all of these factors, Dr. Furr opined that Plaintiff injured both of her knees when she fell off the ladder on August 5, 2013. Dr. Furr further opined that when Plaintiff fell, she may have received some type of trauma to the tibia which was enough to cause some loosening.
>
> . . .
>
> 44. Dr. Furr opined that Plaintiff had "some type of manipulation where there was a twisting or manipulation of the knee itself and make a contusion" and the "injury resulted in her having continuous symptomology to the point where ten months later a bone scan showed some loosening." While Dr. Furr cannot tell whether the loosening is getting better or worse, he opined that "the manipulation or injury itself from *the fall is what initiated, aggressed, or aggravated* this to occur."

(Emphasis added.) Deputy Commissioner Hullender subsequently concluded that: "The preponderance of the competent, credible evidence in the record established that Plaintiff did sustain a material aggravation of her right knee and left shoulder as a result of the August 5, 2013 accident."

¶ 26 Although Plaintiff did not use the words "material aggravation" in her Form 44, we conclude that she satisfied her obligation to state with particularity the assignments of error and grounds for review. Deputy Commissioner Hullender's conclusion that Plaintiff had sustained a

material aggravation of her right knee was rooted in his findings regarding Dr. Furr's testimony, which indicated there was loosening and "the fall is what . . . aggravated this to occur." Plaintiff stated in her Form 44 "that loosening was caused by plaintiff's August 5, 2013 accident was precluded from determination by [Deputy Commissioner Tillman.]" This statement is sufficient to put Defendants on notice of the material aggravation theory, especially considering the clear reference to Deputy Commissioner Hullender's Opinion and Award and given the findings contained therein.

¶ 27 Furthermore, in Plaintiff's 9 July 2019 Motion to Submit Additional Evidence and to Allow Additional Depositions, Plaintiff stated her belief "that the necessity for the total knee revision surgery was caused or *aggravated* by her August 5, 2013 fall at work." (Emphasis added.) This statement would have noticed the material aggravation theory to Defendants prior to the Full Commission hearing on 1 August 2019.

¶ 28 For these reasons, we hold that the Full Commission did not abuse its discretion in allowing Plaintiff's motions to submit additional evidence in the form of medical records from Plaintiff's right knee surgery and Dr. Comadoll's second deposition.

B. Right Knee Surgery

¶ 29 **[2]** Defendants argue next that the Commission erred by concluding that they failed to rebut the *Parsons* presumption in relation to Plaintiff's right knee surgery and by awarding Plaintiff payment for the cost of her right knee surgery. Defendants challenge Findings of Fact 29, 30, and 31 as being unsupported by competent evidence.

¶ 30 In a workers' compensation appeal, "[t]he reviewing court's inquiry is limited to two issues: whether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). "The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, even though there is evidence that would support findings to the contrary." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (internal marks and citation omitted). "Thus, on appeal, an appellate court does not have the right to weigh the evidence and decide the issues on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (internal marks

and citation omitted). "The Commission's conclusions of law are reviewed *de novo*." *McRae*, 358 N.C. at 496, 597 S.E.2d at 701.

¶ 31 A workers' compensation claimant has the initial burden of proving the compensability of an injury—"of showing that the injury complained of resulted from the accident." *Snead v. Sandhurst Mills, Inc.*, 8 N.C. App. 447, 451, 174 S.E.2d 699, 702 (1970). After satisfying this burden, the claimant is entitled to a presumption that any further medical treatment for the "very injury the Commission has previously determined to be the result of a compensable accident" is directly related to that compensable injury. *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997). The claimant is not required to prove causation again to receive compensation for treatment; rather, the defendant-employer must rebut the *Parsons* presumption by proving "the original finding of compensable injury is unrelated to [the] present discomfort." *Id.* "The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury." *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005). This evidence can include "expert testimony or affirmative medical evidence[.]" *Id.* at 137, 620 S.E.2d at 293.

¶ 32 Defendants contend that the testimony given by Dr. Comadoll in his first deposition was enough to rebut the *Parsons* presumption "that the work injury was not related to the need for surgery[.]"

¶ 33 In his first deposition, Dr. Comadoll offered the following relevant testimony:

> [Plaintiff's Counsel:] Okay. Now . . . after your PA saw Ms. Kluttz-Ellison, did you, at some point, see Ms. Kluttz-Ellison?
>
> [Dr. Comadoll:] Yes.
>
> [Plaintiff's Counsel:] And did you make a determination as to whether or not her right knee hardware was loose?
>
> [Dr. Comadoll:] Yeah. Her -- her -- the part on the shin bone radiographically looked loose, at the minimum.
>
> [Plaintiff's Counsel:] In your opinion, does Plaintiff have loose hardware in her right total knee?
>
> [Dr. Comadoll:] Yes.
>
> . . .

> [Defendants' Counsel:] Okay. So the factors in Ms. Ellison's case that the [sic] most likely caused her hardware in her right knee to loosen are possibly how the alignment was when the -- when the hardware was initially put in, and the fact of her weight?
>
> [Dr. Comadoll:] Yes, ma'am.
>
> [Defendants' Counsel:] Do you have any reason to believe that the August 5th, 2013 incident caused her hardware to loosen?
>
> [Dr. Comadoll:] No.
>
> . . .

¶ 34 Plaintiff, on the other hand, argues that Defendants "ignore[d] Dr. Comadoll's testimony that the 5 August 2013 fall from the ladder materially aggravated Plaintiff's loose right knee hardware[.]"

¶ 35 In his second deposition, Dr. Comadoll offered the following relevant testimony:

> [Plaintiff's Counsel:] All right. So, if I understand your testimony, your testimony is not that the trauma caused the loosening of the hardware; is that right?
>
> [Dr. Comadoll:] Correct.
>
> [Plaintiff's Counsel:] But materially aggravated it?
>
> [Dr. Comadoll:] Correct.
>
> [Plaintiff's Counsel:] After re-reviewing Dr. Masonis' records today, is that still your opinion?
>
> [Dr. Comadoll:] Yes, sir.
>
> [Plaintiff's Counsel:] And do you hold that opinion to a reasonable degree of medical probability or certainty?
>
> [Dr. Comadoll:] Yes, sir.
>
> [Plaintiff's Counsel:] Is that opinion based on your review of Ms. Kluttz-Ellison's medical records, your own examinations and medical records, her diagnostic testing?
>
> [Dr. Comadoll:] The x-rays.

> [Plaintiff's Counsel:] X-rays.
>
> [Dr. Comadoll:] Once it -- once it breaks free, it is going to continue to move --
>
> [Plaintiff's Counsel:] Right.
>
> [Dr. Comadoll:] -- and continue to shift. And once it takes on load, it's going to exponentially shift.
>
> [Plaintiff's Counsel:] And would a fall from five or six feet off a ladder be the type of trauma that would aggravate that loosening?
>
> [Dr. Comadoll:] Yes, sir.
>
> [Plaintiff's Counsel:] And, in your opinion, based on the description of the accident and the opinion and award that you just read, would that have materially aggravated her loosening such that it required revision of her knee?
>
> [Dr. Comadoll:] It could, yes.
>
> [Plaintiff's Counsel:] All right. And is that more likely than not, in fact, what happened in Ms. Kluttz-Ellison's case?
>
> [Dr. Comadoll:] I don't know.
>
> [Plaintiff's Counsel:] Okay.
>
> [Dr. Comadoll:] If -- and you can correct me if I'm -- if she had a loose tibia, which she did, it will continue to erode the bone and she will necessitate a revision of her knee, no matter what. It was just a matter if [sic] timing.
>
> [Plaintiff's Counsel:] Right.
>
> [Dr. Comadoll:] Now, if you ask me did the fall potentiate that and shorten that timeline, the answer is yes.

¶ 36 If we view the above evidence in a light to favor Defendants, we could describe the testimony Dr. Comadoll gave in his first and second depositions as contrarian: that Dr. Comadoll first concluded the work accident *did not* cause the hardware to loosen and then later concluded the work accident *did* cause the hardware to loosen in the form of a material aggravation. If we view the evidence in a light to favor Plaintiff,

we could describe the testimony Dr. Comadoll gave in his second deposition as a clarification of his first deposition: that the work accident did not *cause* Plaintiff's right knee hardware to loosen, rather it only accelerated the loosening of the hardware through a material aggravation of the prosthesis. Ultimately, the *Parsons* presumption is intended to serve as a benefit to plaintiffs and not a burden, but regardless of how we treat the differences in Dr. Comadoll's deposition testimony, this issue is resolved by the fact the *Parsons* presumption applies to the material aggravation theory of compensability for Plaintiff's right knee injury. *See Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869 (asserting that requiring a plaintiff to reprove causation "is unjust and violates our duty to interpret the Act in favor of injured employees").

¶ 37 In its Conclusion of Law 4, the Commission stated that "Plaintiff's right knee injury was determined to be compensable by Deputy Commissioner Hullender's December 12, 2016 Opinion and Award. As neither party appealed the award, it is conclusive and binding." Deputy Commissioner Hullender concluded the injury was compensable because "Plaintiff sustained a material aggravation of her pre-existing right knee condition . . . ." The *Parsons* presumption therefore applied to Plaintiff's right knee injury and gave Plaintiff the benefit of a presumption that the requested medical treatment for her right knee was necessitated by her 5 August 2013 work accident. Defendants thus had to produce evidence that the medical treatment Plaintiff sought—the total revision of her right knee replacement—was not directly related to the material aggravation of Plaintiff's right knee that resulted from the 5 August 2013 work accident.

¶ 38 In examining the whole of Dr. Comadoll's first and second deposition testimony, Defendants have not presented any expert witness testimony or other affirmative medical evidence that the 5 August 2013 accident did not materially aggravate Plaintiff's pre-existing right knee condition. Dr. Comadoll's testimony in his first deposition that the work accident did not cause the loosening does not refute or counter his testimony that the work accident materially aggravated the loosening and accelerated the need for surgery. Defendants failed to produce evidence that the work accident did not result in a material aggravation of Plaintiff's right knee. Accordingly, Defendants failed to overcome the *Parsons* presumption that applied to Plaintiff's right knee injury.

¶ 39 Based on Dr. Comadoll's first and second deposition testimony, there was at least some competent evidence to support Findings of Fact 29, 30, and 31. Those findings in turn support the Commission's conclusions of law that Plaintiff's need for right knee surgery was related

to her 5 August 2013 work accident. Accordingly, we hold that the Full Commission did not err in awarding Plaintiff compensation for the treatment of her right knee injury, namely for the cost of her 29 May 2019 revision right total knee arthroplasty.

C. Bariatric Surgery

¶ 40 **[3]** Defendants lastly argue that the Commission erred in awarding compensation for Plaintiff's bariatric surgery because it is not directly related to Plaintiff's compensable injury. Specifically, Defendants challenge Conclusion of Law 8 as being unsupported by Findings of Fact 23 and 24.

¶ 41 Here, the Commission's relevant findings are as follows:

> 23. Dr. Comadoll referred Plaintiff to Eric John Mallico, M.D., a board-certified surgeon who focuses his practice on laparoscopic surgery. Dr. Mallico testified that it is very typical and a part of protocol to not allow a patient to undergo knee joint replacement surgery until the BMI of a patient is below 40. Because of Plaintiff's attempts at weight loss, her partial success in losing weight and the tremendous amount of weight she needs to lose, it is Dr. Mallico's opinion that the only way for her to be successful in reducing her weight to achieve a BMI below 40 is to undergo bariatric surgery.
>
> 24. Ronnie Barrier, M.D., Plaintiff's primary care medical provider, an expert in family medicine, testified that he would also recommend that Plaintiff reduce her BMI below 40 before undergoing total left knee replacement and revision right total knee arthroplasty. Dr. Barrier testified that it would be healthier if Plaintiff did lose weight, but the emergent requirement for loss of weight derives from her need for her left total knee replacement or revision of her right total knee replacement.

¶ 42 The Commission's relevant conclusion is as follows:

> 8. When an employee suffers a compensable injury, "[m]edical compensation shall be provided by the employer." N.C. Gen. Stat. § 97-25(a) (2020). Medical compensation is defined as "medical, surgical, hospital, nursing, and rehabilitative services . . . *and other*

> *treatment* . . . as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability . . . ." N.C. Gen. Stat. § 97-2(19) (2020) (emphasis added). "[I]n case of a controversy arising between the employer and the employee, the Industrial Commission may order necessary treatment." N.C. Gen. Stat. § 97-25(c) (2020). Both Dr. Mallico and Dr. Barrier opined that reduction of Plaintiff's BMI was necessary for Plaintiff's safety and to achieve an optimal outcome from the revision right total knee arthroplasty surgery prescribed to treat her compensable right knee injury. Therefore, subject to the provisions of N.C. Gen. Stat. § 97-25.1, Plaintiff is entitled to payment of medical expenses incurred as a result of her bariatric surgery, as such surgery was medically necessary to assist Plaintiff achieve an optimal BMI to allow her to undergo the May 29, 2019 revision right total knee arthroplasty. N.C. Gen. Stat. §§ 97-2(19), 97-25, 97-25.1 (2020).

¶ 43 North Carolina General Statute § 97-25 "contains three grounds upon which an employer must provide future medical expenses[.]" *Little v. Penn Ventilator Co.*, 317 N.C. 206, 211, 345 S.E.2d 204, 208 (1986). "In order for the Commission to grant an employee's request to change treatment or health care provider, the employee must show by a preponderance of the evidence that the change is reasonably necessary to effect a cure, provide relief, or lessen the period of disability." N.C. Gen. Stat. § 97-25(c) (2021). " 'Logically implicit' in this statute is the requirement that the future medical treatment be 'directly related to the original compensable injury.' " *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869 (quoting *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286, *disc. rev. denied*, 343 N.C. 513, 472 S.E.2d 18 (1996)).

¶ 44 The question before this Court is whether Plaintiff's bariatric surgery is directly related to the compensable injury caused by her work accident on 5 August 2013. To answer this question, we must determine the degree of connection that is required between future medical treatment and a compensable injury for the treatment to be considered "directly related." In doing so, we are guided by our Supreme Court's foundational principle for addressing workers' compensation cases: "our Work[ers'] 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." *Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968); s*ee also Adams*, 349 N.C. at 680, 509 S.E.2d at 413.

¶ 45 Defendants argue that Plaintiff's weight problems were not caused by or directly resulted from the 5 August 2013 work accident; rather, Plaintiff's weight problem preexisted the accident and therefore her need to undergo bariatric surgery is not directly related to the compensable injury. Defendants suggest that at most the need for weight loss surgery is indirectly related. We disagree.

¶ 46 As Plaintiff's counsel contended at oral argument, there is a direct line connecting the dots between Plaintiff's original compensable injury and the Commission's award for bariatric surgery. The 5 August 2013 work accident materially aggravated Plaintiff's preexisting right knee condition. This material aggravation in turn necessitated that Plaintiff undergo right knee surgery (the 29 May 2019 revision right total knee arthroplasty). For Plaintiff to undergo knee surgery, she had to lose weight. According to Dr. Mallico, Plaintiff could not lose weight fast enough due to her physical limitations for the knee surgery to be conducted safely and optimally without undergoing weight loss surgery. By connecting the dots, we can conclude that but for Plaintiff's need to have right knee surgery to treat her compensable injury, she would not have needed to undergo bariatric surgery. Therefore, while the existence of Plaintiff's weight problem was not directly related to the 5 August 2013 accident, the need for bariatric surgery is directly related.

¶ 47 This result aligns with the spirit of N.C. Gen. Stat. § 97-25. "Th[e] rule of causal relation is the very sheet anchor of the Work[ers'] Compensation Act. It has kept the Act within the limits of its intended scope,—that of providing compensation benefits for industrial injuries, rather than branching out into the field of general health insurance benefits." *Duncan v. City of Charlotte*, 234 N.C. 86, 91, 66 S.E.2d 22, 25 (1951). The Commission made Findings of Fact 23 and 24, which Defendants concede are supported by competent evidence, indicating that based on the testimony of Dr. Mallico and Dr. Barrier the only way for Plaintiff to lose the weight needed to undergo right knee surgery was to undergo bariatric surgery first. Thus, an award for bariatric surgery is not branching out into the field of general health insurance benefits.

¶ 48 Accordingly, we hold that the Commission's Findings of Fact 23 and 24 support its Conclusion of Law 8, and therefore the Commission did not err in awarding Plaintiff compensation for bariatric surgery.

III. Conclusion

¶ 49 For the foregoing reasons, we conclude that the Full Commission did not err in allowing Plaintiff's motions to submit additional evidence and depositions, did not err in concluding that Plaintiff's need for right knee surgery was related to her work accident, and did not err in concluding that Plaintiff's need for bariatric surgery was directly related to her compensable injury.

AFFIRMED.

Judges COLLINS and GORE concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., Plaintiff
v.
BLAINE DALE HAGUE and KARLA DUNCAN CASS, Administrator of the Estate of Baron Thomas Cass, Defendants

No. COA21-540

Filed 3 May 2022

1. Declaratory Judgments—insurance company—duty to defend or indemnify under personal liability policy—consideration of surrounding facts

In a declaratory judgment action brought by an insurance company asserting it had no duty under defendant's personal liability policy to indemnify or defend defendant from an estate's wrongful death claim, which was filed against defendant after he fatally shot the decedent in an altercation, the trial court's order granting the insurance company's motion for judgment on the pleadings was affirmed. The trial court did not err by considering the facts surrounding the shooting when reaching its determination; rather, the Declaratory Judgment Act permits a court to assess "the facts as alleged in the pleadings" when interpreting an insurance policy to ascertain an insurer's duty to defend.

2. Insurance—insurance company—duty to defend or indemnify under personal liability policy—intentional act by defendant—declaratory judgment

After an estate filed a wrongful death action against defendant based on an altercation culminating in defendant fatally shooting

the decedent, the trial court in a subsequent declaratory judgment action properly determined that the insurance company providing personal liability coverage to defendant had no duty to indemnify or defend him from the estate's claim, where defendant's policy only provided coverage for "accidents" and explicitly excluded coverage for injuries resulting from defendant's "intentional acts." Defendant's act of repeatedly firing a pistol in the decedent's direction was substantially certain to result in injury, and therefore an intent to injure could be inferred from that act as a matter of law. Consequently, defendant's conduct amounted to an "intentional act" excluded from coverage under the insurance policy.

3. Declaratory Judgments—insurance company—duty to defend or indemnify under personal liability policy—treatment of alleged facts

After an estate filed a wrongful death action against defendant based on an altercation culminating in defendant fatally shooting the decedent, the trial court in a subsequent declaratory judgment action properly determined that the insurance company providing personal liability coverage to defendant had no duty to indemnify or defend him from the estate's claim, where defendant's policy explicitly excluded coverage for injuries resulting from defendant's "intentional acts." Although the complaint in the wrongful death action asserted different theories of liability, including that defendant was grossly negligent, it was unnecessary for a finder of fact to determine whether the conduct alleged in that complaint fell within the insurance policy's exclusionary provision. Rather, the proper question in the declaratory judgment action was, assuming the alleged facts as true, whether the insurance company had a duty to defend or indemnify.

Appeal by Defendant from order entered 21 May 2021 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 8 March 2022.

Lipscomb Law Firm, by William F. Lipscomb, for Plaintiff-Appellee.

Clodfelter Law, PLLC, by Christina Clodfelter, for Defendant-Appellant.

GRIFFIN, Judge.

¶ 1 Defendant Blaine Dale Hague appeals from an order granting Plaintiff North Carolina Farm Bureau Mutual Insurance Company, Inc.'s motion for judgment on the pleadings. Defendant argues that (1) the facts surrounding the insurance claim should not have been considered by the trial court, as they fell outside of the scope of the Declaratory Judgment Act; (2) Defendant must have acted with an intent to injure/kill, and not just with the intent to discharge a firearm, to be excluded from coverage; and (3) a finder of fact must determine whether the allegations of the underlying lawsuit fall within the exclusionary provision of the insurance policy. We hold that the trial court did not err in its consideration of the alleged facts surrounding the shooting, and that Plaintiff has neither a duty to defend nor indemnify Defendant. We affirm.

I. Factual and Procedural Background

¶ 2 On 7 September 2020, Defendant had a physical altercation with Baron Thomas Cass. Cass removed himself from the conflict by walking away. Defendant then produced a handgun and fired multiple shots, some of which struck Cass and killed him.

¶ 3 On 9 October 2020, Cass's Estate brought a wrongful death suit against Defendant in Iredell County Superior Court, alleging that Defendant breached his duty of care and that Cass died because of Defendant's "grossly negligent acts[.]"

¶ 4 On the date of the shooting, Defendant was insured by Plaintiff to provide personal liability coverage in the amount of $1,000,000 per occurrence. The Insuring Agreement of the Policy reads:

> Coverage L – Liability – We pay, up to our limit, all sums for which an **insured** is liable by law because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies. We will defend a suit seeking damages if the suit . . . [is] not excluded under this coverage.

The Policy defines an "occurrence" as "an accident[,] [which] includes loss from repeated exposure to similar conditions." The Policy also includes an Intentional Act Exclusion, which reads: "Farm Personal Liability Coverage does not apply to **bodily injury** or **property damage** which results directly or indirectly from . . . [a]n intentional act or injury resulting from an intentional act of an **insured** or an act done at the direction of an **insured**."

¶ 5 On 5 February 2021, Plaintiff filed a complaint for a declaratory judgment in Wake County Superior Court, asserting that the Policy does not provide liability coverage for the Estate's claim and that Farm Bureau has no duty to defend or indemnify Defendant, because: (1) Defendant's actions do not fall within the Policy's personal liability coverage because the shooting did not constitute an "occurrence"; and (2) the Intentional Act Exclusion excludes coverage for Defendant's intentional acts that resulted in Cass's death.

¶ 6 On 12 March 2021, Plaintiff filed a motion for a judgment on the pleadings. On 20 May 2021, the trial court heard the parties' oral arguments pursuant to the motion. The trial court granted Plaintiff's motion for judgment on the pleadings. The trial court concluded that the complaint could be interpreted as falling within the scope of the Policy's Insuring Agreement, but also that because the complaint alleges Cass's death was caused by an intentional act, Defendant's actions are included within the scope of the Intentional Act Exclusion. Therefore, the court held "as a matter of law . . . Plaintiff does not have a duty under the Policy to defend [Defendant] in the underlying lawsuit." Because "the duty to defend is broader than the duty to indemnify[,]" the trial court found that "Plaintiff also does not have a duty to indemnify [Defendant.]" Defendant provided timely notice of appeal.

II. Analysis

¶ 7 Defendant argues that (1) the facts surrounding the shooting should not have been considered by the trial court, as they fell outside of the scope of the Declaratory Judgment Act; (2) Defendant must have acted with an intent to injure/kill, and not just with the intent to discharge a firearm, to be excluded from coverage; and (3) a finder of fact must determine whether the allegations of the underlying lawsuit fall within the exclusionary provision of the Policy.

A. Declaratory Judgment Act

¶ 8 **[1]** Defendant argues that because the purpose of the Declaratory Judgment Act is to determine law and not facts, the trial court erred in considering the facts surrounding the shooting. Specifically, Defendant contends that, while the Declaratory Judgment Act does apply to the interpretation of written instruments, the authenticity, wording, and rights of the Policy are not in dispute, and the trial court should not have examined the pleadings and applied the facts to the Policy. We disagree.

¶ 9 "When the language of the insurance polic[y] and the contents of the complaint are undisputed, [appellate courts] review de novo the

question whether an insurer has an obligation to defend its insured against those allegations." *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 6, 692 S.E.2d 605, 610 (2010) (citation omitted). "To answer this question, we apply the 'comparison test,' reading the policies and the complaint side-by-side . . . to determine whether the events as alleged are covered or excluded." *Id.*

¶ 10 North Carolina statute provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations, whether or not further relief is or could be claimed." N.C. Gen. Stat. § 1-253 (2021). The purpose of the Declaratory Judgment Act has been construed by our Supreme Court "to provide a speedy and simple method of determining the rights, status and other legal relations under written instruments . . . and to afford relief from uncertainty and insecurity created by doubt as to rights, status or legal relations thereunder." *Prudential Ins. Co. of America v. Powell*, 217 N.C. 495, 500, 8 S.E.2d 619, 622 (1940) (citation omitted). In *Harleysville Mut. Ins.*, under a declaratory judgment sought by an insurer against the insured, the Court "measured . . . *the facts as alleged in the pleadings*" to ascertain the insurer's duty to defend. *Harleysville Mut. Ins.*, 364 N.C. at 6, 692 S.E.2d at 610 (emphasis added) (internal quotations omitted) (citing *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986)). "[W]hen the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend." *Waste Mgmt. of Carolinas, Inc.*, 315 N.C. at 691, 340 S.E.2d at 377.

¶ 11 Here, Defendant is correct in asserting that a declaratory judgment action to determine a duty to defend under an insurance policy requires interpretation of the written instrument. However, our Supreme Court has construed the Declaratory Judgment Act such that a court measures "*the facts as alleged in the pleadings*" to ascertain an insurer's duty to defend. *Harleysville Mut. Ins.*, 364 N.C. at 6, 692 S.E.2d at 610 (emphasis added). Accordingly, it was within the purview of the trial court under the Declaratory Judgment Act to measure the facts as alleged in the pleadings; specifically, what transpired during the shooting.

B. Intentional Act Exclusion

1. Intentional Act

¶ 12 **[2]** Defendant argues that he "[m]ust have acted with intent to injure/kill" for his actions to fall under the Policy's Intentional Act Exclusion. Plaintiff asserts the alleged facts demonstrate that Cass's death resulted from Defendant's intentional acts. Specifically, Defendant contends that

"the insurer must prove that . . . the insured intended the act and . . . the insured intended the injury[,]" and that Defendant's action of firing a pistol does not rise to the level necessary to infer an intent to injure. We disagree.

¶ 13 Our Supreme Court has held that:

> [P]rovisions in an insurance policy which extend coverage to the insured must be construed liberally so as to afford coverage whenever possible by reasonable construction. However, the converse is true when interpreting the exclusionary provisions of a policy; exclusionary provisions are not favored and, if ambiguous, will be construed against the insurer and in favor of the insured.

N.C. Farm Bureau Mut. Ins. Co. v. Stox, 330 N.C. 697, 702, 412 S.E.2d 318, 321–22 (1992) (citations omitted). In *Stox*, the Court assessed whether an insured's action of intentionally pushing someone, which inflicted injury, fell under the policy's exclusionary provision. *Id.* at 703, 412 S.E.2d at 322. The Court held that "where the term 'accident' is not specifically defined in an insurance policy, that term *does* include injury resulting from an intentional act, if the injury is not intentional or substantially certain to be the result of an intentional act." *Id.* at 709, 412 S.E.2d at 325.

¶ 14 Defendant asserts that, unlike "very different" actions such as sexual molestation and deceptive trade practices, his discharging of a firearm was not substantially certain to inflict injury. However, in *Commercial Union Ins. Co. v. Maudlin*, the insured fired multiple shots at a car in which his wife and her friend were riding, killing the friend. *Commercial Union Ins. Co. v. Maudlin*, 62 N.C. App. 461, 461, 303 S.E.2d 214, 215 (1983). The insurance policy in that case had an exclusion clause similar to the one in the present case. This Court found that the insured's actions were intentional and therefore fell within the exclusion clause, because the insured should have "expected" the likelihood of his actions resulting in injury or death. *Id.* at 464, 303 S.E.2d at 217. "To *expect* is to anticipate that something is probable or certain[.]" *Id.* (emphasis added). Applying the *Stox* standard, this Court has held that, for actions substantially certain to cause injury, "intent to injure may be inferred as a matter of law from the intent to act for the purpose of determining coverage under an insurance policy." *Russ v. Great American Ins. Cos.*, 121 N.C. App. 185, 189, 464 S.E.2d 723, 725 (1995); *see Henderson v. U.S. Fidelity & Guitar Co.*, 124 N.C. App. 103, 111, 476 S.E.2d 459, 464 (1996).

Therefore, from the intentional action of firing a pistol multiple times in the direction of another person, where injury is expected (i.e., probable or certain), an intent to injure may be inferred as a matter of law.

¶ 15 Here, Defendant produced a handgun and fired multiple shots in the direction of Cass, some of which struck and killed him. The Policy does not contain a specific definition of "accident" so, for Defendant's actions to be construed as an accident, the resulting injury must not have been intentional or substantially certain to occur. As in *Maudlin*, the action of firing a pistol in the direction of another is conduct from which the actor should expect the probability or certainty of a resulting injury. As intent to injure may be inferred as a matter of law from an act that is substantially certain to result in injury–such as in cases of sexual molestation, deceptive trade practices, and firing a gun in another's direction–Defendant's action of firing a pistol multiple times in the direction of Cass was not an "accident." Therefore, we hold that Defendant's conduct was an intentional act. *Stox*, 330 N.C. at 708, 412 S.E.2d at 325.

2. Duties to Defend and Indemnify

¶ 16 To ascertain an insurer's duty to defend, we employ the "comparison test" and read the policy and the complaint side by side and, in a declaratory judgment action, "measure[] . . . the facts as alleged in the pleadings." *Harleysville Mut. Ins. Co.*, 364 N.C. at 6, 692 S.E.2d at 610 (citation omitted). "[W]hen the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend." *Waste Mgmt. of Carolinas, Inc.*, 315 N.C. at 691, 340 S.E.2d at 377.

¶ 17 Here, the facts alleged in the pleadings indicate that Defendant's conduct–discharging a handgun multiple times in the direction of Cass–constitutes an intentional act. The Policy's Intentional Act Exclusion reads that coverage will not extend to "bodily injury or property damage which results directly or indirectly from . . . [a]n intentional act or injury resulting from an intentional act of an insured or an act done at the direction of an insured." As Defendant's act was intentional, reading the complaint side by side with the Policy's language, Defendant's conduct falls within the Intentional Act Exclusion. Therefore, we conclude as a matter of law that Plaintiff has no duty to defend Defendant.

¶ 18 An insurer's duty to indemnify is narrower than its duty to defend. *See Harleysville Mut. Ins. Co.*, 364 N.C. at 6, 692 S.E.2d at 610; *Waste Mgmt. of Carolinas, Inc.*, 315 N.C. at 691, 340 S.E.2d at 377 ("[T]he insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. An insurer's

duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by facts ultimately determined at trial."). As such, it follows that if an insurer has no duty to defend, it has no duty to indemnify. Therefore, we conclude that Plaintiff has no duty to indemnify Defendant.

C. Factual Determination

¶ 19 **[3]** Defendant argues that a finder of fact must determine whether the allegations of the underlying lawsuit are included within the scope of the Policy's Intentional Act Exclusion. Specifically, Defendant contends that because the complaint alleges different theories of recovery, including grossly negligent acts by Defendant, it cannot be ascertained whether Defendant acted with intent to injure Cass, and a finder of fact must resolve that uncertainty. We disagree.

¶ 20 Under a declaratory judgment action, "[i]n addressing the duty to defend, the question is *not* whether *some interpretation of the facts as alleged* could possibly bring the injury within the coverage provided by the insurance policy; the question is, *assuming the facts alleged as true*, whether the insurance policy covers that injury." *Harleysville Mut. Ins. Co.*, 364 N.C. at 7, 692 S.E.2d at 611 (emphasis added). Assuming the alleged facts as true, Defendant acted intentionally and there is no duty to defend nor duty to indemnify. As such, this argument is without merit.

III. Conclusion

¶ 21 For the reasons stated herein, we affirm the trial court's order.

AFFIRMED.

Judges CARPENTER and GORE concur.

ROARK v. YANDLE

[283 N.C. App. 223, 2022-NCCOA-292]

HILARY ROARK, Plaintiff
v.
JAMES YANDLE, Defendant
v.
RAYMOND AND VIANNA COTTRELL, Intervenors

No. COA21-568

Filed 3 May 2022

1. Appeal and Error—timeliness of appeal—final order—Rule 3 noncompliance—petition for certiorari denied

Defendant's appeal from an order awarding attorney fees to intervenors in his child custody action was dismissed where, because the order was final, defendant's failure to appeal from the order within the thirty days prescribed by Appellate Rule 3 rendered his appeal untimely. Additionally, defendant's petition for a writ of certiorari was denied where he argued that he had not intentionally or voluntarily waived his right to appeal the court's order; this argument lacked merit because defendant had previously filed a motion seeking relief from the order pursuant to Civil Procedure Rule 60(b), which permits a court to relieve a party from a "final judgment," and therefore defendant had judicially admitted that the order was final. Further, a Rule 60(b) motion neither operates as a substitute for a timely appeal nor tolls the time for filing a notice of appeal.

2. Civil Procedure—Rule 60(b) motion—improper mechanism—legal errors—attorney fees award

In defendant's appeal from the denial of his Civil Procedure Rule 60(b) motion seeking relief from an earlier order, in which the trial court awarded attorney fees to intervenors in the case, the Court of Appeals declined to address defendant's arguments that the trial court made insufficient findings of fact to justify its award or that the award was contravened by statute. Rule 60 is an improper mechanism for obtaining review of alleged legal errors, and defendant had neither perfected an appeal from the attorney fees award nor sought relief from that award at the trial level pursuant to Civil Procedure Rule 59.

3. Appeal and Error—abandonment of issues—denial of Rule 60(b) motion—failure to cite legal authority

In defendant's appeal from the denial of his Civil Procedure Rule 60(b)(4) motion seeking relief from an earlier order, in which the trial court awarded attorney fees to intervenors in defendant's

child custody action and directed that those fees be taken from the proceeds of defendant's personal injury settlement following a recent car accident, defendant failed to cite any legal authority supporting his argument that the attorney fees award was void for lack of in rem or quasi in rem jurisdiction over his settlement proceeds. Therefore, defendant's argument was deemed abandoned pursuant to Appellate Rule 28(b)(6).

4. Civil Procedure—Rule 60(b) motion—lack of authority to render judgment—attorney fee award—creating judgment lien on unrelated personal injury proceeds

The trial court in a child custody action abused its discretion by denying defendant's Civil Procedure Rule 60(b)(4) motion seeking relief from an earlier order, in which the trial court awarded attorney fees to intervenors in the case and directed that those fees be taken from the proceeds of defendant's personal injury settlement following a recent car accident. Under N.C.G.S. § 50-13.6, the court was permitted to enter an order for reasonable attorney fees, but it lacked authority to enter a civil judgment taxing the costs of attorney fees to a fund that was unrelated to the custody action.

Appeal by defendant from order entered 5 April 2021 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 8 March 2022.

Arnold & Smith, PLLC, by Paul A. Tharp, for defendant-appellant.

Dozier Miller Law Group, by David M. McCleary, for intervenors-appellees.

GORE, Judge.

¶ 1 Defendant argues the trial court abused its discretion by denying his motion for relief pursuant to N.C. R. Civ. P. 60(b) concerning the enforceability of an award for attorney's fees. Defendant also seeks direct review of the underlying Order for Attorney's Fees entered 9 December 2019. We vacate and remand.

I. Factual and Procedural Background

¶ 2 On 2 August 2019, the intervenors Raymond and Vianna Cottrell appeared in defendant's existing custody action moving for emergency and permanent custody of defendant's minor child, CR. On 4 August 2019,

defendant sustained serious injuries in a car accident in Union County, North Carolina, with medical bills for treatment related to the same exceeding $300,000.00. The day after the crash, on 5 August 2019, the trial court awarded temporary custody of CR to intervenors. After another hearing on 22 August 2019, the trial court issued an order continuing temporary custody of CR with intervenors. Following a status hearing held on 8 October 2019, the trial court entered an order on 4 November 2019 continuing temporary custody with intervenors and restricting visitation by defendant.

¶ 3 After a motion hearing on 18 November 2019, intervenors moved for an award of attorney's fees on 20 November 2019. On 6 December 2019, defendant filed a motion for a new trial. On 9 December 2019, the trial court entered an order awarding attorney's fees to intervenors and directing that such fees be taken from the proceeds of defendant's personal injury settlement if not paid by 31 January 2020.

¶ 4 On 8 January 2020, intervenors moved to have defendant's motion for a new trial dismissed and for sanctions against defendant. On 15 January 2020, the trial court ordered defendant to appear and show cause as to why he should not be held in contempt for failure to comply with a previous order of the court. On 27 January 2020, the trial court dismissed defendant's motion for a new trial. On 1 December 2020, defendant filed a motion pursuant to Rule 60 of the North Carolina Rules of Civil Procedure, seeking an order relieving him of the obligation to pay intervenors' attorney's fees from the proceeds of his pending personal injury settlement. Defendant's motion came on for hearing on 22 March 2021. On 5 April 2021, the trial court entered an order denying defendant's Rule 60(b) motion.

¶ 5 On 28 April 2021, defendant timely filed notice of appeal from the trial court's denial of his Rule 60(b) motion concerning the enforceability of the 9 December 2019 award for attorney's fees.

II. Order for Attorney's Fees

¶ 6 **[1]** We first examine whether this Court has jurisdiction to review defendant's appeal from the 9 December 2019 Order for Attorney's Fees.

A. Grounds for Appellate Review

¶ 7 A party is entitled to an appeal of right following the entry of a "final judgment of a district court in a civil action." N.C. Gen. Stat. § 7A-27(b)(2). A party is also entitled to an appeal of right following the entry of "any interlocutory order or judgment of a . . . district court in a civil action

or proceeding that . . . [a]ffects a substantial right." § 7A-27(b)(3). Here, defendant cites to both §§ 7A-27(b)(2) and (b)(3) and argues the order can be construed as either interlocutory or final.

¶ 8 Ordinarily, an order for an award of attorney's fees is interlocutory and not immediately appealable. *Benfield v. Benfield*, 89 N.C. App. 415, 419, 366 S.E.2d 500, 503 (1988). However, in a case such as this, where the trial court set attorney's fees in a fixed amount, and there are no outstanding substantive claims left for judicial determination, the order is final independent of any subsequent judgment. *In re Cranor*, 247 N.C. App. 565, 569, 786 S.E.2d 379, 382 (2016).

¶ 9 Additionally, defendant filed a Rule 60(b) Motion on 1 December 2020 requesting relief from the Order for Attorney Fees on grounds that the trial court: (1) lacked jurisdiction to create lien rights in his personal injury proceeds; and (2) made statutorily insufficient findings necessary to support the award. Rule 60(b) provides, "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a *final* judgment, order, or proceeding . . . ." § 1A-1, Rule 60(b) (2020) (emphasis added). Thus, by filing a Rule 60(b) Motion, defendant judicially admitted that the order was final. *Sea Ranch II Owners Ass'n v. Sea Ranch II, Inc.*, 180 N.C. App. 226, 229, 636 S.E.2d 332, 334 (2006).

¶ 10 Considering the 9 December 2019 Order for Attorney's Fees is a final judgment of the district court; we note that defendant failed to timely file notice of appeal from that Order. A notice of appeal in a civil action must be filed "within thirty days after entry of judgment . . . ." N.C. R. App. P. 3(c)(1). If the appellant fails to file notice of appeal within the time allowed, this Court lacks jurisdiction to hear the appeal. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008). Furthermore, the party taking appeal must "designate the judgment or order from which appeal is taken . . . ." N.C. R. App. P. 3(d).

¶ 11 Here, the trial court entered the Order for Attorney's Fees on 9 December 2019. Nearly one year later, defendant filed a Rule 60(b) Motion on 1 December 2020. The trial court concluded that defendant's Rule 60(b) Motion was timely filed but denied it by written Order entered 7 April 2021. On 28 April 2021, defendant timely filed notice of appeal from the trial court's denial of his Rule 60(b) Motion.

¶ 12 Defendant failed to designate the 9 December 2019 Order for Attorney's Fees in his notice of appeal and now seeks direct review of a final order more than one year and four months after it was entered. Defendant's appeal of the underlying 9 December 2019 Order for Attorney's Fees is untimely, and this Court lacks jurisdiction to consider

it. Therefore, we dismiss the portion of defendant's appeal that seeks direct review of the underlying Order.

B. Petition for Writ of Certiorari

¶ 13 Defendant acknowledges his statutory right to appeal was potentially waived for failure to enter notice of appeal in compliance with N.C. R. App. P. 3. He also petitions this Court pursuant to N.C. R. App. P. 21 to issue our writ of certiorari and permit appellate review of the 9 December 2019 Order. Under Rule 21, the writ may issue "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1). A petition for writ of certiorari "has specific content requirements designed to ensure that the requesting party provides the Court with the facts and argument necessary to assess, in the Court's discretion, whether issuing the writ is appropriate." *Doe v. City of Charlotte*, 273 N.C. App. 10, 23, 848 S.E.2d 1, 11 (2020); *see also* N.C. R. App. P. 21(c) (specifying content requirements).

¶ 14 In his petition, defendant offers one argument that this case presents appropriate circumstances to permit review; he did not voluntarily or intentionally waive his right to appeal. To substantiate his contention, defendant cites to three cases for the general premise that waiver of appeal is only effective as a voluntary, intelligent, and intentional "relinquishment of a known right." *Luther v. Luther*, 234 N.C. 429, 433, 67 S.E.2d 345, 348 (1951). Those cases are *Luther*, 234 N.C. at 433, 67 S.E.2d at 348 (holding that a party in a contempt proceeding did not waive her right to appeal by paying the "fine under protest at the precise moment she noted her appeal from the order imposing it."); *Johnson v. Zerbst*, 304 U.S. 458, 458, 82 L. Ed. 1461, 1463 (1938) (addressing whether the defendant in a criminal case knowingly and intentionally waived his constitutional right to counsel); and *United States v. Wessells*, 936 F.2d 165, 168 (4th Cir. 1991) (concluding that a criminal defendant did not voluntarily and intelligently waive his right to appeal by accepting a plea agreement where there was no indication that he "knowingly agree[d] to an absolute waiver of all rights to appeal his sentencing.").

¶ 15 Defendant does not analogize, distinguish, or otherwise apply the reasoning from those decisions to the facts before us. Defendant implies that his failure to timely file notice of appeal from the 9 December 2019 Order for Attorney's Fees was unintentional because: (1) he did not know that he could appeal from that order; and (2) he never knowingly and voluntarily relinquished a right to appeal that order as demonstrated by his initial challenge by Rule 60(b) Motion.

¶ 16 It is not obvious from the context of defendant's argument how "waiver of appeal" is at issue in this case. As previously discussed, relief under Rule 60(b) is from final orders. The act of filing a motion for relief under Rule 60(b) at the trial level implicitly acknowledges the finality of the underlying Order. This Court has routinely held that "[a] motion pursuant to Rule 60 cannot be used as a substitute for an appeal of the underlying order to correct errors of law." *Morehead v. Wall*, 224 N.C. App. 588, 592, 736 S.E.2d 798, 801 (2012) (citation omitted).

¶ 17 The fact remains, defendant did not appeal from a final order within thirty days after it was entered, and he did not designate the Order for Attorney's Fees in his notice of appeal. Motions pursuant to Rule 60(b) neither operate as a substitute for an appeal to this Court, nor do they toll the time for filing a notice of appeal. *Wallis v. Cambron*, 194 N.C. App. 190, 193, 670 S.E.2d 239, 241 (2008); *see* N.C. R. App. P. 3(c). We discern no exceptional circumstance in this case warranting direct appellate review of the 9 December 2019 Order. Defendant does not identify any meritorious reason why the writ should issue beyond a circuitous assertion that he unintentionally failed to take timely action. Accordingly, defendant's petition for writ of certiorari is denied.

III. Denial of Rule 60(b) Motion

¶ 18 Unlike defendant's appeal from the underlying Order for Attorney's Fees, his appeal from the trial court's denial of his motion for relief pursuant to Rule 60(b)(4) & (b)(6) is timely.

¶ 19 Pursuant to N.C. R. Civ. P. 60(b),

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (4) The judgment is void;
>
> . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C. R. Civ. P. 60(b)(4), (b)(6).

¶ 20 We review a trial court's denial of a motion for relief under Rule 60(b) for abuse of discretion. *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). "The test for abuse of discretion is whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have

been the result of a reasoned decision." *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (cleaned up). "[I]f the trial court makes a discretionary ruling based upon a misapprehension of the applicable law, this is also an abuse of discretion." *Myers v. Myers*, 269 N.C. App. 237, 240, 837 S.E.2d 443, 448 (2020) (citation omitted).

¶ 21 Under Rule 60(b)(4), "[a] judgment will not be deemed void merely for an error in law, fact, or procedure. A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered." *Burton v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992) (citation omitted). "An erroneous judgment, by contrast, is one entered according to proper court procedures and practices but is contrary to the law or involves a misapplication of the law." *Id.* at 617, 421 S.E.2d at 383 (citation omitted).

¶ 22 Under Rule 60(b)(6), a movant is only entitled to relief where it can be shown that: "(1) extraordinary circumstances exist, (2) justice demands the setting aside of the judgment, and (3) the defendant has a meritorious defense." *Gibby v. Lindsey*, 149 N.C. App. 470, 474, 560 S.E.2d 589, 592 (2002) (citation omitted).

A. Errors of Law

¶ 23 **[2]** We do not address defendant's arguments that the trial court made insufficient findings of fact to justify its award, or that the specific relief provided is contravened by § 1C-1601(a)(8). It is well established that "Rule 60 is an improper mechanism for obtaining review of alleged legal error." *Catawba Valley Bank v. Porter*, 188 N.C. App. 326, 330, 655 S.E.2d 473, 475 (2008). "The appropriate remedy for errors of law committed by the trial court is either appeal or a timely motion for relief under N.C.G.S. Sec. 1A-1, Rule 59(a)(8). Motions pursuant to Rule 60(b) may not be used as a substitute for appeal." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (cleaned up). "Rule 60(b) provides no specific relief for 'errors of law' and our courts have long held that even the broad general language of Rule 60(b)(6) does not include relief for 'errors of law.' " *Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988) (citation omitted).

¶ 24 Defendant failed to either perfect an appeal from the 9 December 2019 Order or seek relief at the trial level pursuant to N.C. R. Civ. P. 59. He now seeks a " 'second bite at the apple' " through an improper mechanism. *Baxley v. Jackson*, 179 N.C. App. 635, 639, 634 S.E.2d 905, 907 (2006). This he is not permitted to do.

B. Rule 60(b)(4)

¶ 25 "With respect to Rule 60(b)(4), a judgment is 'void' only where the court that renders it did not have jurisdiction over the parties and the subject matter and did not have authority to render the judgment entered." *Hoolapa v. Hoolapa*, 105 N.C. App. 230, 232, 412 S.E.2d 112, 114 (1992) (*purgandum*).

1. Personal Jurisdiction

¶ 26 **[3]** Defendant contends the trial court lacked *in rem* or *quasi in rem* jurisdiction over his personal injury settlement proceeds. Defendant fails to cite any legal authority to substantiate this conclusory assertion. "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005). This argument is deemed abandoned. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

2. Authority to Render the Judgment Entered

¶ 27 **[4]** Defendant argues the trial court abused its discretion by denying his Motion pursuant to Rule 60(b)(4) because it lacked authority to create a judgment lien on his personal injury proceeds. We agree.

¶ 28 Section 50-13.6 provides, "In an action or proceeding for the custody . . . of a minor child, . . . the [trial] 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." § 50-13.6 (2019).

¶ 29 The trial court theorized it had the authority to order defendant to pay intervenor's attorney's fees from the proceeds of his personal injury settlement because the 9 December 2019 Order for Attorney's Fees was an Order, not a Judgment. Defendant concedes that § 50-13.6 authorizes the trial court to enter an order for an award of reasonable attorney's fees. However, he contends the trial court's 9 December 2019 Order was an order in name only.

> There is a clear difference between including attorney fees in the costs taxed against a party to a lawsuit and in ordering the payment of attorney fees. When costs are taxed, they establish a liability for payment thereof, and if a fund exists which is the subject matter of the litigation, costs may be ordered paid out of

> the fund prior to distribution of the balance thereof to the persons entitled. *Rider v. Lenoir County*, 238 N.C. 632, 78 S.E.2d 745 (1953). If no such fund exists, the satisfaction of the judgment for costs may be obtained by methods as for the enforcement of any other civil judgment. N.C.G.S. § 6-4.
>
> In the case of attorney fees authorized by N.C.G.S. § 50-13.6, the court is given power to "order payment of reasonable attorney's fees to an interested party," which makes the award of attorney's fees an order of the court, enforceable by contempt for disobedience, rather than a civil judgment.

Smith v. Price, 315 N.C. 523, 538, 340 S.E.2d 408, 417 (1986).

¶ 30 In this case, the Order for Attorney's Fees is enforceable by the trial court's contempt powers, and it does not tax the costs of the action against defendant. Critically, however, it provides an additional remedy; it creates a lien on defendant's personal injury proceeds if payment is not received by 31 January 2020. Under § 50-13.6, the trial court may enter an order for reasonable attorney's fees. It is not authorized to enter a civil judgment taxing the costs of attorney's fees to a fund that is unrelated to the subject matter of the litigation. *See id*. Thus, pursuant to Rule 60(b)(4), the trial court did not have authority to render the judgment entered, and a misapprehension of law is tantamount to abuse of discretion. *See Myers*, 269 N.C. App. at 240, 837 S.E.2d at 448.

IV. Conclusion

¶ 31 For the foregoing reasons, we vacate and remand for further consideration by the trial court not inconsistent with this opinion.

VACATED AND REMANDED.

Judges CARPENTER and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
AMBER LYNN AMATOR, DEFENDANT

No. COA21-433

Filed 3 May 2022

Search and Seizure—traffic stop—reasonable suspicion—officer's mistake of law—reasonable

Even assuming the police officer who stopped defendant's vehicle was incorrect in his belief that N.C.G.S. § 20-66(c) required her vehicle registration sticker to be placed in the upper right corner of her license plate (defendant's was placed in the upper left corner), the officer's mistake of law was reasonable because section 20-66(c) required that registration stickers be displayed as "prescribed by the Commissioner" and the officer's quick reference guide and the registration cards mailed by the Commissioner both stated that the stickers should be placed in the upper right corner—even though the Administrative Code did not yet reflect this update. Therefore, the officer had reasonable suspicion to conduct the traffic stop, which led to the discovery of illegal drugs.

Appeal by Defendant from judgment entered 16 February 2021 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 8 February 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna B. Wojcik, for the State.

Sharon L. Smith for the Defendant.

DILLON, Judge.

¶ 1 Defendant Amber Lynn Amator appeals from a judgment finding her guilty of trafficking in methamphetamine. She was convicted based on the discovery of drugs found in her car during a traffic stop. On appeal, she challenges the validity of that stop.

I. Background

¶ 2 On 30 December 2018, a police officer stopped Defendant's vehicle for what he believed to be a license plate renewal sticker violation. The

officer also recognized Defendant's car as a vehicle he had attempted to stop weeks earlier. After discovering that another passenger had an outstanding warrant for arrest, a second police officer arrived with a K9. The K9 alerted on the car, and the officers searched the vehicle's interior. The search revealed several bags of methamphetamine. Defendant claimed one bag of methamphetamine amounting to 48.88 grams.

¶ 3 Defendant was charged with several drug offenses, as well as with improperly placing the renewal sticker on her license plate. Defendant moved to suppress the evidence obtained during the search of her vehicle. The trial court denied Defendant's motion, and Defendant subsequently pleaded guilty to trafficking in methamphetamine. The State dismissed Defendant's remaining charges. Defendant received a fine and an active sentence of seventy (70) to ninety-three (93) months. Defendant appealed to our Court.

II. Analysis

¶ 4 Defendant argues that the trial court erred in denying her motion to suppress, contending that the officer did not have reasonable suspicion to initiate the stop based on an alleged misplacement of her renewal sticker. We disagree.

¶ 5 The question before us is whether the trial court had reasonable suspicion that Defendant committed a crime based on the placement of the renewal sticker on her license plate. We review a motion to suppress to determine "whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Unchallenged findings of fact are binding on appeal. *State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008).

¶ 6 In the years prior to Defendant's arrest, the DMV Commissioner sent out to each vehicle owner two stickers with each vehicle registration, one with the month and one with the year. At the time of Defendant's arrest, our Administrative Code instructed that the "month and year stickers shall be displayed on the plate in the correct position[.]" 19A N.C.A.C. 3C.0237 (2018).

¶ 7 Sometime before the time of Defendant's arrest, the DMV Commissioner had stopped sending two separate stickers with each registration and began sending out a *single* month/year registration renewal sticker. The registration card accompanying the single sticker instructed drivers to place the sticker on the upper *right* corner of the

license plate. The Commissioner, however, did not immediately amend the Code provision to recognize the change.[1]

¶ 8 When Defendant received her sticker and registration card, she placed the sticker in the upper *left* corner of her plate. Defendant was later stopped by an officer who believed that she was in violation of N.C Gen. Stat. § 20-66(c) (2018), which simply requires that the single registration renewal sticker "must be displayed on the registration plate it renews in the place prescribed by the Commissioner[.]"

¶ 9 Therefore, the issue before us does not concern whether there was sufficient evidence that Defendant was in violation of that statute. Rather, the issue is whether the officer *reasonably believed* Defendant was violating that statute to justify the stop that led to the discovery of the methamphetamine. Defendant argues that there could be no reasonable belief because neither the statute nor the Code provision in effect at the time of the stop stated where a single month/year sticker needed to be placed on one's license plate. Here, even assuming that the officer was not correct in his interpretation of the law, we conclude that any mistake made by the officer was reasonable.

¶ 10 Regarding the officer's belief, the trial court found that:

> 1. [The officer] understood that the sticker should be on the upper right side of the plate. He based his understanding on the language in his "Law Enforcement Officers Quick Reference Statute Guide" referring to [N.C. Gen. Stat. § 20-66(c)] (State's Exhibit 1) and the information provided on the back of North Carolina vehicle registration cards (State's Exhibit 2), both indicating that the month/year tag should be placed on the upper right side of the license plate.

¶ 11 Section 20-66(c) requires drivers to place their stickers on their license plates in a manner prescribed by the Commissioner of the DMV. It is true, as Defendant argues, that the Code was silent on the issue of placement of the single sticker at the time of her arrest. But the registration card received by Defendant did contain the instruction that a single sticker be placed in the upper right-hand corner. And there is a statute, which neither party cited, which states that it is the Commissioner's

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1. This Code provision was updated in 2021 to reflect single month/year stickers: "The single month and year sticker shall be displayed on the plate in the upper right-hand corner." 19A N.C.A.C. 3C.0237 (2021).

responsibility to create and provide the registration card received with the sticker. N.C. Gen. Stat. § 20-41 ("The Commissioner shall provide suitable forms for . . . registration cards . . . requisite for the purpose of this Article[.]").

¶ 12 Of course, our conclusion might be different if there was a controlling decision stating that the information on the registration card cannot support a prosecution under Section 20-66(c). But there is no such decision in our jurisprudence. *See State v. Eldridge*, 249 N.C. App. 493, 499, 790 S.E.2d 740, 744 (2016) (noting jurisdictions requiring the "absence of settled caselaw interpreting the statute at issue in order for the officer's mistake of law to be deemed objectively reasonable").

¶ 13 The United States Supreme Court held in *Heien v. North Carolina* that reasonable suspicion can arise from an officer's mistake of law, so long as the mistake is reasonable. 574 U.S. 54, 61 (2014). In *Heien*, an officer stopped a vehicle with only one working brake light, believing that the defendant had violated a North Carolina law requiring a "stop lamp." *Id.* at 58-59. The Supreme Court concluded that the officer's error of law was reasonable because the relevant law also provided that a stop lamp "may be incorporated into a unit with one or more *other* rear lamps" and that "all originally equipped rear lamps [must be] in good working order." *Id.* at 67-68 (emphasis in original). Therefore, it was reasonable for the officer to conclude, pursuant to an *ambiguous* statute, that all brake lights on a vehicle must be functioning in order to satisfy the law. *Id.* at 68.

¶ 14 Defendant also cites *Eldridge*, which involves an officer who stopped a motorist driving a vehicle with out-of-state plates for failing to have an exterior mirror on the driver's side of the vehicle. 249 N.C. App. at 494, 790 S.E.2d at 741. Our Court concluded that the officer's mistake of law was unreasonable because the relevant law clearly stated that it only applied to vehicles "registered in this State." *Id.* at 499-500, 790 S.E.2d at 744 (citing N.C. Gen. Stat. § 20-126(b)). That is, we so concluded because the relevant law was unambiguous. *Id.* at 499, 790 S.E.2d at 744. We conclude that *Eldridge* is distinguishable from the case at bar for this reason.

¶ 15 Here, the relevant law was ambiguous at the time of Defendant's traffic stop. It is not clear from the statute exactly where the single month/year sticker should be placed, only that it be displayed as "prescribed by the Commissioner." Therefore, the officer relied on his quick reference guide and the information from the Commissioner on the back of the registration card to conclude that Defendant had violated Section

20-66(c), and there was reasonable suspicion to conduct the traffic stop on this ground. If the officer was mistaken, his mistake was reasonable.

III. Conclusion

¶ 16 We conclude that the officer had reasonable suspicion that Defendant was in violation of Section 20-66(c). Accordingly, we conclude that the trial court did not err in denying Defendant's motion to suppress.

AFFIRMED.

Chief Judge STROUD and Judge JACKSON concur.

STATE OF NORTH CAROLINA
v.
JABAR BALLARD, DEFENDANT

No. COA21-202

Filed 3 May 2022

1. Constitutional Law—due process—Brady violation—missing witness statement—materiality

In a prosecution for robbery with a firearm and related charges, the State did not violate defendant's due process rights pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding the written statement of a witness who was one of the victims (due to the entire police file having been lost) because the statement was not material. Defense counsel had sufficient opportunity to cross-examine the witness at trial about his inconsistent statements and presented an impeachment witness, and the jury heard other evidence identifying defendant as the perpetrator.

2. Constitutional Law—due process—false testimony—State's witness—inconsistencies for jury to resolve

In a prosecution for robbery with a firearm and related charges in which one of the victims was inconsistent regarding his identification of defendant as the perpetrator, defendant's due process rights were not violated pursuant to *Napue v. Illinois*, 360 U.S. 264 (1959), where there was no evidence that the State knew or believed that the victim's testimony was false, and any conflicts raised by the State's evidence were for the jury to resolve.

3. Constitutional Law—due process—effective assistance of counsel—summary dismissal of claims

In a prosecution for robbery with a firearm and related charges, the trial court erred by failing to hold an evidentiary hearing on defendant's post-conviction claims of ineffective assistance of counsel—though not on defendant's due process claims, which had no merit even if the factual allegations were taken as true—because the record was insufficient to support summary dismissal.

4. Constitutional Law—effective assistance of counsel—investigation of alibi witness—record insufficient—evidentiary hearing required

After convictions for robbery with a firearm and related charges, defendant's claims of ineffective assistance of counsel were erroneously dismissed summarily where, in particular, there was no record evidence regarding whether defense counsel thoroughly investigated using a potentially key alibi witness. The question of whether counsel made a strategic decision regarding that witness constituted a question of fact which necessitated an evidentiary hearing.

5. Criminal Law—motion for appropriate relief—gatekeeper order—bar to future filings inappropriate

After defendant was convicted of robbery with a firearm and related charges and his motion for appropriate relief (raising claims of due process violations and ineffective assistance of counsel) was summarily denied, the trial court's order barring defendant from filing future motions for appropriate relief was vacated where the court improperly invoked N.C.G.S. § 15A-1419(a) as authority to enter a gatekeeper order and where defendant had not filed numerous frivolous motions.

Judge MURPHY concurring with the exception of paragraph 35.

Judge GRIFFIN concurring by separate opinion.

Appeal by Defendant from order entered 15 October 2020 by Judge J. Stanley Carmical in Brunswick County Superior Court. Heard in the Court of Appeals 2 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State.

Hynson Law, PLLC, by Warren D. Hynson, for the Defendant.

JACKSON, Judge.

¶ 1 Jabar Ballard ("Defendant") appeals from an order denying his motion for appropriate relief ("MAR"). We affirm the trial court's *Brady* and *Napue* conclusions but hold that the trial court erred by (1) failing to conduct a hearing on Defendant's ineffective assistance of counsel ("IAC") claims and (2) barring Defendant from filing a future MAR. We therefore vacate the IAC portion of the order and the portion barring Defendant from filing a future MAR, and remand this case for an evidentiary hearing on Defendant's IAC claims.

I. Background

¶ 2 This case deals with post-conviction claims raised by Defendant in an MAR. After a jury trial held in October 2011, Defendant was found guilty of robbery with a firearm, two counts of assault by pointing a gun, and possession of a firearm. Defendant challenged his conviction on appeal to this Court, and we found no error in an unpublished opinion filed 7 August 2012. *State v. Ballard*, 222 N.C. App. 317, 729 S.E.2d 730 (2012) (unpublished), *cert. and disc. rev. denied*, 366 N.C. 429, 736 S.E.2d 505 (2013). Thereafter, Defendant filed an MAR in Brunswick County Superior Court.

A. The Robbery and Defendant's Trial

¶ 3 In the early morning of 13 November 2009, Hardy Ballard, III, and his fifteen-year-old son Kashon McCall were leaving their home for work and school when they were approached by a masked man with a gun. Hardy recognized the voice and face of the man as that of his cousin, Defendant. Hardy's grandfather and Defendant's grandfather were brothers; Hardy and Defendant knew each other when they were growing up but did not remain close as adults. Kashon also claimed to recognize Defendant, although they had only met a few times.

¶ 4 When Defendant approached Hardy and Kashon, he told Kashon to get on the ground and pointed the gun to Hardy's head. Hardy gave his wallet to Defendant, and then went inside the home to retrieve more money, leaving Kashon outside with Defendant. Kashon remained on the ground with Defendant's gun at the back of his head. From inside the home, Hardy's wife, Nikita Ballard, called the police, and Hardy threw more cash outside the back door of the home. Defendant collected the money and left.

¶ 5 When the police arrived, Hardy and Kashon were both asked to write statements. Hardy told the police that Defendant was the perpetrator

and reflected that in his statement. Kashon did not speak with the police about Defendant's identity on the day of the robbery, and the contents of his original statement remain unclear.[1]

¶ 6 The State presented four witnesses at trial, including both Hardy and Kashon, Hardy's wife, and Defendant's probation officer. Both Hardy and Kashon testified at trial that they identified the perpetrator as Defendant. Nikita testified to seeing a gunman from inside the house, but she could not identify him. Defendant's probation officer was not a witness to the crime, but instead testified to Defendant's possible motive: he was in violation of his probation for being $500 in arrears prior to the robbery, which he paid four days after the robbery.

¶ 7 Defendant's trial counsel prepared a list of seven potential defense witnesses, but only presented one at trial. Trial counsel also notified the prosecutor of five potential alibi witnesses who were willing to testify that Defendant was seen at home the morning of the crime. Ultimately, trial counsel did not present any alibi witness at trial.

¶ 8 The jury convicted Defendant of robbery with a firearm, two counts of assault by pointing a gun, and possession of a firearm by a felon. Defendant was sentenced to a term of 146 to 185 months of incarceration for the robbery and assault convictions and a consecutive term of 29 to 35 months for possession of a firearm.

B. Defendant's MAR

¶ 9 Defendant filed an MAR *pro se* in Brunswick County Superior Court, and thereafter his counsel filed an amended MAR. In his amended MAR, Defendant raised eight total claims: one *Brady* claim, one *Napue* claim, and six IAC claims. Defendant's specific IAC claims alleged that trial counsel failed to (1) present known impeachment evidence of Hardy Ballard, III; (2) present known alibi witnesses and interview other known alibi witnesses; (3) pursue or compel known exculpatory evidence; (4) impeach Kashon McCall with testimony from Police Chief C. Taylor; (5) challenge identification evidence with expert testimony; and (6) properly request the pattern jury instruction on identification. In an appendix of exhibits supporting his MAR, Defendant submitted hundreds of pages of documents, including sworn statements from Defendant's

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1. The police department lost the entire police file for this case, including Kashon's original statement, and the only photocopy of the statement was illegible. Kashon testified at trial that he could not recall what he wrote in his original statement, but he maintained that he recognized Defendant. The disputed contents of the statement premise Defendant's *Brady* claim, which we address below.

trial counsel, family members, and potential alibi witnesses. Defendant sought an evidentiary hearing on his claims, or alternatively, for his convictions to be vacated and a new trial granted.

¶ 10 The trial court dismissed all of Defendant's claims in an order ("Order") without holding an evidentiary hearing. In the Order, specifically regarding the IAC claims, the trial court found that "Defendant's first, second, fourth and fifth assertions within his ineffective assistance of counsel claim were strategic decisions regarding witnesses made by Defendant's trial counsel." The trial court also found that, with regard to Defendant's sixth assertion, "trial counsel did request the pattern jury instruction on identification" which was denied in the discretion of the trial judge. Accordingly, for all but Defendant's third assertion, the trial court found that trial counsel's conduct did not fall below an objective standard of reasonableness. Lastly, for Defendant's third assertion, the trial court found that "Defendant's trial counsel deficiently performed when she failed to pursue or obtain a legible copy of Kashon McCall's written statement," but that the second *Strickland* prong was not satisfied because Defendant failed to establish that but for counsel's error the trial would have had a different outcome.

¶ 11 On 21 October 2020, Defendant filed a notice of intent to seek appellate review and a request for the appointment of appellate counsel. Defendant filed a petition for writ of certiorari, seeking appellate review of the Order denying his MAR. This Court granted the petition in an order dated 29 January 2021.

II. Analysis

¶ 12 On appeal, Defendant argues that the trial court erred by (1) denying his MAR because law enforcement's loss of an eyewitness statement was a due process violation under *Brady*, (2) denying his MAR because the State presented false testimony in violation of *Napue*, (3) failing to conduct an evidentiary hearing for his *Brady*, *Napue*, and IAC claims, and (4) barring Defendant from filing any future motions for appropriate relief. We remand for an evidentiary hearing on the IAC claims.

A. Jurisdiction

¶ 13 The State argues we should decline to consider issues one, two, and four, because these issues fall outside the scope of Defendant's petition for writ of certiorari, which was previously granted by this Court. Our order allowed the writ "for purposes of reviewing the order entered by Judge J. Stanley Carmical on 16 October 2020 in Brunswick County Superior Court denying petitioner's motion for appropriate relief."

Because Defendant's arguments fall within the scope of reviewing Judge Carmical's order, we hold that we have jurisdiction to review them.

B. Standard of Review

¶ 14 Where a defendant's MAR has been dismissed without holding an evidentiary hearing, "[w]e review the MAR court's summary dismissal de novo to determine whether the evidence contained in the record and presented in [Defendant's] MAR—considered in the light most favorable to [Defendant]—would, if ultimately proven true, entitle him to relief." *State v. Allen*, 378 N.C. 286, 296-97, 2021-NCSC-88, ¶24. "If answering this question requires resolution of any factual disputes, N.C.G.S. § 15A-1420(c)(1) requires us to vacate the summary dismissal order and remand to the MAR court to conduct an evidentiary hearing." *Id.* at 297, 2021-NCSC-88, ¶24.

C. *Brady* Claim

¶ 15 **[1]** Defendant argues on appeal that the trial court erroneously denied his *Brady* claim. In his MAR, Defendant argued that the State violated his right to due process by suppressing Kashon McCall's original written statement to police, which was lost by the police department and not available at trial. The trial court concluded that Kashon's statement was not material. After careful review, we affirm the trial court's conclusion on Defendant's *Brady* claim.

¶ 16 A criminal defendant's due process rights under the 14th Amendment to the United States Constitution are violated when the prosecution suppresses evidence favorable to the defendant that is "material either to guilt or to punishment[.]" *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Therefore, "[t]o establish a *Brady* violation, a defendant must show (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *State v. McNeil*, 155 N.C. App. 540, 542, 574 S.E.2d 145, 147 (2002) (citing *Brady*, 373 U.S. at 87). "Favorable" evidence can be impeachment evidence or exculpatory evidence, and evidence is "material" if "there is a reasonable probability of a different result had the evidence been disclosed." *State v. Williams*, 362 N.C. 628, 636, 669 S.E.2d 290, 296 (2008) (internal marks and citations omitted).

¶ 17 Here, even assuming that the first two *Brady* elements are met, the trial court correctly concluded that Kashon's statement was not material. Even without the original statement, we agree with the trial court that "trial counsel was sufficiently able to cross-examine Kashon McCall on the inconsistencies in his statements."

¶ 18 Trial counsel revealed inconsistences in Kashon's testimony during the following cross-examination:

> [Defense counsel]: So, just to clarify, it's your testimony that as soon as you saw the masked gunman you knew it was Jabar Ballard?
>
> [Kashon]: Yes.
>
> [Defense counsel]: And when the police arrived did you tell the police officers that?
>
> [Kashon]: No, ma'am, I didn't.
>
> . . .
>
> [Defense counsel]: Do you remember writing the statement?
>
> [Kashon]: No, I don't remember writing it down, no.
>
> [Defense counsel]: You don't remember writing the statement at all?
>
> [Kashon]: Yes, I wrote a statement.
>
> . . .
>
> [Defense counsel]: And do you remember what you wrote in the statement?
>
> [Kashon]: No, not really, I don't.
>
> [Defense counsel]: Did you write in the statement that you knew it was Jabar Ballard in the mask?
>
> [Kashon]: No, ma'am.
>
> [Defense counsel]: You didn't write that in your statement?
>
> [Kashon]: No, ma'am, I don't remember, actually.
>
> . . .
>
> [Defense counsel]: And have you had to testify at a prior court proceeding in a matter related to this incident?
>
> [Kashon]: Yes ma'am, but I don't remember the testimony.

. . .

[Defense counsel]: And do you remember whether you testified at that hearing that the masked man was Jabar Ballard?

[Kashon]: Yes, I guess, I don't remember anything.

[Defense counsel]: But, you remember today, you know today that it was Jabar Ballard?

[Kashon]: Yes, ma'am.

. . .

[Defense counsel]: But you never told anybody that day that it was Jabar Ballard, did you?

[Kashon]: No, ma'am.

¶ 19 Additionally, trial counsel presented R. Smithwick ("Mr. Smithwick") as an impeachment witness. Mr. Smithwick, who represented Defendant during pretrial proceedings, testified that Kashon was unable to identify Defendant as the perpetrator during the probable cause hearing.

¶ 20 Although impeachment with the actual statement could have been more effective than these methods used, this is not the test for materiality. Here, trial counsel was able to effectively cross-examine and impeach Kashon without the original statement, revealing inconsistencies in his testimony to the jury. We do not believe that, had trial counsel instead impeached Kashon with the original statement, there would have been a "reasonable probability of a different result[.]" *Williams*, 362 N.C. at 636, 669 S.E.2d at 296 (internal marks omitted).

¶ 21 Finally, the suppression of the statement was not enough to "undermine confidence in the outcome of the trial." *Williams*, 362 N.C. at 636, 669 S.E.2d at 296 (internal marks and citation omitted). The jury's verdict was not premised solely on Kashon's eyewitness testimony and identification of Defendant as the perpetrator. Kashon's father and Defendant's cousin, Hardy, was also an eyewitness to the crime, and Hardy unwaveringly identified the perpetrator as Defendant both in his statements to police and at trial.

D. *Napue* Claim

¶ 22 **[2]** Defendant argues that the trial court erroneously denied his *Napue* claim that the State violated his right to due process by presenting evidence the State knew was false. The trial court concluded that "there is

no indication that the prosecution knew the testimony was false." After careful review, we affirm the trial court's conclusion on Defendant's *Napue* claim.

¶ 23 A defendant's due process rights are violated when a State witness gives false testimony that the prosecution knew to be false. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). In order to prove a *Napue* violation, a defendant must show that "testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction[.]" *State v. Call*, 349 N.C. 382, 405, 508 S.E.2d 496, 511 (1998) (internal marks and citations omitted). If a defendant meets this burden, he is entitled to a new trial. *Id.*

¶ 24 However, "there is a difference between the knowing presentation of false testimony and knowing that testimony conflicts in some manner. It is for the jury to decide issues of fact when conflicting information is elicited by either party." *State v. Allen*, 360 N.C. 297, 305, 306, 626 S.E.2d 271, 279 (2006) (concluding that "the prosecution did not violate defendant's constitutional rights by submitting conflicting testimony when nothing in the record tends to show the prosecution knew the testimony was false").

¶ 25 Here, Defendant specifically argues that the State knew Kashon's testimony identifying Defendant as the perpetrator was false because (1) Chief Taylor testified at Defendant's probation revocation hearing that Kashon "never looked at the [perpetrator's] face" and the State had a copy of this testimony, and (2) an assistant district attorney ("ADA") that interviewed Kashon wrote notes indicating that Kashon saw "a man with a 'hunting hoodie' and 'hunting pants,' mask and Vasqueds shoes."

¶ 26 However, even assuming the other *Napue* elements are met, the record does not support Defendant's contention that the State knew Kashon's testimony was false. Although Kashon's trial testimony that he instantly identified Defendant as the robber was inconsistent with Chief Taylor's pre-trial testimony that Kashon never saw his face, "there is a difference between knowing presentation of false testimony and knowing the testimony conflicts in some manner." *Allen*, 360 N.C. at 305, 626 S.E.2d at 279. Moreover, despite indicating that Kashon saw "a man" in the first reference to the perpetrator, the ADA's notes do not support Defendant's contention that the State knew Kashon could not identify Defendant. The ADA's notes from Kashon's interview also refer to the perpetrator as "JB," Defendant's initials, on every reference thereafter. There was simply no record evidence that the State knew or believed Kashon's testimony to be false, and any inconsistencies in

Kashon's identification of Defendant as the perpetrator were elicited during cross-examination, as described above. Merely because inconsistent testimony was presented does not suggest that such testimony was "knowingly and demonstrably false." *State v. Allen*, 360 N.C. at 305, 626 S.E.2d at 279. Therefore, the trial court correctly concluded that there was no evidence the State knew Kashon's testimony was false to support Defendant's *Napue* claim.

E. Evidentiary Hearing

¶ 27 **[3]** Defendant argues that the trial court erred by failing to grant an evidentiary hearing on his *Brady*, *Napue*, and IAC claims because there were unresolved issues of fact requiring an evidentiary hearing. We agree as to the IAC claims but reject Defendant's argument as to the *Brady* and *Napue* claims. Even accepting Defendant's factual allegations as true, he would not be entitled to relief on his *Brady* and *Napue* claims as discussed above.

¶ 28 Evidentiary hearings on motions for appropriate relief are "the general procedure rather than the exception." *State v. Howard*, 247 N.C. App. 193, 207, 783 S.E.2d 786, 796 (2016). An evidentiary hearing is not required where the "motion and supporting and opposing information present only questions of law[,]" however, "[i]f the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact." N.C. Gen. Stat. § 15A-1420(c)(3), (4) (2021). In other words, "an evidentiary hearing is mandatory unless summary denial of an MAR is proper, or the motion presents a pure question of law." *State v. Howard*, 247 N.C. App. at 207, 783 S.E.2d at 796 (citing *State v. McHone*, 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998)).

¶ 29 For IAC claims in particular, "[w]here the claim raises potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues." *State v. Santillan*, 259 N.C. App. 394, 402, 815 S.E.2d 690, 696 (2018) (internal quotation and citation omitted). However, summary denial of a defendant's MAR alleging IAC—without a hearing—may be appropriate where a defendant fails to support IAC claims with any evidence. *State v. Rhue*, 150 N.C. App. 280, 290, 563 S.E.2d 72, 79 (2002) (supporting the trial court's summary denial of Defendant's MAR and rejecting defendant's IAC claim, based partly on his attorney's alleged failure to contact various defense witnesses, where "defendant failed to file *any* affidavits or other evidence to support his assertions that counsel was ineffective") (emphasis added)).

¶ 30 For reasons elaborated below, we hold that the trial court erred by not granting an evidentiary hearing on Defendant's IAC claims.

F. Ineffective Assistance of Counsel

¶ 31 **[4]** On appeal, as relief, Defendant seeks an evidentiary hearing on his IAC claims, and therefore "the question at this stage is not whether [Defendant] has proven that he received IAC. Instead, the question is whether he has stated facts which, if proven true, would entitle him to relief." *Allen*, 378 N.C. 286, 299, 2021-NCSC-88, ¶29. We conclude that Defendant is entitled to an evidentiary hearing.

¶ 32 A criminal defendant's right to counsel under the Sixth Amendment to the United States Constitution includes the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. To prove ineffective assistance of counsel, the United States Supreme Court created the following two-part test that must be satisfied: (1) "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) "the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

¶ 33 "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. It follows that "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable [only] to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S. 510, 514 (2003) (internal marks and citation omitted). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 689, 691 ("[T]he defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (internal quotation omitted)).

¶ 34 Decisions regarding "what witnesses to call" and "whether and how to conduct cross-examination" are typically considered strategic

choices in the "exclusive province" of the lawyer. *State v. Quick*, 152 N.C. App. 220, 222, 566 S.E.2d 735, 737 (2002). *See also State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986) ("Trial counsel are necessarily given wide latitude in these matters. Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness." (internal marks omitted)). However, whether a defendant's counsel "made a particular strategic decision remains a *question of fact*, and is not something which can be hypothesized." *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017) (emphasis added) (citation omitted).

¶ 35 Although there are no prior North Carolina cases precisely on point, other courts have concluded that an attorney's representation was deficient for failing to contact and interview prospective alibi witnesses. *See, e.g.*, *Griffin v. Warden, MD. Correctional Adjustment Ctr.*, 970 F.2d 1355, 1358 (4th Cir. 1992) ("[Counsel] did not even talk to [the prospective alibi witness], let alone make some strategic decision not to call him."); *Grooms v. Solem*, 923 F.2d 88, 90, 91 (8th Cir. 1991) ("[I]t is unreasonable not to make some effort to contact [alibi witnesses] to ascertain whether their testimony would aid the defense[,]" and "[p]rejudice can be shown by demonstrating that the uncalled alibi witnesses would have testified if called at trial and that their testimony would have supported [Defendant's] alibi."); *Clinkscale v. Carter*, 375 F.3d 430, 445 (6th Cir. 2004) ("The fact that none of these individuals could provide any corroboration for this alleged alibi certainly must have significantly affected the jury's assessment of [Defendant's] guilt. Had even one alibi witness been permitted to testify on [Defendant's] behalf, [Defendant's] own testimony would have appeared more credible . . ."); *Bryant v. Scott*, 28 F.3d 1411, 1417 (5th Cir. 1994) ("[Counsel's] failure to investigate potential alibi witnesses was not a 'strategic choice' that precludes claims of ineffective assistance.").

¶ 36 Because of the significance of a criminal defendant's alibi defense, we are persuaded that a trial counsel's failure to investigate known alibi witnesses can constitute deficient performance. Therefore, we focus our analysis primarily on Defendant's IAC argument regarding counsel's investigation of alibi witnesses.

¶ 37 In her affidavit, which was attached as an exhibit to Defendant's MAR, trial counsel testified as follows regarding her handling of Defendant's alibi witnesses and defense:

> 10. During the course of my representation prior to trial, I interviewed Toye Baker, Tiye Cheatham, and Vashaun (Kyheim) Cheatham. . . .

> 11. I did not look for the progress report to determine if it existed and / or corroborated Tiye's alibi for Jabar. . . .
>
> 12. I filed a notice of alibi on August 4, 2011. . . .
>
> 13. On August 30, 2011, I e-mailed the prosecutor, Gina Essey, to inform her of Mr. Ballard's potential alibi witnesses: Toye Baker, Tiye Cheetham (sic), Kyheem Cheetham (sic), Khalies (sic) Ballard, and Jauhar Ballard. . . .
>
> 14. I did not present any alibi witnesses at Mr. Ballard's trial.
>
> 15. I do not recall whether I interviewed Khalief Ballard.
>
> . . .
>
> 20. Shortly before trial, I received additional discovery from the State consisting of Mr. Ballard's recorded telephone conversations from jail. I believed and I told the Court that I had a right to hear those recordings so that I could prepare a defense. I thought there could be things in those recordings that could exonerate Mr. Ballard. I did not know if Mr. Ballard discussed his alibi in those recordings.

¶ 38 Regarding counsel's allegedly deficient investigation into Defendant's alibi, there is a significant omission from the Order that the State fails to address on appeal: potential alibi witness, Khalief Ballard, corroborated Defendant's alibi and claimed to have been with him the morning of the crime. Defendant now claims that Khalief, Defendant's son, was never contacted or interviewed by trial counsel prior to trial. In her affidavit, trial counsel states that she "do[es] not recall" whether she interviewed Khalief, although she concedes he was not on her witness list. In his sworn statement, Khalief claims that he "was never contacted or interviewed" by trial counsel about his father's case. Moreover, nothing in the record indicates why counsel may have chosen not to interview Khalief, and, in fact, we do not know whether trial counsel interviewed him at all. Because whether a defendant's counsel "made a particular strategic decision remains a *question of fact*, and is not something which can be hypothesized[,]" *Todd*, 369 N.C. at 712, 799 S.E.2d at 838 (emphasis added), we cannot say with certainty whether counsel strategically decided not to investigate Khalief as an alibi witness, and this factual issue

can only be appropriately resolved at an evidentiary hearing. *See also Allen*, 378 N.C. at 300, 2021-NCSC-88, ¶32 ("[T]he court is not at liberty to invent for counsel a strategic justification which counsel does not offer and which the record does not disclose.").

¶ 39 Therefore, applying *Strickland*, Defendant has sufficiently alleged a factual dispute regarding his alibi defense that, if ultimately proven true, would support his contention that counsel's failure to investigate Khalief as an alibi witness was deficient and prejudiced the outcome of the trial. He is entitled, at a minimum, to an evidentiary hearing on his IAC claims. We therefore vacate and remand the Order of the trial court, with instruction to hold an evidentiary hearing on the IAC claims. Because we conclude that the trial court erred in summarily denying one of Defendant's IAC claims, "we need not address his other claims here without the benefit of a more fully developed factual record." *Allen*, 378 N.C. at 303, 2021-NCSC-88, ¶40.

G. Gatekeeper Order

¶ 40 **[5]** In the Order, the trial court concluded that "pursuant to N.C.G.S. § 15A-1419(a), Defendant's failure to assert any other grounds in this Motion shall be treated in the future as a **BAR** to any other motions for appropriate relief that he might hereafter file in this case." However, we have previously held that this statute does not allow trial courts to enter "gatekeeper" orders that preclude defendants from filing any future MAR, because "the determination regarding the merits of any future MAR must be decided based upon that motion. Gatekeeper orders are normally entered only where a defendant has previously asserted numerous frivolous claims." *State v. Blake*, 275 N.C. App. 699, 714, 853 S.E.2d 838, 848 (2020) (citations omitted). Because this is not a case where Defendant "has filed many frivolous MARs asserting the same claims[,]" *id.*, we therefore vacate the erroneous gatekeeper portion of the trial court's Order.

III. Conclusion

¶ 41 For the foregoing reasons, we affirm the *Brady* and *Napue* portions of the Order, vacate the gatekeeper and IAC portions of the Order, and remand for the trial court to conduct an evidentiary hearing on Defendant's IAC claims.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judge MURPHY concurs with the exception of paragraph 35.

Judge GRIFFIN concurs by separate opinion.

GRIFFIN, Judge, concurring.

¶ 42 While I concur in the result reached in the case before us, this is, in part, based solely upon this Court's adherence to North Carolina Supreme Court precedent. I write separately to express my concerns with our Supreme Court's precedent binding this Court to hold that Defendant is entitled to an evidentiary hearing on his IAC claim.

¶ 43 The standard employed by the majority effectively guarantees any defendant an MAR evidentiary hearing when the defendant merely alleges "facts which, if proven true, would entitle him to relief." *State v. Allen*, 378 N.C. 286, 2021-NCSC-88, ¶ 29. The novel precedent set out in *Allen* requires this Court to review Defendant's MAR "in the light most favorable to [Defendant]" and "to vacate the summary dismissal order and remand to the MAR court to conduct an evidentiary hearing" if any factual disputes arise. *Id.* ¶ 24. I acknowledge the reliance on *Allen* in utilizing this standard. However, the standard utilized in *Allen* is not supported anywhere in the North Carolina General Statutes or North Carolina caselaw. Our legislature, in writing this unambiguous statute, provided MAR defendants with sufficient protections as the statute is written.

¶ 44 The holding in *Allen* allows a petitioning party to take away the gatekeeping function of the trial judge. This results in meritless hearings that will deplete the resources of our trial courts by simply alleging a disputed fact, regardless of its legitimacy. Certainly, our Supreme Court thought about the practical implications of flooding our trial courts by applying this new standard for evidentiary hearings. *See id.* ¶ 78 (Berger, J., dissenting) ("The majority opinion, however, strips trial court judges of this important gatekeeping function. As a result, trial courts will now be forced to spend precious time and resources conducting evidentiary hearings on meritless post-conviction motions.") This position clearly frustrates the plain language of the statute, takes away discretion from our trial judges, and shows a need for our Supreme Court to revisit its holding.

¶ 45 Requiring an evidentiary hearing in this instance runs counter to the plain language of N.C. Gen. Stat. § 15A-1420(c), which states:

> (1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection,

whether an evidentiary hearing is required to resolve questions of fact. Upon the motion of either party, the judge may direct the attorneys for the parties to appear before him for a conference on any prehearing matter in the case.

(2) An evidentiary hearing is not required when the motion is made in the trial court pursuant to G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact.

(3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law. The defendant has no right to be present at such a hearing where only questions of law are to be argued.

(4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. The defendant has a right to be present at the evidentiary hearing and to be represented by counsel. A waiver of the right to be present must be in writing.

(5) If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

(6) A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.

(7) The court must rule upon the motion and enter its order accordingly. When the motion is based upon an asserted violation of the rights of the defendant under the Constitution or laws or treaties of the United States, the court must make and enter conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

N.C. Gen. Stat. § 15A-1420(c) (2019). The official commentary of this section provides for two types of hearings: "One is the hearing based

upon affidavits, transcripts, or the like, plus matters within the judge's knowledge, to comply with the parties' entitlement to a hearing on questions of law and fact. The other is an evidentiary hearing." N.C. Gen. Stat. § 15A-1420, Off. Comment. (2019).

¶ 46 Based on the plain language of the statute and its official commentary, the trial court is permitted discretion to determine whether an evidentiary hearing is required. *See id.* § 15A-1420(c)(1). Additionally, even when questions of fact are presented to the trial court or a motion has merit, it is clear that an evidentiary hearing is not necessarily required by the statute. Instead, the trial court has been given clear authority in the statute to exercise discretion. If the motion presents a factual dispute, the trial court may conduct a "hearing based upon affidavits, transcripts, or the like, plus matters within the judge's knowledge, to comply with the parties' entitlement to a hearing on questions of law and fact[,]" unless, "the court cannot rule upon the motion without the hearing of evidence[.]" *Id.* §§ 15A-1420(c)(1), (4), and Off. Comment. However, the statute clearly leaves open the possibility for the trial court to resolve the motion without a hearing if the trial court determines it is not necessary. *See State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) ("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." (citation and internal quotation marks omitted)).

¶ 47 Here, the trial court determined that it could decide the matter without an evidentiary hearing. The trial court was provided with an extensive record from the trial and post-conviction proceedings. The submissions before the judge included an affidavit from the defense counsel and the alleged alibi witness. The trial judge had sufficient information to decide the IAC claim and, in his discretion, determined the MAR could be resolved without an evidentiary hearing. The trial court's order stated that "Defendant's . . . assertions within his ineffective assistance of counsel claim were strategic decisions regarding witnesses made by Defendant's trial counsel" and therefore "Defendant's first claim . . . that he received ineffective assistance of counsel, is without merit." Since there were no factual disputes requiring a hearing and the trial court found no merit to Defendant's IAC claim, the trial court, within its authority, summarily resolved the claims in its order.

¶ 48 While I disagree with the *Allen* standard regarding the evidentiary hearing, I recognize that this Court is bound by our Supreme Court's

precedent. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) ("[T]he Court of Appeals . . . has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." (citations and internal quotation marks omitted)). Accordingly, I concur in the majority opinion.

STATE OF NORTH CAROLINA
v.
JOHN WESLEY CONNER, DEFENDANT

No. COA21-715

Filed 3 May 2022

1. Confessions and Incriminating Statements—admission to law enforcement—drug possession—not in custody

In a prosecution for multiple sexual offenses against a child and one charge of methamphetamine possession where, on the day of his arrest, defendant locked himself in a bedroom and threatened to commit suicide, police officers tried to convince defendant to come out without hurting himself, and defendant told them there was methamphetamine in the bedroom, the trial court properly denied defendant's motion to suppress his statement about the methamphetamine. At the time defendant made the statement, defendant was not in custody such that *Miranda* warnings were required where, although the officers had informed defendant that they were there to arrest him, they had not placed him under formal arrest, they had not restrained defendant's movement (he chose to lock himself in the bedroom), and all of their communications with defendant were for the purpose of convincing him to safely leave the bedroom.

2. Judgments—criminal—clerical error—minimum sentence

After defendant was convicted of multiple sexual offenses against a child and one charge of methamphetamine possession, one of his criminal judgments was vacated and remanded for correction of a clerical error where the judgment listed the minimum sentence for the offense as nineteen months but the trial court had announced at sentencing that the minimum sentence would be sixteen months.

Judge MURPHY concurring in result only.

Appeal by defendant from judgments entered 21 May 2021 by Judge Steve R. Warren in McDowell County Superior Court. Heard in the Court of Appeals 5 April 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamika L. Henderson, for the state-appellee.

Drew Nelson for defendant-appellant.

GORE, Judge.

¶ 1 Defendant John Wesley Conner appeals from judgments entered upon a jury's verdicts finding him guilty of statutory rape of a child by an adult, five counts of indecent liberties with a child, two counts of statutory sex offense with child by adult, and possession of methamphetamine. After careful review, we find no error in part and vacate and remand one judgment to the trial court for correction of a clerical error.

I. Background

¶ 2 On 19 January 2018, defendant was arrested by McDowell County Sheriff's Office pursuant to warrants alleging that between 1 November 2017 and 17 January 2018 defendant committed statutory rape of a child by adult and multiple counts of indecent liberties with a child. Defendant was released pursuant to a secured bond that same day. On 22 January 2018, additional arrest warrants were issued and executed alleging that between 1 November 2017 and 17 January 2017 defendant committed the offenses of statutory sex offense with a child by adult and indecent liberties with child and on 19 January 2018, defendant committed the offense of possession of methamphetamine. Defendant was again released pursuant to secured bond. A final warrant for arrest was issued on 29 January 2018 and executed on 30 January 2018 alleging defendant committed statutory sex offense with child by adult and indecent liberties with child, between 1 November 2017 and 17 January 2018. Defendant was once again released pursuant to secured bond.

¶ 3 Deputies from the McDowell County Sheriff's Office served the first set of arrest warrants at defendant's aunt's house. When deputies arrived at the aunt's house defendant was in a locked bedroom. Deputies instructed defendant to exit the bedroom, but defendant refused indicating that he had a knife and if the deputies entered the bedroom, he would kill himself. The deputies, communicating with defendant

through the locked door, initiated negotiations with the purpose of convincing defendant to come out peacefully and not harm himself. The negotiations lasted approximately five hours. During the negotiations, the deputies told defendant that they were there to execute arrest warrants regarding allegations made against him by a child. At some point during the negotiations between McDowell County Sherriff's Office deputies and defendant, defendant informed the deputies that he purchased what he believed to be either methamphetamine or cocaine and those drugs were with him in the bedroom. Following hours of negotiations deputies were able to convince defendant to exit the bedroom peacefully.

¶ 4 On 4 April 2018, defendant was indicted for one count of statutory rape of a child by an adult, two counts of statutory sex offense with child by an adult, five counts of indecent liberties with a child, and one count of possession of methamphetamine.

¶ 5 The matter came on for trial on 17 May 2021 and lasted five days. During the trial, defendant objected to the introduction of testimony from a McDowell County Sherriff's Office deputy regarding defendant's statement about the presence of methamphetamine in the bedroom. Defendant argued that at the time he made the statement he was in custody and subject to interrogation and, because he was not read his *Miranda* rights, any incriminating statements are not admissible at trial. The trial court overruled defendant's objection, concluding that the deputy's statements during negotiations with defendant were for the purpose of convincing him to exit the room safely and were not to elicit an incriminating response, thus, the questions did not constitute interrogation.

¶ 6 At the conclusion of the trial, the jury returned guilty verdicts on all charges submitted. The trial court entered consecutive sentences of 300 to 420 months imprisonment each for the statutory rape of child by adult offense and statutory sex offense with child by adult, four consecutive 16 to 29 months imprisonment sentences for four of the indecent liberties with a child charges, and one consecutive sentence of 19 to 29 months imprisonment for the final indecent liberties with a child charge. The trial court consolidated the sentence or the possession of methamphetamine offense into one of the indecent liberties with child sentences.

¶ 7 Defendant entered oral notice of appeal in open court on 21 May 2021.

II. Discussion

¶ 8 Defendant raises two issues on appeal. First, he argues that the trial court erred by allowing testimony of a statement defendant made while

allegedly in custody. Second, he argues that the judgment in 18 CRS 50077 contains a clerical error. We discuss these arguments in turn.

A. Custodial Interrogation

¶ 9 **[1]** The questions of whether defendant was subject to custodial interrogation is a question of law, and thus, subject to *de novo* review. *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001). "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) (quotation marks and citation omitted).

¶ 10 The Fifth Amendment to the United States Constitution requires police officers to give suspects of a crime certain warning in order to protect that individual's right against self-incrimination in the inherently compelling context of custodial interrogations by police officers. *See generally Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). "[T]he initial inquiry in determining whether *Miranda* warnings were required is whether an individual was 'in custody.' " *Buchanan*, 353 N.C. at 337, 543 S.E.2d at 826.

¶ 11 The *Miranda* Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706. The Supreme Court has since provided further context to this definition. In *Oregon v. Mathiason*, the Supreme Court stated that

> police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."

Oregon v. Mathiason, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977). The ultimate inquiry is based on the totality of the circumstances and requires a determination whether there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Thompson v. Keohane*, 516 U.S. 99, 112, 133 L. Ed. 2d 383, 394 (1995).

¶ 12 This State's Supreme Court summarized the application of *Miranda* in custodial interrogations as such: "in determining whether a suspect

[is] in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). Therefore, "the appropriate inquiry in determining whether a defendant is in custody for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828 (cleaned up).

¶ 13 Defendant argues that *Miranda* warnings were required because he was subject to an interrogation. Defendant argues the encounter was an interrogation because the deputy knows or reasonably should have known that the words or actions were reasonably likely to elicit an incriminating response. *See State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000).

¶ 14 The facts of the present case show that the McDowell County Sheriff's Office deputies arrived at the house to execute an arrest warrant and arrest defendant. When the deputies arrived, defendant locked himself in a bedroom, refused to exit the bedroom, and threatened to kill himself. The deputies engaged in negotiations with defendant in an attempt to convince him to leave the bedroom. Defendant was informed the deputies were there to arrest him, but the negotiations were limited to the purpose of having defendant safely leave the bedroom. During the negotiations, defendant informed the deputies there was methamphetamine in the bedroom. Defendant was not placed under formal arrest, nor did the deputies restrain his movement (defendant chose to lock himself in the bedroom).

¶ 15 Our review of North Carolina case law does not reveal any North Carolina cases with facts directly on point. However, other jurisdictions have contemplated similar factual scenarios. *See United States v. Mesa*, 638 F.2d 582, 588 (3d Cir. 1980) (concluding the defendant was not in custody when barricaded in a motel room with a gun and communicating with law enforcement via the telephone); *see also West v. State*, 923 P.2d 110, 113 (Alaska Ct. App. 1996) ("For reasons that seem sound upon reflection, [multiple courts around the country] unanimously conclude that custodial interrogation requiring *Miranda* warnings does not occur when police communicate with a barricaded suspect who holds them at bay."); *Atac v. State*, 125 So. 3d 806, 811 (Fla. Dist. Ct. App. 2013) (concluding that a defendant who refused to exit his apartment and threatened to commit suicide was not in custody when law enforcement

attempted to convince him to exit the apartment peacefully). We find these court's decisions persuasive.

¶ 16 In the instant matter, defendant refused to exit the bedroom and threatened to commit suicide if McDowell County Sheriff's Office deputies entered the bedroom. The deputies attempted to convince him to exit the bedroom peacefully. At the time of the negotiation defendant was not under formal arrest. Law enforcement cannot be expected to issue *Miranda* warnings when attempting to arrest an individual. *Miranda* warnings are only required once an arrest has been made or law enforcement is able to exercise a degree of control equivalent to a formal arrest. Defendant's actions prevented the deputies from placing defendant under formal arrest or exercising any degree of control equivalent to a formal arrest. We conclude that because defendant had barricaded himself in the bedroom and refused to exit defendant was not in custody. Thus, we need not reach the issue of whether the deputies' conversation with defendant amounted to "interrogation," as defendant argues, because defendant was never in custody; therefore, *Miranda* warnings were not required.

B. Clerical Error

¶ 17 **[2]** Defendant next asserts that the judgment in 18 CRS 50077 contains a clerical error. The judgment states the minimum sentence for the offense as 19 months. However, at sentencing the trial court announced the minimum sentence as 16 months. The State concedes this clerical error and contends that the matter should be remanded to the trial court for correction. *See State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999). We agree.

III. Conclusion

¶ 18 For the foregoing reasons we conclude that the trial court did not err in allowing testimony of defendant's statement to McDowell County Sheriff's Office deputies that he possessed methamphetamine. We also conclude that the judgment in 18 CRS 50077 contains a clerical error. Thus, we find no error in part and vacate and remand in part for correction of clerical error.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judge MURPHY concurs in result only.

Judge GRIFFIN concurs.

STATE v. DARR

[283 N.C. App. 259, 2022-NCCOA-296]

STATE OF NORTH CAROLINA
v.
STAMEY JASON DARR

No. COA21-493

Filed 3 May 2022

1. Confessions and Incriminating Statements—custodial interrogation—request for counsel—ambiguous

Defendant's confession in the sheriff's office before he was placed under arrest for the rape of a minor was not subject to right-to-counsel analysis. On the other hand, his subsequent statements made after he was informed that he was under arrest were subject to right-to-counsel analysis; however, because his request regarding an attorney was ambiguous ("I'll talk but I want to hire a lawyer with it") and the sheriff's detective attempted to clarify whether defendant wanted an attorney before he spoke further with the detectives, defendant's right to counsel was not violated.

2. Rape—statutory—indictment and proof—variance—dates of crime

A variance between the date on the indictment charging defendant with statutory rape and the victim's testimony did not necessitate dismissal of the charge. The date in an indictment for statutory rape is not an essential element of the crime, and the victim's testimony that the crime occurred when she was fourteen years old and the defendant was nineteen years her elder allowed the State to survive defendant's motion to dismiss.

Judge ARROWOOD concurring in result in separate opinion.

Appeal by defendant from judgment entered 19 February 2021 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 26 January 2022.

Massengale & Ozer, by Marilyn G. Ozer, for Defendant-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

CARPENTER, Judge.

¶ 1 Stamey Jason Darr ("Defendant") was indicted on 1 October 2018 for statutory rape and forcible rape of the victim ("Victim"). On 19 February 2021, the trial court convicted Defendant of statutory rape, and he appealed. After careful review, we find no error.

I. Factual & Procedural Background

¶ 2 Defendant was born on 20 May 1982, and Victim was born on 30 August 2001. Victim testified Defendant first had vaginal intercourse with her in 2016; Victim was fourteen years old, and Defendant was thirty-three years old. Victim testified sexual contact between her and Defendant was consistent and continued through 2018. The indictment listed 2017 as the date of the vaginal intercourse. In August 2018, Victim told her high school guidance counselor about her sexual contacts with Defendant, and the counselor notified law enforcement officers.

¶ 3 Randolph County Sheriff's Detective Sibbett requested Defendant come to the Sheriff's Office to discuss a "DSS referral," which concerned an unrelated shooting on Defendant's property, and Defendant did so. Defendant was not formally arrested or restrained when he arrived. Defendant was interrogated by Detectives Trogden and Sibbett on the topic of the "DSS referral." During interrogation, Defendant was allowed to leave to use the restroom and make phone calls. After questioning regarding the shooting incident ceased, the interrogation shifted to Defendant's relationship with Victim.

¶ 4 Detective Trogden assured Defendant he was not under arrest and told Defendant he could leave. The detectives questioned Defendant about Victim's allegations and played a recording of Defendant speaking with Victim. After hearing his recorded conversation with Victim, Defendant told the detectives he had engaged in vaginal intercourse with Victim multiple times in 2017 and 2018.

¶ 5 After Defendant's confession, the detectives left the room, and a Department of Social Services ("DSS") employee entered the room to speak with Defendant. After the DSS employee left the room, the detectives returned, and Detective Sibbett told Defendant he was under arrest and would be charged. Detective Sibbett read Defendant his *Miranda* Rights. Defendant stated, "I'll talk to you but I want a lawyer with it and I don't have the money for one."

¶ 6 After Defendant stated he wanted "a lawyer with it," the detectives asked several questions to clarify Defendant's wishes. Detective Trogden told Defendant he did not see how talking with the detectives "could hurt [Defendant]," and "[he] want[ed] to make sure [Defendant was] willing to speak[.]" Detective Trogden then asked Defendant if he

wished to speak without a lawyer present, if he wished to speak with the detectives, and if he wanted a lawyer present for questioning.

¶ 7 Detective Trogden asked Defendant to respond "yes or no" to whether Defendant would answer questions without an attorney present. Defendant answered in the affirmative and signed a waiver of his right to counsel. Defendant continued to speak with the detectives; however, Defendant did not expand on his earlier confession after his arrest. The video of the Defendant's interrogation by Detectives Sibbet and Trogden records the following exchange, in relevant part:

> **Detective Sibbet:** I've been told Detective Sibbet, who I understand to be a Detective, that he would like to question me—has also explained to me, and I understand that—I have the right to remain silent. That means I do not have to answer anything or answer any questions. Anything I can say can be used against me. I have the right to talk to a lawyer, and to have a lawyer present here with me that will advise and help me during questioning. If I want to have a lawyer with me during questioning, but cannot afford one, a lawyer will be provided to me at no cost before our questioning. You good there?
>
> **Defendant:** Yes, sir.
>
> **Detective Sibbet:** I understand my rights as explained by Detective Sibbet. I now state that I do? Wish? [pause] to answer any questions at this time. Is that—would you like to talk to me?
>
> **Defendant:** I mean I do but I wanna, I don't know what to do.
>
> **Detective Trogden:** We can't make this decision for you.
>
> **Detective Sibbet:** That's up to you, brother.
>
> **Defendant:** There's just so much to think – I mean, am I going to be charged? I mean, I just, I just want to know that, can you tell me that?
>
> **Detective Sibbet:** We don't set bonds, that's completely up to the court.
>
> . . .
>
> **Detective Trogden:** Before we can go any further in this discussing the whole matter, we need to know what you want to do as far as talking to us.

Defendant: I'll talk but I want to hire a lawyer with it. I mean, I don't have to money to get one. . . .

Detective Trogden: Well, the court is going to appoint an attorney to represent you, but just to be clear, you want to talk to us right now?

Defendant: I mean, yeah.

Detective Trogden: Okay.

Defendant: I mean, you'll help me, right?

Detective Trogden: It certainly can't hurt.

Detective Trogden: I think us understanding the truth about what happened will help.

Defendant: [Unintelligible]

Detective Sibbet: Well yeah, this is your opportunity.

Detective Trogden: Would it help if we read it to you again?

Defendant: No sir, I know what it says.

Detective Trogden: Well, what we need you to do is initial where it says initial. . . .

. . .

Detective Sibbet: Just so we're clear, you do want to talk to us right now?

Defendant: Yeah, I mean, I'll talk to y'all. But I know I need a lawyer.

Detective Trogden: So are you, are you saying, you want to talk to us with a lawyer present, are you saying that you want to talk to us, are you saying that you don't walk to talk to us?

Defendant: I mean I wanna talk, I wanna get this figured this out, so I can do whatever.

Detective Trogden: Well, it's very important that we're clear right now as to whether or not you want an attorney. Do you want an attorney to be here with you now or are you saying that you're willing to talk to us without an attorney present? Like, we understand that you're going to get an attorney later to represent you for these charges.

Defendant: So once I talk to y'all, I guess we'll go to the magistrate?

> **Detective Trogden:** Yes sir, that's correct, but to answer my question, is that a yes, or a no?
>
> **Defendant:** I mean, I'll talk to you.

¶ 8 Defendant moved to suppress any statements given in his interrogation and moved to dismiss his statutory rape charge. The trial court found Defendant's alleged request for counsel "equivocal" and "ambiguous," and the trial court found Detective Trogden's statements to be "a poor choice of words in light of all the circumstances" but not an inducement to sign the waiver. Both of Defendant's motions were denied. Defendant was convicted by a jury of statutory rape of a child 15 year or younger, but was found not guilty of second degree forcible rape. Defendant was sentenced as a prior record level II to an active term of 240 to 348 months. Defendant gave oral notice of appeal.

II. Jurisdiction

¶ 9 This Court has jurisdiction to address Defendant's appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2021) and N.C. Gen. Stat. § 15A-1444(a) (2021).

III. Issues

¶ 10 The issues on appeal are whether the trial court erred in denying: (1) Defendant's motion to suppress, or (2) Defendant's motion to dismiss.

IV. Standards of Review

¶ 11 Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

¶ 12 "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 a defendant's motion to dismiss for insufficient evidence, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense." *State v. Cox*, 367 N.C. 147, 150, 749 S.E.2d 271, 274 (2013) (internal quotations and citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "The evidence is to be considered in the light most favorable to the State, and the State is entitled to

. . . every reasonable inference to be drawn therefrom." *Cox*, 367 N.C. at 150, 749 S.E.2d at 274 (internal quotation marks and citations omitted).

V. Analysis

A. Motion to Suppress

¶ 13 **[1]** Defendant first contends the evidence from his interrogation should be suppressed because he requested and did not receive counsel.

¶ 14 Under the Fifth Amendment, "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). A defendant has the right to have an attorney present during custodial interrogation "[i]f . . . he indicates . . . he wishes to consult with an attorney before speaking." *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

¶ 15 A request for counsel must be unambiguous. *State v. Hyatt*, 355 N.C. 642, 655, 566 S.E.2d 61, 70 (2002) (citing *Davis v. United States*, 512 U.S. 452, 459 (1994)). A request for counsel is unambiguous if the suspect "articulate[s] his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *State v. Golphin*, 352 N.C. 364, 450, 533 S.E.2d 168, 225 (2000) (quoting *Davis*, 512 U.S. at 459). "[W]hen a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney." *State v. Taylor*, 247 N.C. App. 221, 226, 784 S.E.2d 224, 228 (2016) (quoting *Davis*, 512 U.S. at 461).

¶ 16 The right to presence of counsel during questioning applies only to custodial interrogation. *State v. Medlin*, 333 N.C. 280, 290, 426 S.E.2d 402, 407 (1993). "[T]he appropriate inquiry in determining whether a defendant is 'in custody' for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.' " *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001). This inquiry is an objective determination. *Id.* at 341, 543 S.E.2d at 829.

¶ 17 Here, Defendant came to the Randolph County Sheriff's Office on his own volition. Prior to Defendant's confessing to sexual intercourse with Victim, Detective Trogden told Defendant he was not under arrest and could leave. Further, Defendant's freedom of movement was not

restrained; he was allowed to use the restroom and make phone calls. Therefore, based on the totality of the circumstances, competent evidence shows Defendant was not in custody when he confessed to having sexual intercourse with Victim. *See Cooke*, 306 N.C. at 134, 291 S.E.2d at 619; *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828. Defendant was not in custody when he first confessed and voluntarily answered the questions of the detectives. Therefore, an analysis of a request-for-counsel inquiry is inapplicable to Defendant's initial confession. *See Medlin*, 333 N.C. at 290, 426 S.E.2d at 407.

¶ 18 After Defendant's initial confession, the detectives arrested Defendant, read him his *Miranda* rights, and told him he would be charged. At this point, Defendant was in custody, as he had been formally arrested. *See Buchanan*, at 341, 543 S.E.2d at 829. Therefore, Defendant's statements made after his formal arrest are subject to a request-for-counsel inquiry, as these statements were made during a custodial interrogation. *See Medlin*, 333 N.C. at 290, 426 S.E.2d at 407.

¶ 19 After Defendant was arrested, he stated, "I'll talk but I want to hire a lawyer with it. I mean, I don't have to money to get one." It is unclear what Defendant meant by "I want a lawyer with it;" in light of his initial voluntary confession, "it" could have referred to the charge, the expected trial, or the interrogation. The detectives repeatedly tried to clarify Defendant's request, a practice labeled by this Court as "good police practice." *See Taylor*, 247 N.C. App. at 226, 784 S.E.2d at 228. Defendant then agreed to continue the interrogation without counsel and signed a waiver of counsel. In the factual context of this case, a reasonable police officer would not understand Defendant's statement as an unambiguous request for counsel during interrogation. *See Golphin*, 352 N.C. at 450, 533 S.E.2d at 225.

¶ 20 In his brief, Defendant cites to *State v. Torres*, a case overruled on several grounds, to assert the detectives did not seek to clarify his comments; rather, Defendant asserts Detective Trogden attempted to dissuade him from obtaining counsel. *See State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992); *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012). The trial court found one of Detective Trogden's comments to be a "poor choice of words," but was not an inducement to waive counsel. After making the comments, Detective Trogden asked Defendant if he wished to speak without a lawyer present, if he wished to speak with the detectives, and if he wanted a lawyer present for questioning. Detective Trogden asked several questions that were clarifying in nature, and only one that "was a poor choice or words."

¶ 21 Because Defendant's statement was ambiguous, and the questions that followed were intended to clarify the statement, competent evidence shows Defendant's right to counsel was not violated. *See Hyatt*, 355 N.C. at 655, 566 S.E.2d at 70; *Golphin*, 352 N.C. at 450, 533 S.E.2d at 225; *Taylor*, 247 N.C. App. at 226, 784 S.E.2d at 228; *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

¶ 22 Accordingly, competent evidence exists to support the finding Defendant was not in custody until after his arrest. Any statement made prior to his arrest was valid and not subject to a right-to-counsel analysis, and an analysis of Defendant's right to counsel is only applicable to his statements made after arrest. *See Taylor*, 247 N.C. App. at 226, 784 S.E.2d at 228; *Medlin*, 333 N.C. at 290, 426 S.E.2d at 407. The trial court's findings were supported by competent evidence to show Defendant's request was ambiguous at the time the request was made, and the detective's statements were an attempt to clarify Defendant's statements. Therefore, the statements made after Defendant's arrest were not subject to suppression. These findings supported the trial court's conclusion to deny Defendant's motion to suppress. *See Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

B. Motion to Dismiss

¶ 23 **[2]** Defendant argues the trial court erred in denying his motion to dismiss because the dates alleged in the indictment varied from Victim's testimony, and the only evidence supporting the charge was imprecise testimony.

¶ 24 A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse with another person who is fifteen years of age or younger, and the defendant is at least twelve years old and six years older than the other person. N.C. Gen. Stat. § 14-27.25(a) (2021). The elements of statutory rape are: (1) vaginal intercourse; (2) with a child who is fifteen years old or younger; and (3) the defendant is at least six years older than the child. *State v. Sprouse*, 217 N.C. App. 230, 240, 719 S.E.2d 234, 242 (2011).

¶ 25 An indictment must allege facts supporting each element of the offense charged. N.C. Gen. Stat. § 15A-924(a)(5) (2021). An indictment must also identify the date of offense. N.C. Gen. Stat. § 15A-924(a)(4). However, "[e]rror as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice." N.C. Gen. Stat. § 15A-924(a)(4).

¶ 26 The date given in an indictment for statutory rape "is not an essential element of the crime charged. . . ." *State v. Norris*, 101 N.C. App.

144, 151, 398 S.E.2d 652, 656 (1990). Particularly in cases involving the sexual abuse of children, courts are lenient concerning differences between dates alleged in the indictment and dates proven at trial. *State v. McGriff*, 151 N.C. App. 631, 637, 566 S.E.2d 776, 779 (2002). A victim's testimony of sexual intercourse is enough to uphold a trial court's denial of a motion to dismiss. *State v. Estes*, 99 N.C. App. 312, 316, 393 S.E.2d 158, 160 (1990); *State v. Bruce*, 315 N.C. 273, 281, 337 S.E.2d 510, 516 (1985) (stating a victim's testimony the defendant penetrated her is all that is "required to permit the jury to find beyond a reasonable doubt that the penetration had in fact occurred").

¶ 27 Here, Victim testified Defendant engaged in vaginal intercourse with her in 2016 when she was fourteen years old, and Defendant was nineteen years her elder. Defendant admitted to having vaginal intercourse with Victim in 2017, but it is unclear whether these occasions were before or after Victim's fifteenth birthday. The date of the vaginal intercourse listed on the indictment was 2017.

¶ 28 Variance between the date on the indictment and Victim's testimony is not enough to justify a motion to dismiss, as the date given on an indictment for statutory rape is not an essential element of the crime, and courts are lenient concerning dates in cases involving the sexual abuse of minors. *See Norris*, 101 N.C. App. at 151, 398 S.E.2d at 656; *McGriff*, 151 N.C. App. at 637, 566 S.E.2d at 779. Therefore, Victim's testimony alleging vaginal intercourse in 2016 between her and Defendant—when Victim was fourteen and Defendant was nineteen years her elder—is sufficient to survive a motion to dismiss. *See Sprouse*, 217 N.C. App. at 240, 719 S.E.2d at 242; *Estes*, 99 N.C. App. at 316, 393 S.E.2d at 160.

¶ 29 Accordingly, the trial court properly denied Defendant's motion to dismiss, as relevant evidence existed to support a finding of each essential element of the offense charged and to maintain Defendant was the perpetrator. *See Cox*, 367 N.C. at 150, 749 S.E.2d at 274; *Smith*, 300 N.C. at 78-79, 265 S.E.2d at 169.

VI. Conclusion

¶ 30 Competent evidence exists to support the finding Defendant was not in custody until after his arrest. An analysis of Defendant's right to counsel in the context of this case is only applicable to his confession made after his arrest. Therefore, any statement made prior to Defendant's arrest—including his confession—was valid and not subject to a right-to-counsel analysis. Further, competent evidence shows Defendant's request, though custodial, was ambiguous, and therefore, did not trigger his right to counsel. *See Taylor*, 247 N.C. App. at 226, 784

S.E.2d at 228; *Medlin*, 333 N.C. at 290, 426 S.E.2d at 407; *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

¶ 31 Lastly, the trial court properly denied Defendant's motion to dismiss the charge of statutory rape, as relevant evidence existed to support a finding of each essential element of the offense charged and to maintain Defendant was the perpetrator. *See Cox*, 367 N.C. at 150, 749 S.E.2d at 274; *Smith*, 300 N.C. at 78-79, 265 S.E.2d at 169. Accordingly, we find no error in the jury's verdict or in the judgment entered thereon.

NO ERROR.

Judge TYSON concurs.

Judge ARROWOOD concurs in separate opinion.

ARROWOOD, Judge, concurring in result.

¶ 32 I concur in the result of the majority opinion affirming defendant's conviction, and further concur in the majority's analysis regarding defendant's initial confession and motion to dismiss. I write separately, however, to address defendant's request for counsel during the custodial interrogation. Although the majority concludes defendant's request was ambiguous and Detective Trogdon's questions were "good police practice" aimed at clarifying defendant's request, I believe defendant's request was sufficiently clear and unambiguous.

¶ 33 As the majority correctly notes, a defendant must make an unambiguous request for counsel which articulates their desire to have an attorney present at custodial interrogation, "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *See State v. Hyatt*, 355 N.C. 642, 655, 566 S.E.2d 61, 70 (2002) (citation omitted); *State v. Golphin*, 352 N.C. 364, 450, 533 S.E.2d 168, 225 (2000) (citations and quotation marks omitted).

> There are no "magic words" which must be uttered in order to invoke one's right to counsel. The crucial determination is whether the person has indicated "in any manner" a desire to have the help of an attorney during custodial interrogation. . . . In deciding whether a person has invoked [their] right to counsel, therefore, a court must look not only at the words spoken, but the context in which they are spoken as well.

State v. Barber, 335 N.C. 120, 130, 436 S.E.2d 106, 111 (1993) (quoting *State v. Torres*, 330 N.C. 517, 528, 412 S.E.2d 20, 26 (1992)). "[A] statement either is such an assertion of the right to counsel or it is not." *Davis v. United States*, 512 U.S. 452, 459, 129 L. Ed. 2d 362, 371 (1994) (citation and quotation marks omitted). "If a criminal suspect invokes his right to counsel at any time during custodial interrogation, the interrogation must cease, and it cannot be resumed in the absence of an attorney unless the defendant initiates further discussion with the officers." *Hyatt*, 355 N.C. at 655, 566 S.E.2d at 70 (citations omitted).

¶ 34 In *Davis*, the United States Supreme Court held that a defendant's statement, "Maybe I should talk to a lawyer," made an hour and a half into his interrogation, was not a request for counsel. *Davis*, 512 U.S. at 462, 129 L. Ed. 2d at 373. In *Hyatt*, the North Carolina Supreme Court held that a defendant's statements were insufficient to constitute an invocation of his Fifth Amendment right to counsel because the statements "conveyed his father's wish that [defendant] get an attorney," but did not unambiguously convey defendant's own desire to receive the assistance of counsel. *Hyatt*, 355 N.C. at 656-57, 566 S.E.2d at 71. Similarly, in *State v. Dix*, this Court held that a defendant's statement, "I'm probably gonna have to have a lawyer," was not sufficiently unambiguous when taken out of context. *State v. Dix*, 194 N.C. App. 151, 156, 669 S.E.2d 25, 28 (2008), *writ denied*, *disc. review denied*, *appeal dismissed*, 363 N.C. 376, 679 S.E.2d 140 (2009).

¶ 35 In this case, once defendant was formally arrested, he initially expressed uncertainty about what he wanted to do. Detective Sibbett told defendant that the detectives "need to know what [defendant] want[s] to do as far as talking" with them, and defendant responded "I'll talk but I want to hire a lawyer with it. I mean, I don't have the money to get one . . . ." The following exchange ensued:

> Detective Trogdon: Well, the court is going to appoint an attorney to represent you, okay, but just to be clear, you want to talk to us right now?
>
> Defendant: I mean, yeah.
>
> Detective Trogdon: Okay.
>
> Defendant: I mean you'll help me right?
>
> Detective Trogdon: It certainly can't hurt.

Detective Trogdon offered to read defendant his rights again, but defendant stated that he knew "what [the paper] says." Detective Trogdon

then directed defendant to sign, date and initial a form indicating that he waived his right to have counsel present for the interrogation. After defendant returned the completed form, Detective Sibbett again asked, "[j]ust so we're clear, you do want to talk to us right now?" Defendant responded, "[y]eah, I mean, I'll talk to y'all. But I know I need a lawyer."

¶ 36 Detective Trogdon then asked, "are you saying that you want to talk to us with a lawyer present, or are you saying that you want to talk to us, or are you saying that you don't want to talk with us?" Defendant responded, "I wanna talk, I want to get this figured out so I can . . . do whatever, I mean . . . ." Detective Trogdon responded that it was "very important that we're clear right now as to whether or not you want an attorney. Do you want an attorney to be here with you now or are you saying that you're willing to talk to us without an attorney present?" Detective Trogdon noted that defendant was "going to get an attorney later to represent [him] for these charges." Defendant responded, "[s]o once I talk to y'all, I guess we'll go to the magistrate?" Detective Trogdon told defendant that was correct, and asked regarding his previous question, "is that a yes, or a no[,]" to which defendant responded, "I mean, I'll talk to you."

¶ 37 Although defendant initially expressed some willingness to speak with police, his statements were also clear that he wanted a lawyer before doing so. Rather than ceasing the interrogation at that point, Detective Trogdon stated that counsel would be appointed and framed defendant's statements as an indication that he "want[ed] to talk to" the detectives. When Detective Sibbett made a similar inquiry, defendant again stated "[b]ut I know I need a lawyer."

¶ 38 This case is distinguishable from the aforementioned cases where defendants stated that they "maybe" or "probably" needed to speak with a lawyer before custodial interrogation, or failed to articulate their own desires. Instead, defendant stated that he would talk to police, "*but I want a lawyer with it* . . . [and] I don't have the money to get one . . . ." (emphasis added). This was an unequivocal, unambiguous request for counsel, combined with a statement that defendant could not afford to hire counsel. Once defendant told Detective Trogdon that he wanted a lawyer, the custodial interrogation should have ceased, and Detective Trogdon's statements, including stating how he did not see how talking to police "could hurt [defendant]," were improper. This is especially clear given defendant's later statement reasserting his desire for the assistance of counsel. Although defendant eventually did agree to talk with the detectives after a more detailed inquiry, the interrogation should have ceased prior to that point. As the United States Supreme

Court held, a defendant's statement is either "an assertion of the right to counsel or it is not[,]" and in this case a reasonable police officer should have understood defendant's statement was an invocation of his right to counsel. *Davis*, 512 U.S. at 459, 129 L. Ed. 2d at 371 (citation and quotation marks omitted).

¶ 39 Nevertheless, because defendant's initial confession was made voluntarily and prior to custodial interrogation, the trial court's decision regarding the suppression of defendant's later statements amounts to harmless error. And although the trial court's error does not impact the result of this appeal, I believe it is important to set out the correct analysis rather than perpetuating the trial court's error.

STATE OF NORTH CAROLINA
v.
MARQUIS JULIUS GRAHAM, DEFENDANT

No. COA21-99

Filed 3 May 2022

1. Criminal Law—jury instructions—felony-murder of child—unexplained death—inference that adult with exclusive custody is perpetrator

In a prosecution for the murder of a child, there was no error by the trial court in instructing the jury that when an adult has exclusive custody of a child who suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries. The challenged instruction, when viewed in context and in light of the entire jury charge, did not create a mandatory presumption and was not likely to mislead the jury.

2. Appeal and Error—preservation of issues—questions about privileged communications—one objection sufficient

The defendant in a murder prosecution preserved for appeal the issue of whether the trial court erred by allowing the State to cross-examine him about communications he had with his attorney by making an initial objection (which was denied). Although defendant did not thereafter renew his objections during continued questioning, pursuant to N.C.G.S. § 15A-1446(d)(10), any further questions about the privileged communications were preserved because the objection was improperly overruled.

3. Evidence—privileged attorney-client communication—questions allowed—no prejudice

In a murder trial, although the trial court erred by allowing the State to cross-examine defendant about privileged communications he had with his attorney about the case—specifically, whether defendant told his attorney the same information that he testified to at the trial—the error did not prejudice defendant where, prior to cross-examination, he had already admitted that he lied to the police on the morning the victim died, and his credibility was therefore already in question.

4. Indictment and Information—first-degree murder—denial of motion to compel State to identify specific theory

The trial court properly denied defendant's pre-trial motion to compel the State to disclose which theory of first-degree murder it was proceeding with because the State is not required to elect a specific theory prior to trial.

Appeal by Defendant from judgment entered 19 February 2020 by Judge David A. Phillips in Gaston County Superior Court. Heard in the Court of Appeals 12 January 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General John P. Barkley, for the State.

Dylan J.C. Buffum for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Marquis Julius Graham appeals from a judgment entered upon a jury's verdict finding him guilty of first-degree murder. Defendant argues that the trial court erred by (1) instructing the jury that there was sufficient evidence to infer that Defendant intentionally injured the victim; (2) allowing the State to examine Defendant about privileged communications between Defendant and his counsel; and (3) denying Defendant's motion to compel the State to disclose the theory upon which it sought to convict Defendant of first-degree murder. After review, we conclude that Defendant received a fair trial, free from prejudicial error.

I. Factual and Procedural Background

¶ 2 Defendant lived with his girlfriend, Ayanha Barnett, and her two sons at the time of the alleged murder. On the morning of 5 November

2017, Defendant woke up and travelled to a convenience store before returning home to smoke a cigar outside. Defendant returned to bed to lie down after he finished smoking. Meanwhile, Ms. Barnett was preparing to leave for an appointment in Charlotte. After Ms. Barnett informed Defendant that she was leaving for her appointment, Defendant walked her to the door before returning to bed and falling asleep. Ms. Barnett testified that at the time she left for her appointment, the two children were still asleep in their room.

¶ 3 Defendant testified that he slept for approximately two more hours after Ms. Barnett left for her appointment. After he woke up, Defendant watched some television before one of Ms. Barnett's sons, Cayden, asked Defendant to make him breakfast. Defendant prepared cereal for Cayden. After Cayden finished his breakfast, he returned to his room before telling Defendant that his brother, Kye, would not wake up to play with him. Defendant testified that he then entered the boys' bedroom and found Kye lying on the bed "pale in his face." Defendant stated that when he attempted to speak to Kye, Kye "did not respond," causing Defendant to "panic" and call Ms. Barnett.

¶ 4 Defendant called Ms. Barnett, and she advised Defendant to give Kye his medicine. Defendant told Ms. Barnett that she needed to return home so that they could take Kye to the doctor. When Ms. Barnett returned home, Defendant met her outside with Kye and Cayden, and they all travelled to the hospital together. Kye remained unresponsive.

¶ 5 On 13 November 2017, a Gaston County grand jury returned a short form indictment charging Defendant with first-degree murder. Prior to trial, Defendant filed a Motion to Compel, requesting that the court compel the State to disclose the theory by which it intended to convict Defendant of first-degree murder. Defendant's motion was denied.

¶ 6 During the jury charge conference, the State announced that it sought to convict Defendant under both a theory of premeditation and deliberation and felony murder. The trial court also instructed the jury that "[w]hen an adult has exclusive custody of a child for a period of time during which that child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries."

¶ 7 On 19 February 2020, the jury found Defendant guilty of felony murder but not guilty of premeditated and deliberate murder. Defendant provided oral notice of appeal in open court.

II. Analysis

¶ 8 Defendant argues that the trial court erred by (1) instructing the jury that there was sufficient evidence to infer that Defendant intentionally injured the victim; (2) allowing the State to examine Defendant about privileged communications between Defendant and his counsel; and (3) denying Defendant's motion to compel the State to disclose the theory upon which it sought to convict Defendant of first-degree murder. We conclude that Defendant received a fair trial, free from prejudicial error.

A. Jury Instruction

¶ 9 **[1]** Defendant argues that the trial court erred by instructing the jury that "[w]hen an adult has exclusive custody of a child for a period of time during which that child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries." Defendant contends that this language impermissibly "created a 'mandatory presumption' " that Defendant intentionally injured Kye. We disagree.

¶ 10 We review "the trial court's decisions regarding jury instructions" *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted).

> [W]e review jury instructions contextually and in [their] entirety. The charge will be held to be sufficient if it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Ballard, 193 N.C. App. 551, 559–60, 668 S.E.2d 78, 83 (2008) (citations omitted).

> A presumption, or deductive device, is a legal mechanism that allows or requires the factfinder to assume the existence of a fact when proof of other facts is shown. The fact that must be proved is called the basic fact; the fact that may or must be assumed upon proof of the basic fact is the presumed fact.

> . . . If the words of instruction describe an inference which must be drawn upon proof of basic facts, then the presumption is mandatory in nature. Mandatory presumptions which conclusively prejudge the existence of an elemental issue or actually shift to [the] defendant the burden to disprove the existence of an elemental fact violate the Due Process Clause.

State v. Reynolds, 307 N.C. 184, 188–89, 297 S.E.2d 532, 535 (1982) (citations omitted).

¶ 11 If, "in the absence of further elaboration by the trial judge, a reasonable juror could have interpreted the instruction as either 'an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption' or 'a direction to find intent upon proof of the defendant's voluntary actions[,]' " then the instruction provides a mandatory presumption. *State v. White*, 300 N.C. 494, 506, 268 S.E.2d 481, 488–89 (1980) (citation omitted).

¶ 12 Here, the trial judge instructed the jury that "[w]hen an adult has exclusive custody of a child for a period of time during which that child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries." However, this instruction must be viewed not in isolation, but "in light of the entire charge." *Ballard*, 193 N.C. App. at 559–60, 668 S.E.2d at 83 (citations omitted). The trial judge also instructed the jury that it was "the sole judge[] of the weight to be given to any evidence" and stated, "If you decide certain evidence is believable, you must determine the importance of that evidence in light of all other believable evidence."

¶ 13 The instruction was also provided in the greater context of the law regarding intent to inflict serious injury and the distinction between circumstantial and direct evidence. The court explained that "intent is a mental attitude that is seldom, if ever, provable by direct evidence." The trial judge then correctly instructed the jury that "[w]hen an adult has exclusive custody of a child for a period of time during which that child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries." Indeed, this *is* sufficient evidence from which the jury could infer intent to inflict serious injury, as demonstrated by numerous cases regarding the sufficiency of the State's evidence employing this exact same language. *See, e.g.*, *State v. Liberato*, 156 N.C. App. 182, 186, 576 S.E.2d 118, 120–21 (2003) ("[W]hen an adult has exclusive custody

of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, *there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries*." (emphasis added) (citations omitted)); *State v. Perry*, 229 N.C. App. 304, 319, 750 S.E.2d 521, 532–33 (2013) (citations omitted).

¶ 14 Lastly, the phrase "sufficient to create an inference" cannot reasonably be interpreted as meaning that the basic facts, if proven, "*necessarily* create an inference" of intent. Defendant has provided no basis to conclude that the lay members of the jury did not understand the meaning of the word "sufficient" as it is commonly understood. Viewing the jury instruction "contextually and in its entirety[,]" we hold that the instruction provides "no reasonable cause to believe the jury was misled or misinformed" by the instruction. *Ballard*, 193 N.C. App. at 559–60, 668 S.E.2d at 83 (citations omitted).

B. Privileged Communications

¶ 15 Defendant next argues that the trial court erred "when it allowed the State to examine [Defendant] about privileged communications with counsel." Although the trial court erred by allowing questions probing the substance of Defendant's communications with counsel, we hold that Defendant has not shown prejudice sufficient to warrant a new trial.

¶ 16 The following colloquy occurred during the State's cross-examination of Defendant at trial:

> Q: Mr. Graham, the last thing you and [your attorney] were covering or talking about [during direct examination] was your interview . . . at Gaston County Police Department, correct?
>
> A: Yes, ma'am.
>
> Q: You told [your attorney during direct examination] that interview that you gave the police was not accurate, not truthful, correct?
>
> A: Yes, ma'am.
>
> Q: But everything you told the jury here today is, in fact, accurate, and in fact, the truth?
>
> A: Yes, ma'am.
>
> Q: So that has been a little over two years ago, correct?
>
> A: Yes, ma'am.

Q: And have you at any point told anybody the version of what you told the jury here today in those two years?

A: Not the full version, no. I was told not to talk about my case.

Q: So you didn't think it was important to tell . . . your attorney[] what you told—

A: I—

Q: Let me finish asking the question. You didn't think it was important to tell . . . your attorney[] what you testified to here today?

A: I told him things.

Q: Did you tell him everything you testified about today?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

Q: You told him some of this information?

A: We talked about my case. I told him many things we talked about today.

Q: At any point, did you talk to him about calling Detective Sampson or any of the other law enforcement officers involved in this case and tell him, hey, I have got to clean my story up. I have to tell them the truth in that two-and-a-half years?

A: No, ma'am.

. . .

Q: Back to what I was asking you earlier. You never asked your attorney or talked to anybody since [two years earlier] about telling them what you're now saying is the truth?

A: No, ma'am.

. . .

Q: So you waited until today to tell this version, right?

A: Yes, ma'am.

¶ 17 **[2]** First, the State argues that Defendant failed to preserve his argument for appellate review because, although he initially objected to the State's question regarding the substance of communications with counsel, Defendant failed to renew his objection when the State asked subsequent questions probing communications with counsel. We disagree.

¶ 18 N.C. Gen. Stat. § 15A-1446(d)(10) provides in pertinent part:

> (d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.
>
> . . .
>
> (10) Subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning.

N.C. Gen. Stat. § 15A-1446(d)(10) (2019); *see also State v. Corbett*, 376 N.C. 799, 2021-NCSC-18, ¶ 55 ("Pursuant to N.C.G.S. § 15A-1446(d)(10), notwithstanding a party's failure to object to the admission of evidence at some point at trial, a party may challenge '[s]ubsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning.' ").

¶ 19 Defendant did object to the State's initial question regarding the substance of Defendant's communications with counsel. Accordingly, any further questions regarding the substance of those communications is preserved as a matter of law if the objection was erroneously overruled. Because we conclude that Defendant's objection was improperly overruled, Defendant's argument is properly before this Court.

¶ 20 **[3]** "The long-established rule is that when the relation of attorney and client exists all confidential communications made by the latter to his attorney on faith of such relation are privileged[.]" *State v. Van Landingham*, 283 N.C. 589, 601, 197 S.E.2d 539, 547 (1973) (citations omitted). However, "not all communications between an attorney and a client are privileged." *In re Miller*, 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2003) (citations omitted). Rather, the party arguing that communications are privileged bears the burden of proving the following five elements:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication

> relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

Id. at 335, 584 S.E.2d at 786 (citations omitted).

¶ 21 In this case, the State asked Defendant, "Did you tell [your attorney] everything you testified about today?" Defendant's counsel objected to the question, which was overruled. The State then continued to ask questions probing the substance of Defendant's communications with counsel. Because the questions were pertinent to the substance of Defendant's communications with his attorney about his case, the communications were privileged and should not have been permitted. The State does not argue on appeal that the communications were not privileged. Nonetheless, the trial court's error was not so prejudicial as to entitle Defendant to a new trial.

¶ 22 "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." N.C. Gen. Stat. § 15A-1443(a) (2019).

¶ 23 Here, the purpose of the State's line of questioning was to impeach the credibility of Defendant:

> Q: You told [your attorney during direct examination] that interview that you gave the police was not accurate, not truthful, correct?
>
> A: Yes, ma'am.
>
> Q: But everything you told the jury here today is, in fact, accurate, and in fact, the truth?
>
> A: Yes, ma'am.
>
> Q: So that has been a little over two years ago, correct?
>
> A: Yes, ma'am.
>
> Q: And have you at any point told anybody the version of what you told the jury here today in those two years?
>
> A: Not the full version, no. I was told not to talk about my case.

> Q: So you didn't think it was important to tell . . . your attorney[] what you told—
>
> A: I—
>
> Q: Let me finish asking the question. You didn't think it was important to tell . . . your attorney[] what you testified to here today?
>
> A: I told him things.
>
> Q: Did you tell him everything you testified about today?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> Q: You told him some of this information?
>
> A: We talked about my case. I told him many things we talked about today.

¶ 24 In light of the foregoing colloquy and the other evidence admitted at trial, we cannot discern how Defendant could have been prejudiced by the State's questions regarding privileged communications. Prior to cross examination, Defendant had already admitted that he lied to the police about what happened on the morning that Kye passed away. Defendant's credibility was therefore already at issue due to Defendant's own admission of being untruthful with police in the past. Moreover, prior to Defendant's objections to the State's line of questioning, the State asked Defendant, "You didn't think it was important to tell . . . your attorney[] what you testified to here today?" Defendant replied, "I told him things." This was after Defendant had already testified that he had not told anyone about his case in the roughly two-year period between speaking with the police and trial.

¶ 25 We hold that Defendant has not established prejudice sufficient to warrant a new trial.

C. Motion to Compel

¶ 26 **[4]** Defendant argues that the trial court erred by denying his Motion to Compel the State to disclose the theory upon which it sought to convict Defendant of first-degree murder. It is well-established that "when first-degree murder is charged, the State is not required to elect between theories of prosecution prior to trial." *State v. Garcia*, 358 N.C. 382, 389, 597 S.E.2d 724, 732 (2004) (citation omitted); *State v. Strickland*, 307

N.C. 274, 292, 298 S.E.2d 645, 657 (1983) ("[T]he State is not required, prior to trial, to declare whether it will prosecute a first degree murder indictment under a theory of premeditation and deliberation or felony murder."), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 203–04, 344 S.E.2d 775, 781–82 (1986); *State v. Hicks*, 241 N.C. App. 345, 349, 772 S.E.2d 486, 489–90 (2015) ("When the State's indictment language sufficiently charges a defendant with first degree murder, it 'is not required to elect between theories of prosecution prior to trial.' Rather, 'a defendant must be prepared to defend against any and all legal theories which the facts may support.' " (quoting *Garcia*, 358 N.C. at 389, 597 S.E.2d at 732)).

¶ 27 Defendant states in his brief that he "presents the [instant] argument for the purposes of preservation" only. Defendant's argument is without merit.

III. Conclusion

¶ 28 For the foregoing reasons, we conclude that Defendant received a fair trial, free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges MURPHY and COLLINS concur.

STATE OF NORTH CAROLINA
v.
JAMES MATTHEW KITCHEN

No. COA21-297

Filed 3 May 2022

Motor Vehicles—impaired driving—warrantless blood draw—harmless error

In an impaired driving case, any error by the trial court in ordering the release, pursuant to N.C.G.S. § 8-53, of defendant's medical records from the night he was arrested for drunk driving—including the results of a warrantless blood draw—and admitting them over defendant's objection was harmless in light of the overwhelming evidence of defendant's guilt. After a witness who noticed defendant's slurred speech and impaired demeanor called police, law enforcement officers pulled defendant over and observed that defendant smelled strongly of alcohol, had red and glassy eyes, exhibited slurred speech, and was unable to remain steady on his feet. Although defendant did not fully cooperate, a breathalyzer test was positive for alcohol and field sobriety tests indicated impairment.

Appeal by Defendant from judgment entered 18 November 2020 by Judge Joshua W. Willey, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 25 January 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State-Appellee.

Thomas, Ferguson & Beskind, by Kellie Mannette, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant James Matthew Kitchen appeals a judgment entered upon his conviction for driving while impaired, his stipulation to three prior driving while impaired convictions resulting in Defendant attaining habitual impaired driving status, and his guilty plea of attaining habitual felon status. Defendant argues that the trial court erred by denying his motion to suppress his medical records, which included evidence of his blood alcohol concentration level, because disclosure of the medical records to the State pursuant to N.C. Gen. Stat. § 8-53 violated his

Fourth Amendment right to be free from warrantless search and seizure, and that admitting the records at trial was prejudicial error. Assuming arguendo that the trial court erred by denying Defendant's motion to suppress and admitting the medical records at trial, any error was harmless in light of the overwhelming evidence of Defendant's guilt of driving while impaired by driving "[w]hile under the influence of an impairing substance" under N.C. Gen. Stat. § 20-138.1(a)(1). Accordingly, there is no prejudicial error in the trial court's judgment.

I. Background

¶ 2 Defendant was arrested on 1 May 2017 for driving while impaired. Defendant was indicted by superseding indictment for habitual driving while impaired and attaining habitual felon status.[1] The State filed an Amended Motion For Production of Medical Records on 22 June 2020, moving the court to enter an order directing the custodian of records at Carteret Health Care to disclose to the Carteret County District Attorney, Defendant's medical records, including blood tests and toxicology screens, relating to his treatment at Carteret Health Care on or about 1 May through 2 May 2017. In support of its motion, the State alleged as follows:

> 1. That Defendant is currently charged with Habitual Impaired Driving, Assault on a Female, Resisting Public Officer.
>
> 2. All the above stated charges resulted from an incident that occurred in the evening of May 1, 2017.
>
> 3. That Defendant was arrested for impaired driving. Prior to his arrest, Officer's (sic) asked him to submit to a PBT (Portable Breath Test) and the results of that test indicated a positive reading for alcohol. The number results are not admissible at trial.
>
> 4. Officer's (sic) noted a strong odor of alcohol on Defendant's breath and witnesses stated that a male inside the same type of vehicle that was stopped appeared intoxicated.

1. On 3 June 2019, Defendant was indicted by the Carteret County Grand Jury for Habitual Impaired Driving. The Grand Jury issued superseding indictments for the same offense on 19 August 2019 and 13 July 2020. On 19 August 2019, the Grand Jury also indicted Defendant for attaining habitual felon status, with a superseding indictment issued on 13 July 2020.

5. During processing, the Defendant was combative, aggressive with officers, and refused to submit to an ECIR II breath test.

6. That Officers did not seek a search warrant for a blood test and the Defendant did not consent to a blood test.

7. That the Carteret County Detention Center refused to accept Defendant into the jail without medical clearance which resulted in Defendant being transported to Carteret Health Care/Carteret General Hospital.

8. Medical Staff would not release Defendant and Defendant remained at the hospital for treatment.

9. These records are necessary for the prosecution of Defendant for Habitual Impaired Driving.

10. Upon information and belief, Defendant's medical records are in the custody of Carteret Health Care in Carteret County, N.C. and may contain information regarding Defendant's impairment within a relevant time after driving and information regarding what substances Defendant consumed leading to his impaired condition.

11. That production and disclosure of these records may be compelled pursuant to provisions by N.C. General Statute 8-53 which states that "any resident or presiding judge . . . either at trial or prior thereto . . . may compel disclosure (of medical records) if in his opinion disclosure is necessary to a proper administration of justice."

12. Federal HIPAA laws allow the disclosure of protected health information during any judicial hearing when pursuant to a court order, subpoena, discovery request, or other lawful process, 45 C.F.R. § 164.512(e)(1)(i), as long as the information is "relevant and material to a legitimate law enforcement inquiry and limited in scope as reasonably practicable". 45 C.F.R. § 164.512(f)(1)(ii).

13. Disclosure of this information is in the best interest of justice and the enforcement of the laws of the

> State of North Carolina. The information sought in Defendant's medical records is relevant and material to the prosecution of Defendant for Driving While Impaired. The information sought is not available to the State from any other appropriate source and is limited in scope as reasonably practicable.
>
> 14. The State believes the information contained in the medical records described is necessary and relevant to this case and that it is necessary to the proper administration of justice for the Court to enter an order compelling disclosure of the above-described records to the Carteret County District Attorney's office pursuant to N.C. [Gen. Stat. §] 8-53.

¶ 3 The trial court granted the motion, finding and concluding that "the proper administration of justice requires that these records be provided to the State of North Carolina for the prosecution of this case." The records were released to the State.

¶ 4 On 23 October 2020, Defendant filed a motion to suppress the medical records asserting that, (1) the State failed to meet the requirements of N.C. Gen. Stat. § 8-53 by failing to submit "an affidavit or other similar evidence setting forth facts or circumstances sufficient to show reasonable grounds to suspect that a crime has been committed, and that the records sought are likely to bear upon the investigation of that crime," as required by *State v. Scott*, 269 N.C. App. 457, 462, 838 S.E.2d 676, 680 (2020), *rev'd on other grounds*, 377 N.C. 199, 2021-NCSC-41, and (2) disclosure of the medical records violated the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, Sec. 19 and/or 23 of the North Carolina Constitution. The motion was accompanied by Defendant's affidavit, in which he averred that he "never consented to the State obtaining [his] medical records from Carteret Health Care for May 1st and 2nd, 2017" and "never saw a search warrant for those records."

¶ 5 Defendant's motion came on for hearing on 9 November 2020. Following argument, the trial court denied the motion, finding that the State had filed a Motion for Production pursuant to N.C. Gen. Stat. § 8-53, and that "[a]lthough it was not supported by affidavit, the motion did contain sufficient other information as required by [section] 8-53 for the [trial court] to be able to make an independent determination that the production of the records was necessary for the proper administration of justice." The trial court further concluded, "[t]here is a presumption

that statutes are constitutional. The Court is not going to hold that [section] 8-53 violate[s] the federal or state constitution. . . . Defendant's motion to suppress is, therefore, denied."

¶ 6 Also on 9 November 2020, Defendant admitted and stipulated to driving while impaired convictions on 10 December 2012, 20 December 2012, and 8 January 2013. The case proceeded to trial and the evidence and arguments of counsel tended to show the following:

A. Kirsten Lambert

¶ 7 Kirsten Lambert, an assistant general manager at the Taco Bell in Morehead City, North Carolina, was working the Taco Bell drive-through on the evening of 1 May 2017 when a vehicle pulled up to the drive-through window. A woman was driving the vehicle, and a man was in the passenger's seat. "The female driver was nervous and scared. You could see she was visibly shaken. The male passenger seemed to be kind of sloppy and he was slurring his speech. So he appeared intoxicated." Ms. Lambert then, "quietly asked the female driver if she was okay because she seemed scared. And she quietly said 'yes.' " After the vehicle drove away, Ms. Lambert called 911, describing the situation and her concerns, and gave the operator the vehicle's license plate number and description. An officer arrived at the Taco Bell and took a written statement from Ms. Lambert. The statement was admitted into evidence. Ms. Lambert reported in the statement that the male passenger appeared "intoxicated" and "irritated."

B. Sergeant Kristopher Cummings

¶ 8 Sergeant Kristopher Cummings of the Morehead City Police Department ("MCPD") was on duty on the night of 1 May 2017 when he received a dispatch to perform a "welfare check" on a female occupant of a blue Oldsmobile, last seen leaving the Morehead City Taco Bell. Within a "minute or two" of receiving the dispatch, Sergeant Cummings spotted an Oldsmobile that matched the description of the vehicle reported for the welfare check. The Oldsmobile was speeding 55 miles-per-hour in a 35 mile-per-hour zone. Sergeant Cummings stopped the Oldsmobile approximately 2 miles from the Taco Bell and approached the vehicle on foot.

¶ 9 Defendant was in the driver's seat and there was a female in the front passenger's seat. There was "a strong odor of alcohol coming from the passenger area. The female passenger was nervous, seemed very anxious, kind of matched the description given by dispatch of the welfare check." Sergeant Cummings had Defendant step out of the vehicle

because, based on the call, "there was a possible domestic, or an assault, or something to do with the two of them . . . but also that there was a strong odor of alcohol," and he wanted to separate Defendant from the cabin area of the car. Sergeant Cummings determined the smell of alcohol was coming from Defendant.

¶ 10 Sergeant Cummings was trained in detecting and apprehending impaired drivers. Defendant "had a slur to his speech, . . . [h]is eyes were glassed over," and he was "unsteady on his feet." Defendant "could not stand up straight without swaying, moving, shifting his feet and shifting his weight." Within five minutes of Sergeant Cummings having stopped Defendant, Officer Tracy Bruno of the MCPD patrol division arrived. Sergeant Cummings turned the investigation over to Officer Bruno.

C. Officer Tracy Bruno

¶ 11 When Officer Bruno arrived at the scene, she performed a welfare check on the female passenger, and noted that she "had a fresh contusion on her face. She had blood on her lip and she had blood splatter on her cheek area and . . . had been crying and upset." Officer Bruno then approached the male driver, whom she identified at trial as Defendant. Officer Bruno testified, "So when I walked up to him, I noticed right away that I could smell alcohol, an alcoholic beverage. He had red, glassy eyes. And when I started speaking to him, he was slurring his speech. And he did state to me that he shouldn't have been driving and that he was also revoked." Officer Bruno noted that Defendant "looked sloppy, like kind of disheveled." Officer Bruno suspected alcohol was a factor because Defendant "was displaying, showing signs of impairment. He was unsteady on his feet. I smelled a very strong odor of alcohol. He had red, glassy eyes. He slurred his speech while talking to me. I mean he couldn't stand up straight by any means."

¶ 12 Officer Bruno was trained in apprehending and detecting impaired drivers and in conducting a portable breathalyzer test ("PBT"), and was certified to perform standardized field sobriety testing. At the scene of the stop, Officer Bruno administered a PBT to Defendant. Although Defendant was uncooperative, the PBT registered a breath sample that was positive for alcohol. Officer Bruno testified that, despite Defendant's failure to cooperate, the positive result on the sample was reliable.

¶ 13 Defendant agreed to submit to standardized field sobriety testing. Officer Bruno administered three tests: the horizontal gaze nystagmus ("HGN"), one leg stand ("OLS"), and walk and turn ("WAT"). On the HGN test, Defendant manifested all six "clues of impairment." Officer Bruno testified that these clues indicate impairment. On the WAT test,

Defendant started early, did not follow directions, was unable to walk heel-to-toe in a straight line, was unsteady on his feet, and would not complete the test. Officer Bruno testified, "usually when you perform a test, people can usually follow enough instructions to try to complete the whole test or, you know, at least even if they're impaired or something, they still try to complete the [test]. [But Defendant] just completely quit after the first nine steps." Similarly, on the OLS test, Defendant started early, was unsteady, did not follow directions, and would not complete the test. As a "safety matter," because they were on the side of a highway, Officer Bruno terminated the testing process. Officer Bruno testified that these clues—including failure to follow instructions, starting early, and inability or unwillingness to complete the tests—indicate impairment.

¶ 14 When asked whether Officer Bruno was "able to form an opinion satisfactory to [her]self as to whether the defendant consumed a sufficient quantity of an impairing substance as to appreciably impair his mental or physical faculties," Officer Bruno testified that it was her opinion that Defendant was "appreciably impaired." Officer Bruno's opinion was based on her interactions with Defendant for the twenty minutes she spent with him prior to his arrest, what she smelled, what she saw, and his performance on the tests.

¶ 15 Officer Bruno arrested Defendant for driving while impaired. She drove Defendant in her patrol car to MCPD. Defendant was admitted for processing and an "observation period." Officer Bruno notified Defendant of his rights in accordance with N.C. Gen. Stat. § 20-16.2(a) for "implied-consent" offenses, including impaired driving. Defendant refused to sign paperwork acknowledging that he understood his rights.

¶ 16 Defendant began to act "irate" and "belligerent." After Defendant requested to call an attorney, Officer Bruno allowed Defendant access to the phone and offered to dial if Defendant provided a phone number. Defendant yelled at Officer Bruno that it was "[her] f-ing job to call his attorney, not [his]." When Officer Bruno explained to Defendant that she did not have phone numbers for lawyers after hours, Defendant yelled that Officer Bruno was "an f-ing B-I-T-C-H, an f-ing C-U-N-T. And he started bucking up his chest and beating on his chest." Officer Bruno called for backup assistance from Officer Jonathan Sloan. When Officer Sloan arrived about twenty minutes into the observation period, Defendant urinated on the police station floor in front of the officers. At the end of the observation period, Officer Bruno requested that Defendant take a breathalyzer test. In response, Defendant was "bucking up and screaming he wasn't f-ing doing anything until . . . his lawyer comes."

Specifically, Defendant was "bucking up his chest, beating on it. Like, look, you'll see what I'm going to do. Punching his fist, calling us names the whole time, the B word, the C word, F this, F that." Officer Bruno again asked Defendant to take a breathalyzer test; Defendant said "he wasn't f-ing blowing into it." Officer Bruno indicated on the test report that Defendant refused the breathalyzer test.

¶ 17 Officers Bruno and Sloan transported Defendant to the Carteret County Jail to be seen by a magistrate. Upon arrival, Defendant started "bucking up again and he was screaming, Mr. Kitchen is f-ing here" as they walked into the jail. The jailer asked Defendant to submit to another PBT, but Defendant said "that he wasn't doing sh-- until his lawyer gets there and that [the jailer] could stick it up his A-S-S." Because of Defendant's behavior and refusal to submit to the PBT, the jailer insisted that Defendant be taken to Carteret Health Care to be medically evaluated and cleared prior to being processed.

¶ 18 On the way to the hospital, Defendant again resisted getting into the patrol car; Officer Bruno described it as being like "the mattresses that you have rolled up that you undo them and they puff up, that's how it was trying to get him in the car." Officers Bruno and Sloan had to push and pull Defendant to get him seated inside the vehicle and belted. Once at the hospital, security and medical personnel were waiting to meet Defendant. Officers Bruno and Sloan walked Defendant inside the hospital by holding his arms, as Defendant "was screaming and scaring all the patients in the hospital, screaming cuss words, telling everyone that, at this point, that [Officer Bruno] and Officer Sloan sexually assaulted [Defendant], and that Officer Sloan put his finger in [Defendant's] butt." The officers left Defendant in the hospital's care. Officer Bruno testified that the night she arrested Defendant, "stood out in my mind. It's probably one of the worst cases I've ever dealt with, or one of the worst subjects I've ever dealt with in any kind of case I've ever had to investigate or be a part of."

D. Officer Jonathan Sloan

¶ 19 Officer Jonathan Sloan of MCPD received a call from Officer Bruno that she needed back-up in the processing room because her arrestee was "acting belligerent." When he first encountered Defendant inside the processing room, "Defendant[']s appearance looked disheveled, and he appeared to be annoyed[.]" Much of Officer Sloan's testimony corroborated Officer Bruno's testimony regarding what occurred at the police station during the observation period, when the two officers took Defendant to the jail, and when they took Defendant to the hospital.

¶ 20 Officer Sloan was trained in apprehending and detecting impaired drivers, and also was trained and certified to administer breathalyzer tests and standardized field sobriety tests. At the time of Defendant's arrest in May 2017, Officer Sloan had investigated and/or made arrests in approximately 100 impaired driving cases. In response to the question, "Did you have a sufficient amount of time with this defendant as to form an opinion as to whether he was impaired?" Officer Sloan testified that he spent "hours" with Defendant that night and he "formed an opinion that [Defendant] was appreciably impaired on alcohol."

E. Medical Records

¶ 21 After arriving at Carteret Health Care, Defendant was examined by medical staff who recommended that Defendant be involuntarily committed for treatment and submitted an Affidavit and Petition for Involuntary Commitment to a magistrate. The magistrate found that Defendant was "mentally ill and dangerous to himself or others" and ordered Defendant involuntarily committed to Carteret Health Care for custody and treatment.

¶ 22 Sherill Hand, the custodian of medical records at Carteret Health Care, retrieved the records from the archive related to Defendant's stay in the Carteret Health Care emergency room. She testified that the medical records were a "true and accurate copy of the medical records that were on file for [Defendant] for May 1 and 2, 2017." The medical records were introduced as evidence and admitted to the jury, over Defendant's objection.

¶ 23 The medical records indicate that hospital staff performed a psychiatric evaluation of Defendant, and completed medical intake, including recording Defendant's medical history and past diagnoses. Defendant did not sign the medical authorization treatment form; hospital staff noted on the form that "p[atient] was unable to sign." The records also indicate that medical personnel drew Defendant's blood between 9:42 p.m. and 10:39 p.m. for routine medical diagnosis and treatment. The records include a toxicology lab report containing the chemical analysis results of the blood draw, including the amount of alcohol registered in the blood sample. The records indicate that Defendant stayed overnight at the hospital before being released and taken to Carteret County Jail for processing.

F. Paul Glover

¶ 24 Paul Glover, former Branch Head of the Forensic Tests for Alcohol Branch of the North Carolina Department of Health and Human Services, and certified toxicologist, performed a conversion of the chemical analysis results provided in the medical records and determined that

Defendant's blood alcohol concentration was 0.12 at the time of the blood draw. Glover described the process and mathematical calculations by which he came to this conclusion, including that the conversion ratio he used to convert the hospital's chemical analysis results into a blood alcohol concentration level is accepted by the scientific community.

G. Closing Arguments

¶ 25 During its closing argument, the State argued, in part, as follows:

> You have his medical records. I gave those to you. They were admitted into evidence. So you know he wasn't having some type of medical episode that could have caused this behavior. His aggressiveness and belligerent nature suddenly appear when he realizes he's going to jail, and then it suddenly goes away when he sobers up.
>
> It wasn't a medical issue and it wasn't a mental health issue. He was impaired.
>
> His medical records were admitted into evidence and it's because he went to the hospital that we have actual evidence of what his alcohol concentration was, since he refused the breath test.

¶ 26 Defendant argued in closing that the outcome of the case depended on whether the jury accepted the reliability of the State's evidence that Defendant's blood alcohol concentration was above the legal limit on the night in question, stating,

> [T]his case is about impairment. And this is -- this is what it comes down to. They called Mr. Kitchen a "0.12" and you have to believe, and be entirely satisfied and convinced of that number "0.12," despite not hearing any evidence of who ran that test, if it was done correctly, what it was done with.
>
> All that we know is that there was a number on a piece of paper that may have been auto-generated after they ran the test. That's what you've got.
>
> And you have an expert that took his calculator and took that number, and divided it by another number and moved the decimal. That's what the State presented to you on the number. You get to believe that that number is correct in this case.

¶ 27 The jury convicted Defendant of driving while impaired. Defendant pled guilty to having attained habitual felon status. The trial court entered judgment, sentencing Defendant to 144 to 185 months' imprisonment for habitual impaired driving as a habitual felon.

¶ 28 Defendant appealed.

II. Discussion

¶ 29 Defendant argues that the trial court erred by denying his motion to suppress his medical records, which contained his blood alcohol concentration level at the time of Carteret Health Care's blood draw, because the medical records were obtained in violation of his Fourth Amendment right to be free from warrantless search and seizure. Defendant specifically contends that N.C. Gen. Stat. § 8-53, which allows a judge to compel disclosure of confidential medical information "if in [the judge's] opinion disclosure is necessary to a proper administration of justice[,]" was not a constitutional method for law enforcement to obtain Defendant's medical records. *See* N.C. Gen. Stat. § 8-53 (2020).

¶ 30 Assuming arguendo that the medical records were obtained in violation of Defendant's constitutional rights and that the records were improperly admitted at trial, these errors were harmless beyond a reasonable doubt. *See State v. Autry*, 321 N.C. 392, 399, 364 S.E.2d 341, 346 (1988) (concluding that the Court would not "address the question of whether the search was valid" where any error in the admission of the evidence obtained from the search was harmless beyond a reasonable doubt).

¶ 31 A violation of a defendant's federal constitutional rights "is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b) (2020). The burden is on the State to demonstrate, beyond a reasonable doubt, that the error was harmless. *Id.* "[T]he presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *Autry*, 321 N.C. at 400, 364 S.E.2d at 346 (citation omitted).

¶ 32 "A person commits the offense of habitual impaired driving if he drives while impaired as defined in [N.C. Gen. Stat. §] 20-138.1 and has been convicted of three or more offenses involving impaired driving . . . within 10 years of the date of this offense." N.C. Gen. Stat. § 20-138.5 (2020).

> (a) A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration[.]

N.C. Gen. Stat. § 20-138.1 (2020). The act of driving while under the influence of an impairing substance under subsection (a)(1) and the act of driving with an alcohol concentration of 0.08 or more under subsection (a)(2) are separate, independent, and distinct ways by which one can commit the single offense of driving while impaired. *State v. Perry*, 254 N.C. App. 202, 209, 802 S.E.2d 566, 572 (2017). Thus, the State may convict a person of driving while impaired for the act of driving while under the influence of an impairing substance under subsection (a)(1) where the person's blood alcohol concentration is entirely unknown or less than 0.08. *Id.*

¶ 33 A person is under the influence of an impairing substance if "his physical or mental faculties, or both, [are] appreciably impaired by an impairing substance." N.C. Gen. Stat. § 20-4.01(48b) (2020). Alcohol is an "impairing substance." *Id.* § 20-4.01(14a); *see State v. Phillips*, 127 N.C. App. 391, 393, 489 S.E.2d 890, 891 (1997) (citation omitted). "The effect must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired." *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985). "Provided a determination of impairment is not based solely on the odor of alcohol, the opinion of a law enforcement officer . . . has consistently been held sufficient evidence of a defendant's impairment." *Perry*, 254 N.C. App. at 209, 802 S.E.2d at 572 (quotation marks, brackets, and citation omitted).

¶ 34 At trial, the State presented the following evidence that Defendant was driving while under the influence of an impairing substance:

¶ 35 Kirsten Lambert testified that Defendant "appeared intoxicated" when he pulled up to the drive-through window at Taco Bell. Sergeant Cummings, who was trained in detecting and apprehending impaired drivers, detected a strong odor of alcohol on Defendant's person when Sergeant Cummings pulled Defendant over for speeding. Sergeant Cummings testified that Defendant had slurred speech and glassy eyes, was unsteady on his feet, and "could not stand up straight without swaying, moving, shifting his feet and shifting his weight."

¶ 36 Officer Bruno was trained and experienced in detecting and apprehending impaired drivers. She testified that when approaching Defendant, she "noticed right away that [she] could smell alcohol, an alcoholic beverage. He had red, glassy eyes. And when [she] started speaking to him, he was slurring his speech." She observed that he was "showing signs of impairment," was sloppy and disheveled, and "couldn't stand up straight by any means."

¶ 37 Officer Bruno was also trained to administer PBTs and certified to perform standardized field sobriety tests. At the site of the traffic stop, Officer Bruno administered a PBT to Defendant. Although Defendant did not cooperate, the PBT registered a breath sample that was positive for alcohol. Officer Bruno testified that despite Defendant's failure to cooperate, the positive result was reliable.

¶ 38 Officer Bruno also administered three standard field sobriety tests: on the HGN test, Defendant manifested all six clues of impairment; on the OLS and WAT tests, Defendant started early, was unsteady on his feet, did not follow instructions, and would not complete the tests. Officer Bruno testified that the clues she registered on each test indicated impairment. Based on her interactions with Defendant for the twenty minutes she spent with him prior to his arrest, what she smelled, what she saw, and his performance on the tests, it was Officer Bruno's opinion that Defendant was "appreciably impaired."

¶ 39 Officer Sloan was also trained in apprehending and detecting impaired drivers and had investigated and/or made arrests in approximately 100 impaired driving cases. He spent "hours" with Defendant that night and "form[ed] an opinion that [Defendant] was appreciably impaired on alcohol."

¶ 40 This overwhelming evidence of Defendant's guilt of driving while impaired by driving "[w]hile under the influence of an impairing substance" under N.C. Gen. Stat. § 20-138.1(a)(1), renders any error in the denial of Defendant's motion to suppress his medical records and the subsequent admission of those records at trial "harmless beyond a reasonable doubt." *State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012); *cf. State v. Scott*, 278 N.C. App. 354, 2021-NCCOA-314, ¶ 15 (concluding that the erroneous admission of blood evidence was not harmless beyond a reasonable doubt where the only evidence of impairment, other than the blood samples, was that defendant was speeding and recklessly driving). In light of our conclusion, we do not address Defendant's remaining arguments.

III. Conclusion

¶ 41 The overwhelming evidence of Defendant's guilt of driving while impaired by driving "[w]hile under the influence of an impairing substance" under N.C. Gen. Stat. § 20-138.1(a)(1) renders any error in the denial of Defendant's motion to suppress his medical records and the subsequent admission of those records at trial harmless beyond a reasonable doubt. There was no prejudicial error in the trial court's judgment.

NO PREJUDICIAL ERROR.

Judges GORE and JACKSON concur.

STATE OF NORTH CAROLINA
v.
BENNIE WAYNE STRICKLAND, JR., DEFENDANT

No. COA21-491

Filed 3 May 2022

1. Constitutional Law—right to counsel—request for appointment of substitute counsel—no absolute impasse

The trial court did not abuse its discretion by denying defendant's request for the appointment of substitute counsel during his trial for solicitation to commit murder where the court's conclusion—that defendant and counsel had not reached an absolute impasse but rather defendant was attempting to disrupt his trial and inject error—was amply supported by the record. Defendant's statements that he believed his attorney was working for the State, sabotaging his case, conducting cross-examinations that were too brief, and not objecting enough did not show an absolute impasse; instead, defendant's frequent inappropriate outbursts showed a desire to derail his prosecution.

2. Homicide—solicitation to commit murder—sufficiency of evidence—request and instructions for killing ex-girlfriend

The State presented sufficient evidence to survive defendant's motion to dismiss the charge of solicitation to commit first-degree murder where defendant had multiple conversations with a fellow inmate in which he requested that the co-inmate kill defendant's ex-girlfriend; defendant drew and gave the co-inmate a detailed

map of the ex-girlfriend's home and the surrounding area when he learned that the co-inmate would soon be released from custody; defendant provided the co-inmate with two detailed suggestions as to how to kill the ex-girlfriend; and defendant offered to kill the co-inmate's ex-girlfriend upon his own release in return for the co-inmate's favor.

3. Criminal Law—prosecutor's closing arguments—witness credibility—characterization of defendant—presumption of innocence—jury's public duty

In defendant's trial for solicitation to commit murder, the trial court did not err by declining to intervene ex mero motu during the prosecutor's closing arguments when the prosecutor spoke on the relative believability of conflicting testimonies but left the ultimate credibility determination up to the jury; referred to defendant as "unpredictable," "impulsive," "angry," "obsessed," "frustrated," and "dangerous" where those adjectives were reasonable inferences from the evidence; argued that the State had offered sufficient evidence to rebut defendant's presumption of innocence and proven his guilt beyond a reasonable doubt (although poorly worded when considered in isolation); and urged the jurors to consider their role as representatives of the community and their ability to prevent defendant from committing similar crimes in the future.

4. Homicide—solicitation to commit murder—jury instructions—lesser-included offense not in indictment

The trial court did not commit plain error in instructing the jury on solicitation to commit second-degree murder instead of solicitation to commit first-degree murder, as alleged in defendant's indictment. A defendant indicted for solicitation of a felony may be convicted of solicitation to commit a lesser-included offense not included in the indictment so long as the conviction is supported by the evidence.

Judge MURPHY concurring only in the result as to Part II.C.

Appeal by Defendant from judgments entered 25 February 2020 by Judge James E. Hardin, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 22 March 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Derek L. Hunter, for the State.

William D. Spence for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant Bennie Wayne Strickland, Jr., ("Defendant") appeals from judgments entered following a jury trial finding him guilty of solicitation to commit murder, two violations of domestic violence protection orders, and hit and run with a motor vehicle. On appeal, Defendant argues that the trial court erred in improperly resolving his motion to substitute counsel during trial, denying his motion to dismiss the solicitation charge, failing to intervene *ex mero motu* during the prosecutor's closing arguments, and in its jury instructions. After careful review, we hold Defendant has failed to demonstrate prejudicial error.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The record below discloses the following:

¶ 3 Defendant and Carrie Thomas were involved in an on-and-off again romantic relationship. At its start, Defendant told Ms. Thomas that, "if I can't have you, nobody will. If it ain't going to be me, it ain't going to be nobody. I'll kill you."

¶ 4 In the summer of 2017, Ms. Thomas and her children moved in with Defendant. Twenty days later, she moved out because of Defendant's "over-possessive nature," but they continued to see each other. This cycle of breaking up and reuniting continued until, on 2 January 2018, Ms. Thomas secured a domestic violence protection order ("DVPO") against Defendant in an effort to finally end their relationship. Ms. Thomas later dismissed the DVPO. When Defendant then threatened to kill Ms. Thomas and her children by burning down her house with her and her children in it, Ms. Thomas procured a second DVPO against Defendant and an emergency permit to carry a concealed weapon.

¶ 5 Defendant continued to harass Ms. Thomas. Her employer blocked Defendant's phone number because he often called while Ms. Thomas was working. On one occasion, Defendant came to her workplace and parked in an adjacent parking lot, leading Ms. Thomas's supervisor to call the police and take additional preventative measures to protect Ms. Thomas at work.

¶ 6 On 30 October 2018, Defendant was arrested for violating the DVPO, hit and run, and assault with a deadly weapon after he followed Ms. Thomas to a Bojangles in Tarboro and drove his truck into the back of her vehicle. Defendant was incarcerated in the Edgecombe County

Detention Center while awaiting trial. While incarcerated, Defendant called Ms. Thomas multiple times, further violating the DVPO.

¶ 7 During his incarceration, Defendant shared a "pod" with Christian Capps, Jerry Plascencio, David Anderson, and approximately 20 to 30 other inmates. Defendant and Mr. Capps often talked to each other about hating their ex-girlfriends and spoke about killing each other's ex-girlfriends. Messrs. Capps, Plascencio, and Anderson eventually disclosed these conversations to law enforcement and, on 11 March 2019, Defendant was indicted on two counts of solicitation to commit first-degree murder.

¶ 8 Defendant's trial began on 17 February 2020.[1] Mr. Capps testified for the State. Mr. Capps told the jury that he did not initially believe Defendant wanted to kill Ms. Thomas and instead dismissed their conversations as venting or "just jail talk." That impression changed after Mr. Capps told everyone in the pod that he would soon make bond and be released before Thanksgiving; upon hearing the news, Defendant gave Mr. Capps a map that he had drawn showing where Ms. Thomas lived. The map included directions, highways, landmarks, and physical descriptions of Ms. Thomas and her car. Defendant told Mr. Capps, "if you go home, you kill my old lady, and I'll kill your old lady in return." Defendant suggested two different ways Mr. Capps could kill Ms. Thomas: (1) by going into her home, making her drink liquor until she passed out, then injecting her with heroin to make it seem like an overdose; or (2) "run up in the house Rambo-style and kill everyone there execution-style." When Defendant later asked for the map back, Mr. Capps told him that he had flushed it down the toilet; however, per Mr. Capps's testimony, he had not in fact flushed the map himself, but had given it to Mr. Plascencio to destroy. Mr. Capps later reported Defendant's comments to members of the Edgecombe County Sheriff's Office, describing the map and its contents to them verbally and by written statement.

¶ 9 One of those law enforcement officers, a sergeant with the Edgecombe County Sheriff's Office investigating Defendant's acts of domestic violence, testified that she was given the map by Mr. Plascencio after interviewing Mr. Capps. She further testified that she also met with Mr. Anderson, who corroborated Mr. Capps's reports with a written statement.

¶ 10 Defendant testified and denied asking Mr. Capps to kill Ms. Thomas. Defendant instead insisted that he drew the map for Mr. Capps so he

1. Defendant's earlier charges for violating a DVPO, assault with a deadly weapon, and hit and run were consolidated for trial with his solicitation charges.

could go to Ms. Thomas's house and explain that Defendant had not meant to hit her vehicle. Defendant also denied asking Mr. Capps for the map back.

¶ 11 Defendant was disruptive throughout the trial, incurring twelve convictions for criminal contempt as a result of numerous vulgar outbursts filled with invectives against the judge, the judge's family, the prosecutor, and others. In one lengthy, expletive-ridden tirade, Defendant stated he was dissatisfied with his counsel's cross-examination and believed that his counsel was working with the State to convict him. Later, Defendant told the trial court that he was "requesting that he not be my lawyer because he's ineffective." Defendant reiterated his dissatisfaction with his counsel's cross-examination and lack of objections, as well as his claim that defense counsel was working for the State. Defendant further asserted his attorney—who is Black—would not represent him in good faith because Defendant had been accused of being a member of the Aryan Nation.

¶ 12 The trial court responded to these statements by asking Defendant if he wished to represent himself, to which he replied, "no. I was asking for [counsel] to be replaced." When the trial court informed Defendant that his only option at that juncture was to continue with his current counsel or represent himself, Defendant acceded that he did not want to represent himself and stated he "d[id]n't care what you [the trial court] d[id]." The trial court then concluded that Defendant's request for new counsel was not the result of an absolute impasse, and instead stemmed from disagreements concerning trial strategy and a desire to "disrupt," interfere with, "and to inject error into this proceeding." And though it identified Defendant's complaints as "without merit" and "frivolous," it ordered Defendant's counsel "to abide by the defendant's wishes to the extent that they are consistent with the law in North Carolina and the rules of professional conduct."

¶ 13 Defendant moved to dismiss the charges against him at the close of the State's evidence; the trial court granted that motion as to one solicitation charge and denied it as to all remaining charges. Defendant later renewed—and the trial court denied—those motions at the close of all evidence. The trial court then conducted the charge conference, during which the court and counsel engaged in the following discussion:

> THE COURT: . . . Now, as to the substantive charges, I am working from pattern instruction 206.17 regarding solicitation to commit murder. It appears to me that although the defendant was charged in an indictment

> as it relates to Christian Capps with the solicitation to commit first-degree murder, given the fact that General Statute Chapter 14-17(b) essentially says that a charge of solicitation to commit second-degree murder is sentenced as the same as first-degree murder.
>
> It would be my intention to give the pattern instruction which essentially relates to solicitation to commit second-degree murder. What is the position of the State? Since it only requires malice.
>
> THE STATE: That's right. And it's the same level of punishment.
>
> THE COURT: Do you agree with that, [Defendant's counsel]?
>
> [DEFENDANT'S COUNSEL]: Yes, Judge.
>
> THE COURT: That's the way I'll give that instruction. I do not see a lesser included offense, do you agree with that?
>
> THE STATE: That's right.
>
> THE COURT: [Defendant's counsel].
>
> [DEFENDANT'S COUNSEL]: I didn't see any either.
>
> THE COURT: Madam Clerk, that verdict sheet will read guilty of solicitation to commit murder. . . . Does the State of North Carolina agree with the construction of the verdict sheet?
>
> THE STATE: Yes, sir.
>
> THE COURT: Does the defendant agree?
>
> [DEFENDANT'S COUNSEL]: Yes, Judge.

¶ 14 With the jury instructions agreed upon, the trial proceeded to closing arguments. The State urged the jury to believe Mr. Capps's testimony over Defendant's:

> THE STATE: . . . And what else doesn't even make sense about what I contend is an untruthful account of why [Defendant] gave Christian Capps this map.
>
> He told the truth when he could have lied.

> . . . .
>
> And when Captain Washington pulled [Capps] into his office[,] [Capps] told the truth because the defendant scared him.
>
> . . . .
>
> So[,] is [Capps] being truthful[?] Yes.

¶ 15 The prosecutor also referred to Defendant as "unpredictable," "impulsive," "angry," "obsessed," "frustrated," and "dangerous." She then concluded her closing as follows:

> THE STATE: . . . [T]o protect society, other members of Edgecombe County[,] and in particular[,] this member of society, a verdict of guilty is necessary here.
>
> It's what the law and justice demands here. His presumption of innocen[c]e has been removed and replaced with proof beyond a reasonable doubt. You represent the people of your county right now. You sit as citizens of Edgecombe County. And by your verdict, you not only protect [Ms.] Thomas[,] but every other vulnerable female in Edgecombe County that might find herself in the unfortunate position of being in a domestic relationship with that defendant.

¶ 16 Following deliberations, the jury acquitted Defendant on the charge of assault with a deadly weapon but found Defendant guilty on one count of solicitation to commit murder, two counts of violation of a DVPO, and one count of hit and run with a motor vehicle. The trial court sentenced Defendant to 110 months to 144 months imprisonment for solicitation to commit murder, a consecutive sentence of 150 days imprisonment for the consolidated convictions of violation of a DVPO and hit and run, and another consecutive sentence of 150 days imprisonment for the remaining violation of DVPO conviction. The court also imposed six separate, consecutive active sentences of 30 days incarceration in the county jail in connection with his criminal contempt during trial. Defendant gave oral notice of appeal in open court.

II. ANALYSIS

¶ 17 Defendant presents four principal arguments on appeal, asserting the trial court erred in: (1) failing to adequately inquire into Defendant's request for new counsel during trial; (2) denying Defendant's motion to dismiss the second solicitation to commit murder charge; (3) failing to

intervene *ex mero motu* during the prosecutor's closing arguments; and (4) instructing the jury on solicitation to commit second-degree murder instead of solicitation to commit first-degree murder as alleged in the indictment. As an alternative to his fourth argument, Defendant further contends that he was denied effective assistance of counsel due to his attorney's accession to the jury instructions. We hold that Defendant has failed to demonstrate prejudicial error.

A. The Trial Court Did Not Err in Resolving Defendant's Request for Substitute Counsel.

1. Standard of Review

¶ 18 **[1]** We review the denial of a defendant's request for the appointment of substitute counsel for an abuse of discretion. *State v. Sweezy*, 291 N.C. 366, 371-72, 230 S.E.2d 524, 529 (1976). An abuse of discretion occurs when the trial court's decision "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. McDonald*, 130 N.C. App. 263, 267, 502 S.E.2d 409, 413 (1998) (citation omitted).

2. Discussion

¶ 19 The State and Federal Constitutions guarantee criminal defendants a right to appointed counsel. *State v. Holloman*, 231 N.C. App. 426, 429, 751 S.E.2d 638, 641 (2013). That right, however, does not "include the privilege to insist that counsel be removed and replaced with other counsel merely because defendant becomes dissatisfied with his attorney's services." *Sweezy*, 291 N.C. at 371, 230 S.E.2d at 528. It is well-established that, in order to warrant appointment of substitute counsel upon request, "a defendant must show good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict." *Holloman*, 231 N.C. App. at 430, 751 S.E.2d at 641 (citing *Sweezy*, 291 N.C. at 372, 230 S.E.2d at 528). A "disagreement over trial tactics does not, by itself, entitle a defendant to the appointment of new counsel," *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981), and "tactical decisions, such as which witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer." *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991). It is only "when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions [that] the client's wishes must control." *Id.* Whenever such an impasse exists, "defense counsel should make a record of the circumstances, his advice to the defendant, the reasons for

the advice, the defendant's decisions and the conclusion reached." *Id.* Our caselaw further establishes that "conclusory allegations of impasse are not enough." *State v. Ward*, 2022-NCCOA-40, ¶ 19 (citation omitted). Nor is the existence of "a personality conflict" or a belief that defense counsel does not have the defendant's "best interest at heart." *Id.* ¶ 23.

¶ 20 The transcript below does not reflect an absolute impasse requiring the appointment of new counsel. The trial court engaged in a lengthy colloquy with Defendant, heard the basis for his dissatisfaction with counsel, and concluded on the record that it "d[id] not constitute an absolute impasse, but that the [D]efendant is acting in a manner to disrupt these proceedings and to inject error into this proceeding as well. The Court finds this to be without merit and the claims are without merit." These determinations are assuredly supported by the record; the outrageousness of Defendant's frequent and expletive-laden outbursts cannot be overstated. The trial court was best positioned to determine whether Defendant's discontented interruptions stemmed from a true irreconcilable conflict with counsel or an ulterior desire to undermine the trial.[2]

¶ 21 We will not disturb the trial court's well-supported findings and conclusions that Defendant's conduct stemmed from a desire to derail his prosecution rather than a genuine absolute impasse. *Cf. State v. Floyd*, 369 N.C. 329, 341, 794 S.E.2d 460, 468 (2016) ("In light of defendant's disruptive behavior, we cannot ascertain, without engaging in conjecture, whether defendant had a serious disagreement with his attorney regarding trial strategy or whether he simply sought to hinder the proceedings. As a result, it cannot be determined from the cold record whether an absolute impasse existed as described in *Ali*.").[3]

¶ 22 Defendant's own statements further disclose that many of his concerns stemmed from unfounded conjecture that do not amount to an impasse. For example, his belief that his attorney was working for the State

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2. Indeed, at the conclusion of the colloquy concerning Defendant's dissatisfaction with counsel, Defendant asked the trial court to hold him in contempt out of an effort to protest and disrupt what he claimed was an illegitimate trial. Defendant expressed similar sentiments in other outbursts denigrating his counsel, at one point stating "you-all got the man in here that writes the damn newspaper. Well, I'm going to help him sell some of them."

3. In *Floyd*, the trial court never ruled on whether the defendant's dispute with counsel amounted to an absolute impasse, and our Supreme Court dismissed the defendant's appeal without prejudice to filing a motion for appropriate relief because the record was not clearly dispositive of the issue. *Id.* This case is markedly different, as the trial court unequivocally ruled that Defendant's dissatisfaction with counsel was designed to derail the trial.

and sabotaging his case because counsel was Black and Defendant an accused white supremacist is not sufficient to show an absolute impasse between counsel and client. *See Ward*, ¶¶ 19, 23. Similarly, Defendant's claims that counsel's cross-examinations were too brief and his objections too scant did not, in themselves, compel the trial court to find an irreconcilable conflict requiring appointment of new counsel. *Hutchens*, 303 N.C. at 335, 279 S.E.2d at 797. We therefore hold that the trial court did not abuse its discretion in denying Defendant's motion for substitute counsel or commit other error under *Ali*.

B. The Trial Court Properly Denied Defendant's Motion to Dismiss the Solicitation Charge.

1. Standard of Review

¶ 23 **[2]** We review a trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). In conducting this review, we consider the matter anew and "freely substitute [our] own judgment for that of the [trial court]." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks omitted).

2. Discussion

¶ 24 In deciding a motion to dismiss, "the question for the trial court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense, and of the defendants being the perpetrator of such offense." *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002). Furthermore, all evidence must be considered in a light most favorable to the State, "giving the [S]tate 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).

¶ 25 In this case, Defendant was charged with solicitation to commit first-degree murder, requiring the State to show that "the defendant counseled, enticed or induced another to commit each of the following: (1) an unlawful killing; (2) with malice; [and] (3) with the specific intent to kill formed after some measure of premeditation and deliberation." *State v. Crowe*, 188 N.C. App. 765, 769, 656 S.E.2d 688, 692 (2008). The crime of solicitation is complete upon the request or inducement of the defendant, even if the crime solicited is never committed. *State v. Smith*, 269 N.C. App. 100, 101, 837 S.E.2d. 166, 167 (2019) (citations

omitted). Therefore, the trial court properly denied Defendant's motion if, when viewed in the light most favorable to the State, the evidence shows Defendant counseled, enticed, or induced Mr. Capps to unlawfully kill another human being with malice and specific intent formed after some measure of premeditation and deliberation.

¶ 26 We hold that the State met its burden and the trial court properly denied Defendant's motion. The State provided evidence through Mr. Capps's testimony that Defendant: (1) had multiple conversations with Mr. Capps in which he requested Mr. Capps kill Ms. Thomas; (2) drew and gave to Mr. Capps a detailed map of Ms. Thomas's house and the surrounding area once he became aware that Mr. Capps was due to be released; (3) provided Mr. Capps with two detailed suggestions as to how to kill Ms. Thomas; and (4) offered to kill Mr. Capps's girlfriend upon his own release if Mr. Capps killed Ms. Thomas. This evidence, viewed in the light most favorable to the State, establishes each and every element of solicitation to commit first-degree murder; Defendant's arguments, which implore us to draw contrary inferences from the evidence, are simply precluded by the legal standard and view of the evidence applicable to motions to dismiss. The trial court did not err in denying Defendant's motion.

C. The Trial Court Did Not Err in Declining to Intervene *Ex Mero Motu* In Closing Argument.

1. Standard of Review

¶ 27 **[3]** "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). "Under this standard, [o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Degraffenried*, 262 N.C. App. 308, 310, 821 S.E.2d 887, 888 (2018) (alteration in original) (citation omitted). Moreover, "a prosecutor's statements during closing argument should not be viewed in isolation[,] but must be considered in the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Augustine*, 359 N.C. 709, 725-26, 616 S.E.2d 515, 528 (2005).

2. Discussion

¶ 28 Defendant argues that the prosecutor made four sets of grossly improper remarks that did not garner objections but nonetheless mandated the trial court's intervention *ex mero motu*. Specifically, Defendant points to the following as grossly improper: (1) the prosecutor's statements urging the jury to believe Mr. Capps over Defendant; (2) the characterization of Defendant as "unpredictable," "impulsive," and possessing other similarly negative traits; (3) the prosecutor's statement that Defendant's presumption of innocence had been removed in favor of proof beyond a reasonable doubt; and (4) the prosecutor's reference to the jury's duty to act for the people of Edgecombe County in reaching its verdict. We address each portion of the State's closing argument in turn.

a. Witness Credibility

¶ 29 Defendant first argues that the prosecutor made grossly improper statements when she asked the jury to believe Mr. Capps's testimony over Defendant's conflicting testimony. While it is true that "an attorney may not . . . express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant," N.C. Gen. Stat. § 15A-1230(a) (2021), the State is "allowed to argue that the State's witnesses are credible . . . [and that] the jury . . . should not believe a witness." *Augustine*, 359 N.C. at 725, 616 S.E.2d at 528 (citations and quotation marks omitted). Such arguments are proper even as to defendants when the evidence places their credibility at issue. *See State v. Williams*, 314 N.C. 337, 357, 333 S.E.2d 708, 721-22 (1985) (holding the prosecutor properly argued to the jury that the defendant's exculpatory statement was untruthful and should not be believed based on other evidence). The prosecutor veers into improper argument, however, when she directly asserts or repeatedly intimates and heavily implies that the witness at issue is a liar rather than being merely untruthful. *State v. Huey*, 370 N.C. 174, 182-83, 804 S.E.2d 464, 471 (2017).

¶ 30 A review of the prosecutor's arguments in context shows that her statements concerning the relative believability of Mr. Capps's and Defendant's conflicting testimonies were not grossly improper requiring intervention *ex mero motu*. Instead, in each instance identified by Defendant, the prosecutor pointed out reasons to believe the former witness over the latter, and she left the ultimate credibility determination up to the jury: "That's for you to decide looking at those same tests for credibility that you'll think about with every witness that testified before you." The prosecutor's statements were not improper, nor grossly

improper as to be prejudicial. *Cf. Huey*, 370 at 182-83, 804 S.E.2d at 471 (holding that while the prosecutor's "repetitive and dominant insinuations that defendant was a liar" were improper, they were not grossly improper requiring a new trial because "the evidence in this case does support a permissible inference that defendant's testimony lacked credibility").

b. Characterization of Defendant

¶ 31 During her closing argument, the prosecution referred to Defendant as "unpredictable," "impulsive," "angry," "obsessed," "frustrated," and "dangerous." All of these statements are reasonable inferences from the record, and a prosecutor may argue all such inferences in closing. *See State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709-10 (1995) ("Counsel may, however, argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.").[4] Furthermore, a prosecutor's remarks that are critical of a defendant, even if derogatory, do not always amount to grossly improper argument. *See State v. Larrimore*, 340 N.C. 119, 163, 456 S.E.2d 789, 812 (1995) (holding that a prosecutor's characterization of a defendant as "the quintessential evil" and "one of the most dangerous men in the state" did not reach the level of gross impropriety that required the trial court to intervene *ex mero motu*). Given that the prosecutor's statements are derived from the evidence, are not mere opinions or name-calling, and were not so incendiary as to warrant objection at the time they were made, we hold that the trial court did not err in declining to intervene *ex mero motu*.

c. Presumption of Innocence and Proof Beyond a Reasonable Doubt

¶ 32 Defendant next argues that the prosecutor's statement that "Defendant's presumption of innocence has been removed and replaced with proof beyond a reasonable doubt," was grossly improper. We disagree. As our Supreme Court has observed, "a defendant's plea of not guilty clothes him with a presumption of innocence *which continues to the moment the State offers evidence sufficient to rebut the presumption* and to show beyond a reasonable doubt that the defendant in fact committed the crime charged, or some lesser degree thereof."

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4. The prosecutor's characterization of Defendant based on the evidence differs from improper statements of opinion that amount to nothing more than name-calling. *See, e.g*, *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107-08 (2002) (holding as grossly improper a prosecutor's statements that the defendant was a "quitter, this loser, this worthless piece of . . . . He's lower than the dirt on a snake's belly.").

State v. Cephus, 239 N.C. 521, 522, 80 S.E.2d 147, 148-49 (1954) (emphasis added). Read in context, the prosecutor simply argued to the jury that the State had offered sufficient evidence to rebut the presumption that Defendant was innocent and had shown Defendant's guilt beyond a reasonable doubt. Although this statement may have been poorly worded in isolation, considering the average juror's lack of legal training, we hold that it was not so grossly improper that the trial court was required to intervene *ex mero motu*.[5]

d. The Jury's Public Duty

¶ 33 In his final effort to show gross impropriety, Defendant points to the following remarks from the prosecutor:

> But to protect society, other members of Edgecombe County[,] and in particular[,] this member of society, a verdict of guilty is necessary here . . . [y]ou represent the people of your county right now. You sit as citizens of Edgecombe County. And by your verdict, you not only protect [Ms.] Thomas[,] but every other vulnerable female in Edgecombe County that might find herself in the unfortunate position of being in a domestic relationship with [the] defendant.

Defendant contends that this was improper insofar as it urged the jury to find Defendant guilty based on a need to protect the victim and other women within the county rather than on the evidence presented.

¶ 34 Our courts "will not condone an argument asking jurors to put themselves in place of the victims." *State v. Warren*, 348 N.C. 80, 109, 499 S.E.2d 431, 447 (1998). *But see State v. Garner*, 340 N.C. 573, 596-97, 459 S.E.2d 718, 730-31 (1995) (holding there was no gross impropriety in a prosecutor's arguments telling the jurors to imagine themselves as the murderer's victims). We also will not allow arguments that seek to hold the jury personally accountable to the victim, the community, or society at large. *State v. Boyd*, 311 N.C. 408, 418, S.E.2d 189, 197 (1984). Prosecutors may, however, impress upon the jury its role as the voice of the community:

> These statements correctly inform[] the jury that for purposes of the defendant's trial, the jury ha[s]

5. And, as the State points out, it does not appear Defendant was prejudiced by this statement, as the jury did find Defendant innocent of the assault with a deadly weapon charge.

> become the representatives of the community. "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130, 61 S. Ct. 164, 165, 85 L. Ed. 84 (1940). Permitting the jury to act as the voice and conscience of the community is required because the very reason for the jury system is to temper the harshness of the law with the "commonsense judgment of the community." *Taylor v. Louisiana*, 419 U.S. 522, 530, 95 S. Ct. 692, 698, 42 L. Ed. 2d 690 (1975). In a criminal case such as this, therefore, "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Williams v. Florida*, 399 U.S. 78, 100, 90 S. Ct. 1893, 1906, 26 L. Ed. 2d 446 (1970).

State v. Scott, 314 N.C. 309, 311-12, 333 S.E.2d 296, 297-98 (1985). A prosecutor may also permissibly argue that a conviction may deter and prevent the defendant specifically from committing crimes in the future. *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994).

¶ 35 Read in context, the prosecutor's statements disclose they were made for the permissible purpose of calling the jury's attention to its role as representatives of the community and out of specific deterrence concerns. She did not impermissibly suggest that the jury would have to answer to the victim or the public if they failed to find Defendant guilty, *see Boyd*, 311 N.C. at 417-18, 319 S.E.2d at 196-97, nor did she ask the jury to determine Defendant's guilt or innocence as if the jurors themselves were victims. *Warren*, 348 N.C. at 109, 499 S.E.2d at 447. The prosecutor's reference to Ms. Thomas and the specific deterrent effect of finding Defendant guilty was likewise not improper. *Abraham*, 338 N.C. at 339, 451 S.E.2d at 143; *see also State v. Campbell*, 340 N.C. 612, 631, 460 S.E.2d 144, 154 (1995) (holding a prosecutor's argument that "it is important to the [victim] Kathy Prices of the future that you do your duty, and you find [the defendant] guilty of everything he's charged with" was entirely proper and did not warrant intervention *ex mero motu*). The trial court did not err in declining to intervene *ex mero motu* here.

D. Any Jury Instruction Error Was Harmless.

1. Standard of Review

¶ 36 **[4]** Defendant concedes he did not object to the jury instructions below and requests plain error review on appeal pursuant to Rule 10 of our Rules of Appellate Procedure. N.C. R. App. P. 10(a)(4) (2022). Plain error is one "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations omitted). Furthermore, "under the plain error rule, [a] defendant must convince [us] not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

2. Discussion

¶ 37 In order to find a defendant guilty of solicitation of first-degree murder, the jury must find beyond a reasonable doubt the defendant asked another person to commit every element of first-degree murder. *Crowe*, 188 N.C. App. at 769, 656 at 692. First-degree murder is distinguished from its lesser-included offense of second-degree murder by the presence (or absence) of premeditation and deliberation:

> The elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation. The elements of second-degree murder, on the other hand, are: (1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation.

Smith, 269 N.C. App. at 102, 837 S.E.2d at 167-68 (citation omitted).

¶ 38 Ordinarily, "it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980). However, "[w]hen a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment." *State v. Hudson*, 345 N.C. 729, 732-33, 483 S.E.2d 436, 438 (1997). This includes first- and second-degree murder. *See State v. Yelverton*, 334 N.C. 532, 544, 434 S.E.2d 183, 190 (1993) ("Involuntary manslaughter and second-degree murder are lesser-included offenses supported by an indictment charging murder in the first degree."). Furthermore, our Supreme Court "has generally held

that the submission of a lesser included offense not supported by the evidence is error, but error nevertheless favorable to the defendant and one for which he cannot complain on appeal." *State v. Ray*, 299 N.C. 151, 159, 261 S.E.2d 789, 794 (1980). Also, "where there is no reasonable possibility that a verdict more favorable to defendant would have occurred absent an erroneous instruction on a lesser offense not supported by the evidence, the error occasioned by such instruction is harmless." *Id.* at 164, 261 S.E.2d at 797; *see also State v. Cheeks*, 267 N.C. App. 579, 612, 833 S.E.2d 660, 681 (2019) ("[T]he defendant must demonstrate prejudice as a result of the variance." (citation omitted)).

¶ 39 Neither party has cited, and we cannot find, a prior appellate opinion directly addressing jury instructions on lesser-included offenses of solicitation crimes.[6] But *State v. Suggs*, 117 N.C. App. 654, 453 S.E.2d 211 (1995), is instructive. In that case, a defendant was charged with, among other crimes, solicitation to commit assault with a deadly weapon inflicting serious injury. *Id.* at 662, 453 S.E.2d at 216. The jury then convicted defendant of that crime. *Id.* On appeal, we held that the trial court erred in submitting the solicitation charge to the jury because the State presented no evidence that the defendant had solicited the use of a deadly weapon. *Id.* Although we vacated the defendant's conviction for solicitation to commit assault with a deadly weapon inflicting serious injury, we held that the jury had properly found her guilty of soliciting an assault:

> In finding the defendant guilty . . . of solicitation . . . to commit assault with a deadly weapon inflicting serious injury . . . , the jury necessarily found the facts establishing the crime[] of . . . solicitation of misdemeanor assault. It follows, therefore, that the verdicts returned by the jury must be considered verdicts of guilty of . . . solicitation of misdemeanor assault . . . . We therefore vacate the defendant's conviction[] of . . . solicitation to commit assault with a deadly weapon inflicting serious injury . . . and remand this

6. The State cites our decision in *Smith*, in which a defendant, indicted for solicitation of first-degree murder, received the same jury instruction omitting premeditation that Defendant received here. 269 N.C. App. at 104, 837 S.E.2d at 169. That defendant did not assert a fatal variance argument, but instead contended the jury was required to make a special finding on malice in order to determine whether the defendant solicited a Class B1 or B2 second-degree murder, as that determination affected the classification of the solicitation conviction for sentencing. *Id.* at 104, 837 S.E.2d at 168-69. We ultimately held that the defendant had waived review of the issue because he neither objected to the jury instructions at trial nor alleged plain error on appeal. *Id.* at 105, 837 S.E.2d at 169.

> case for entry of judgment and re-sentencing on the lesser-included offense[] of . . . solicitation of misdemeanor assault.

Id.

¶ 40 It rationally follows from *Suggs* that a defendant indicted for solicitation of a felony may be properly convicted of solicitation to commit a lesser-included offense not named in the indictment when the conviction for soliciting the unnamed lesser-included offense is supported by the evidence. *Id.*[7] With this proposition regarding solicitation of lesser-included offenses from *Suggs* in mind, Defendant's case is distinguishable from those fatal variance cases where the jury instruction allowed the jury to convict a defendant based on an entirely different theory of the crime than the one alleged in the indictment. *See, e.g.*, *State v. Sergakis*, 223 N.C. App. 510, 514, 735 S.E.2d 224, 228 (2012) (holding it was plain error for the trial court to instruct the jury on conspiracy to commit felony larceny when the indictment only alleged conspiracy to commit felony breaking and entering).

¶ 41 Though the instant case presents a different situation from *Suggs*, consideration of the particular facts of this case leads us to hold that any error in the trial court's instruction was harmless. Based on the evidence presented, if Defendant solicited Mr. Capps to kill Ms. Thomas with malice upon Mr. Capps's release from prison, he necessarily requested Mr. Capps do so *in the future and according to Defendant's suggested plans*. Defendant's solicitation of murder therefore included and required premeditation and deliberation by Mr. Capps. *See State v. Corn*, 303 N.C. 293, 297, 278 S.E.2d 221, 223 (1981) ("Premeditation has been defined by this Court as thought beforehand for some length of time, however short. . . . The intent to kill must arise from a fixed determination previously

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7. It also appears, based on *Suggs*'s treatment of lesser-included offenses, that solicitation to commit second-degree murder is a lesser-included offense of solicitation to commit first-degree murder. *Cf. id.* (holding solicitation of misdemeanor assault is a lesser-included offense of solicitation of assault with a deadly weapon inflicting serious injury). "To be a lesser included offense, all of the essential elements of the lesser crime must also be essential elements included in the greater crime." *State v. James*, 184 N.C. App. 149, 154, 646 S.E.2d 376, 379 (2007) (citation and quotation marks omitted). Given that second-degree murder is a lesser included offense of first-degree murder and, "[w]ith the exception of the elements of premeditation and deliberation, the elements of the two are the same," *State v. Goodson*, 101 N.C. App. 665, 668, 401 S.E.2d 118, 120 (1991), it stands to reason that the indictment alleging Defendant solicited all elements of first-degree murder, *Crowe*, 188 N.C. App. at 769, 656 at 692, necessarily alleged Defendant solicited all elements of second-degree murder. We ultimately do not resolve this question, however, and instead dispense with Defendant's argument on prejudice grounds.

formed after weighing the matter." (citation and quotation marks omitted)); *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 838 (1981) ("[D]eliberation means an intention to kill, executed by defendant in a 'cool state of blood' in furtherance of a fixed design or to accomplish some unlawful purpose." (citations omitted)). Thus, to the extent the evidence convinced the jury beyond a reasonable doubt that Defendant solicited Mr. Capps to kill Ms. Thomas with malice once he was released from prison, that same evidence unavoidably established Defendant solicited a premeditated and deliberated homicide with the specific intent to kill.

¶ 42 In light of the evidence in this case, there is no indication "that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citation omitted). Nor does it appear that the trial court's instruction frustrated Defendant's ability to defend himself from the crime charged, as the record shows his defensive strategy was to persuade the jury that there was no credible evidence he asked Mr. Capps to kill Ms. Thomas at all, regardless of any premeditation, deliberation, or specific intent.[8] Because any error in the jury instruction appears harmless, Defendant is not entitled to a new trial.[9]

III. CONCLUSION

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

NO PREJUDICIAL ERROR.

Judge GRIFFIN concurs.

Judge MURPHY concurs fully as to Parts I., II.A., II.B., II.D., and III., and concurs in the result only as to Part II.C.

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8. We note that, regardless of whether Defendant solicited a first-degree murder or second-degree murder on these facts, the punishment is the same here. *Compare* N.C. Gen. Stat. § 14-17 (2021) (classifying first-degree murder as a Class A felony and second-degree murder—with some inapplicable exceptions—as Class B1), *with* N.C. Gen. Stat. § 14-2.6(a) (2021) ("[S]olicitation to commit a Class A or Class B1 felony is a Class C felony.").

9. Defendant's final argument asks us to review his trial counsel's assent to the challenged jury instruction for ineffective assistance of counsel in the event we declined to conduct plain error review of the instruction. Because we have conducted a plain error review of that issue on the merits and found any error harmless, we do not reach this alternative argument.

TUTTEROW v. HALL

[283 N.C. App. 314, 2022-NCCOA-300]

GILBERT DEAN TUTTEROW, Administrator of the Estate of Vivian Lynn Tutterow, Plaintiff
v.
BRIAN K. HALL, KRIS H. HALL; RANDY HALL AUTOMATIVE, LLC; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; and HORACE MANN PROPERTY AND CASUALTY INSURANCE COMPANY, Defendants

No. COA21-326

Filed 3 May 2022

1. Motor Vehicles—insurance—underinsured motorist coverage—multiple policies—calculation of UIM coverage

The trial court properly calculated the amount of available underinsured motorist (UIM) coverage to be zero in a declaratory judgment action involving multiple underinsured tortfeasors and multiple UIM policies, where the liability insurers each exhausted their policy limits. The plain language of N.C.G.S. § 20-279.21(b)(4) was unambiguous regarding the method of calculation to be used in circumstances involving more than one UIM policy—that is, the amount of available UIM coverage is the difference between the total amount paid under all exhausted liability policies (here, $200,000) and the total limits of all applicable UIM policies (here, also $200,000).

2. Motor Vehicles—insurance—underinsured motorist coverage—right of UIM insurer to reimbursement of advance payment

In a declaratory judgment action to determine insurance coverage for a fatal car accident, where the trial court determined that the available underinsured motorist (UIM) coverage was zero, an insurer that had advanced $100,000 in UIM coverage (after the liability insurers tendered the limits of their policies but before plaintiff accepted both of them) and expressly reserved its right to seek reimbursement did not waive its right to a refund of the UIM payment. Since the UIM insurer had no obligation to pay any amount, the portion of N.C.G.S. § 20-279.21(b)(4) regarding waiver of subrogation rights upon failure to timely advance payment did not apply.

Appeal by plaintiff from order entered 7 January 2021 by Judge Joseph N. Crosswhite in Davie County Superior Court. Heard in the Court of Appeals 9 February 2022.

Martin & Van Hoy, LLP by Henry P. Van Hoy, II; Katherine Freeman, PLLC by Katherine Freeman, for plaintiff.

McAngus, Goudelock & Courtie, PLLC by Jeffrey B. Kuykendal, for defendant State Farm Mutual Automobile Insurance Company.

Teague, Rotenstreich, Stanaland, Fox & Holt, PLLC by Kara V. Bordman, Kenneth B. Rotenstreich, and Robert C. Cratch, for defendant Horace Mann Property and Casualty Insurance Company.

DIETZ, Judge.

¶ 1 This appeal concerns the proper calculation of underinsured motorist or "UIM" coverage in a case involving both multiple underinsured tortfeasors and multiple UIM insurance policies.

¶ 2 The dispute centers on a provision of the Motor Vehicle Safety and Financial Responsibility Act addressing this issue. As with other portions of the Act, this statutory language is incorporated by law into every automobile insurance policy in our State.

¶ 3 The language provides that "if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy." N.C. Gen. Stat. § 20-279.21(b)(4).

¶ 4 Here, there were two negligent drivers who caused the accident, each with exhausted liability policies of $100,000. There were also two applicable UIM policies, each with $100,000 in UIM coverage. As explained below, the trial court properly applied the plain language of the statute and determined that the amount of UIM coverage available under this statutory calculation "is $0.00," which is the difference between the $200,000 paid under the exhausted liability policies and the combined limits of the UIM policies.

¶ 5 The trial court's calculation follows the statute's plain language and is consistent with the purpose of underinsured motorist coverage identified in our State's case law. We therefore affirm the trial court's judgment.

Facts and Procedural History

¶ 6 In 2014, Vivian Tutterow was killed in a car accident. At the time, Tutterow was a passenger in a car driven by Pamela Crump. For purposes of this declaratory judgment action, the parties stipulated that both Crump and Defendant Brian Hall, the driver of a second vehicle, negligently caused the accident.

¶ 7 The parties involved in this accident had the following relevant insurance coverage: Crump had an auto policy issued by Horace Mann with $100,000 per person liability limits and $100,000 per person UIM coverage. Hall had an auto policy issued by Nationwide with $100,000 per person liability limits.

¶ 8 Tutterow, as a passenger in Crump's car, was covered under Crump's $100,000 per person UIM coverage. Tutterow also had an auto policy issued by State Farm with $100,000 per person UIM coverage.

¶ 9 In 2015, Plaintiff, as the administrator of Tutterow's estate, brought a wrongful death action against Crump, Hall, and others. On 10 October 2016, Horace Mann tendered the $100,000 limits of its liability policy on behalf of Crump. On 18 October 2016, Nationwide tendered the $100,000 limits of its liability policy on behalf of Hall.

¶ 10 Several weeks later, Plaintiff notified the UIM carriers of these tenders but advised that Plaintiff had not accepted the tendered liability limits. At that time, the two UIM carriers—Horace Mann and State Farm—did not advance coverage under the UIM policies.

¶ 11 In June 2017, Plaintiff informed the UIM carriers that he had accepted Horace Mann's tender of the full $100,000 liability limit of Crump's liability policy.

¶ 12 In September 2017, State Farm advanced $100,000 to Tutterow's estate under its UIM policy while expressly reserving its "rights to recoup funds" should Plaintiff recover from Hall's liability insurer, Nationwide, "whether such payments are made pursuant to a settlement, a judgement or otherwise."

¶ 13 In July 2019, Plaintiff informed the UIM carriers that he reached a settlement with Hall that included a payment from Nationwide of the $100,000 limits of Hall's liability policy. The following week, State Farm requested that Plaintiff reimburse the $100,000 that it had advanced in late 2017. Those funds were placed in escrow and Plaintiff brought this declaratory judgment action seeking a declaration of the UIM carriers' coverage obligations and State Farm's right to reimbursement.

¶ 14 The parties later filed cross-motions for summary judgment. After a hearing, the trial court entered an order granting summary judgment in favor of the UIM carriers on the ground that the amount of UIM coverage available "is $0.00." Plaintiff timely appealed.

Analysis

¶ 15 **[1]** This case concerns a type of insurance coverage known as underinsured motorist or "UIM" coverage. UIM coverage serves "as a safeguard

when tortfeasors' liability policies do not provide sufficient recovery." *North Carolina Farm Bureau Mut. Ins. Co., Inc. v. Lunsford*, 378 N.C. 181, 2021-NCSC-83, ¶ 13. UIM coverage is governed by the Motor Vehicle Safety and Financial Responsibility Act—a lengthy, complicated statute that explains how UIM coverage and other related insurance operates. N.C. Gen. Stat. § 20-279.21. The provisions of this statute are "written into every policy of automobile insurance" as a matter of law. *North Carolina Farm Bureau Mut. Ins. Co., Inc. v. Dana*, 379 N.C. 502, 2021-NCSC-161, ¶ 9.

¶ 16 Under the statute, the calculation of applicable UIM coverage has three basic steps. First, the reviewing court must determine if a tortfeasor's vehicle meets the definition of an "underinsured highway vehicle." If so, the court must determine if the limits of that tortfeasor's liability policy are exhausted. Finally, if those liability limits are exhausted, the court must calculate the amount of coverage that is available under the applicable UIM policy. *Id.* ¶ 11.

¶ 17 Here, the trial court concluded—and the parties concede—that the first two steps of this analysis are satisfied and that UIM coverage is therefore triggered. All that remains is the calculation of the amount of UIM coverage available.

¶ 18 The crux of this case is how to calculate that available UIM coverage when there are both multiple underinsured tortfeasors and multiple UIM insurance policies. Here, for example, there are two tortfeasors whose liability insurers exhausted their policy limits by tendering $100,000 each. There are also two UIM carriers that both provided Tutterow with UIM coverage of $100,000 per person.

¶ 19 The parties acknowledge that the calculation of UIM coverage in this scenario is governed by a specific section of the Motor Vehicle Safety and Financial Responsibility Act found in Section 20-279.21(b)(4) of our General Statutes:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident. Furthermore, if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference

> between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy . . .

N.C. Gen. Stat. § 20-279.21(b)(4).

¶ 20 Our State's appellate courts have not yet interpreted how this statutory language applies in a case involving both multiple underinsured tortfeasors and multiple UIM insurance carriers. The parties acknowledge that we interpret this provision as we would any other statute—by first examining the plain language of the statute and then, if that language is ambiguous, turning to other interpretive tools. *Dana*, ¶ 16.

We agree with the trial court that this statutory language is unambiguous and supported entry of summary judgment in favor of the UIM carriers. The first sentence of this provision addresses a scenario in which the claimant is covered by only one UIM policy: "In any event, the limit of *underinsured motorist coverage* applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and *the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident*." N.C. Gen. Stat. § 20-279.21(b)(4) (emphasis added).

¶ 21 The word "claim" as used in this sentence means the assertion that the claimant "has sustained bodily injury" or is "injured" in an automobile collision. N.C. Gen. Stat. § 20-279.21(b)(3), (4). Moreover, the references to "underinsured motorist coverage" and "the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident"—with the word "coverage" in the singular—signals that there is only one UIM policy at issue, that being the UIM policy for the vehicle the claimant occupied at the time of the accident.

¶ 22 The second sentence, by contrast, addresses a scenario in which the claimant is covered by more than one UIM policy: "Furthermore, *if a claimant is an insured under the underinsured motorist coverage on separate or additional policies*, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and *the total limits of the claimant's underinsured motorist coverages* as determined by combining the highest limit available *under each policy*." *Id.* (emphasis added).

¶ 23 The use of the transitional word "furthermore" indicates that this second sentence provides an additional factor or consideration that distinguishes it from the preceding statement. *See Merriam-Webster's Collegiate Dictionary* 474 (10th ed. 1993). That additional consideration—meaning the thing that distinguishes the second sentence from the first—is the existence of multiple UIM policies that apply to the claimant. This is confirmed by the grammar of this second sentence, which refers to the "total limits of the claimant's underinsured motorist coverages" in the plural form, in contrast to the first sentence, which refers to the "limit of underinsured motorist coverage" in the singular.

¶ 24 In the scenario addressed in this second sentence, involving multiple applicable UIM policies, the statute provides an unambiguous method to calculate the applicable limit of combined UIM coverage: it is the difference between the total amount paid under all exhausted liability policies and the total limits of all applicable UIM policies.

¶ 25 The trial court properly applied this statutory provision here. The court calculated the total amount paid under the exhausted liability policies as $200,000 and calculated the total limits of the claimant's underinsured motorist coverages as $200,000. The court then determined that the total limits of UIM coverage is the difference between these two totals and, therefore, the "available UIM coverage is $0.00." This determination properly applied the statute's plain language and is correct.

¶ 26 Although we hold that the statute's plain language is unambiguous and compels this result, we note that this interpretation also is consistent with the purpose of the statute. As noted above, UIM coverage serves "as a safeguard when tortfeasors' liability policies do not provide sufficient recovery." *Lunsford*, ¶ 13. The purpose of UIM coverage is to put the insured in a position where total insurance coverage for injuries sustained in an automobile accident is no less than the amount of UIM coverage. *Nationwide Mut. Ins. Co. v. Haight*, 152 N.C. App. 137, 142, 566 S.E.2d 835, 838 (2002). That is precisely what the plain language of this statute accomplishes. Here, for example, the UIM carriers provided combined UIM coverage ensuring that, in the event of bodily injury or death in an auto accident, there would be at least $200,000 in available insurance coverage. That is the amount of liability coverage provided in this case. Accordingly, we affirm the trial court's entry of summary judgment in favor of the UIM carriers on this issue.

¶ 27 **[2]** Plaintiff also argues that the trial court's order failed to acknowledge that State Farm waived its subrogation rights and thus cannot be entitled to reimbursement of the $100,000 in UIM coverage that it advanced while reserving a right to reimbursement.

¶ 28 Under the Motor Vehicle Safety and Financial Responsibility Act, no insurer "shall exercise any right of subrogation. . . where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice." N.C. Gen. Stat. § 20-279.21(b)(4). Plaintiff contends that State Farm's advance of its $100,000 in UIM coverage occurred many months after the tender of the full limits by the liability carriers, and thus waived State Farm's subrogation rights as a matter of law.

¶ 29 The trial court properly determined that this statutory provision is inapplicable. As explained above, when the underlying liability insurers exhausted the limits of their two $100,000 policies by tendering the full limits, the UIM carriers had no duty to advance any payments because they owed nothing under their policies. Because State Farm did not have any obligation to advance payment under its UIM policy, the statutory provision governing waiver of subrogation rights upon failure to timely advance payment does not apply.

¶ 30 Plaintiff does not assert any other basis to challenge the trial court's ruling with respect to State Farm's right to reimbursement, and we therefore affirm this portion of the trial court's order as well. *See* N.C. R. App. P. 28(b).

Conclusion

¶ 31 We affirm the trial court's order.

AFFIRMED.

Judges MURPHY and JACKSON concur.

UPCHURCH v. HARP BUILDERS, INC.

[283 N.C. App. 321, 2022-NCCOA-301]

FARRON JEROME UPCHURCH, PLAINTIFF
v.
HARP BUILDERS, INC. AND VALENTINE JOSEPH CLEARY, DEFENDANTS

No. COA21-472

Filed 3 May 2022

Statutes of Limitation and Repose—counterclaims—relation back to date action was filed—prior holdings

In a case arising from a motor vehicle accident, defendant's counterclaim—filed one day after both plaintiff's complaint and the expiration of the three-year statute of limitations in N.C.G.S. § 1-52(16)—was properly dismissed as time-barred by the statute of limitations. Acknowledging conflicting holdings in prior opinions, the Court of Appeals was bound to hold that the counterclaim did not relate back to the date that plaintiff's action was filed.

Judge MURPHY concurring in result only.

Appeal by Defendant from order entered 22 April 2021 by Judge Phyllis Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 9 February 2022.

Ennis, Baynard, Morton, Medlin & Brown, PA, by Maynard M. Brown, for Plaintiff-Appellee.

Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Andrew J. Hanley, for Defendants-Appellants.

JACKSON, Judge.

¶ 1 Defendant Valentine Joseph Cleary ("Defendant") appeals from an order granting Plaintiff Farron Jerome Upchurch's ("Plaintiff") motion for summary judgment on Defendant's counterclaim and dismissing his counterclaim with prejudice. After careful review, we affirm.

I. Background

¶ 2 This case involves a motor vehicle accident that occurred between the parties on 19 December 2015 in New Hanover County off Interstate 40. On 19 December 2018, Plaintiff filed a complaint alleging that Defendant was at fault and seeking damages for personal injuries sustained in the

accident. On 20 December 2018, Defendant filed an answer and counterclaim alleging that Plaintiff was at fault and seeking damages for personal injuries sustained in the accident. On 13 September 2019, Defendant filed an amended answer and counterclaims. On 27 February 2020, Plaintiff answered, asserting the defenses of contributory negligence and gross negligence. On 7 December 2020, Plaintiff filed an amended answer to Defendant's amended counterclaim, moving to dismiss the counterclaim pursuant to N.C. Gen. Stat. § 1-52(16) on the ground it was barred by the three-year statute of limitations.

¶ 3 On 18 December 2020, Plaintiff moved for judgment on the pleadings, or in the alternative, for summary judgment on the ground that Defendant's counterclaim was filed after the statute of limitations had run. On 5 January 2021, the Honorable R. Kent Harrell ruled on Plaintiff's motion, denying judgment on the pleadings and finding that Plaintiff was required to seek leave of court to file the amended reply that asserted the statute of limitations defense. On 19 January 2021, Plaintiff moved to amend his answer. This motion was allowed on 23 February 2021 by the Honorable Phyllis Gorham. On 26 February 2021, Plaintiff filed an amended answer to Defendant's counterclaim. On 4 March 2021, Plaintiff filed another motion for judgment on the pleadings, or in the alternative, for summary judgment on the ground that the counterclaim was filed after the statute of limitations had run. On 22 March 2021, Defendant filed a second amended answer.

¶ 4 On 22 April 2021, the Honorable Phyllis Gorham entered an order granting Plaintiff's motion for summary judgment on Defendant's counterclaim and dismissed Defendant's counterclaim with prejudice.

On 29 April 2021, Defendant timely filed notice of appeal.

II. Analysis

¶ 5 The sole issue on appeal is whether the trial court erred in granting Plaintiff's motion for summary judgment on the ground that Defendant's counterclaim was barred by the three-year statute of limitations provided in N.C. Gen. Stat. § 1-52(16).

¶ 6 We review a trial court's grant of summary judgment *de novo*. *Summey v. Barker*, 357 N.C. 492, 497, 586 S.E.2d 247, 249 (2003).

¶ 7 North Carolina General Statute § 1-52(16) establishes a three-year statute of limitations "for personal injury or physical damage to claimant's property[.]" N.C. Gen. Stat. § 1-52(16) (2021). The cause of action in such cases begins to accrue when "bodily harm to the claimant or physical damages to his property becomes apparent or ought reasonably

to have become apparent to the claimant, whichever event first occurs." *Id.* The parties seemingly agree that the cause of action in the instant case began to accrue on the day of the accident, 19 December 2015, and claims must have been filed by 19 December 2018 to be within the three-year statute of limitations delineated by N.C. Gen. Stat. § 1-52(16).

¶ 8 Defendant argues that his counterclaim filed on 20 December 2018 should be deemed to relate back to the filing of the original complaint by Plaintiff on 19 December 2018, and thus should be considered timely filed within the three-year statute of limitations. In doing so, Defendant contends that we should decline to follow our Court's holding in *PharmaResearch Corp. v. Mash*, 163 N.C. App. 419, 594 S.E.2d 148, *disc. rev. denie*d, 358 N.C. 733 (2004).

¶ 9 In *PharmaResearch*, a defendant filed counterclaims in a shareholders agreement dispute and argued the filing should relate back to the date the plaintiff filed its original complaint. 163 N.C. App. at 426, 594 S.E.2d at 153. The Court concluded that "counterclaims do not 'relate back' to the date the plaintiff's action was filed[,]" and that the counterclaims were barred by the applicable statute of limitations. *Id.* at 427, 594 S.E.2d at 153. The Court followed our Supreme Court's intervening analysis in *Burcl v. North Carolina Baptist Hospital, Inc.*, 306 N.C. 214, 293 S.E.2d 85 (1982), "that if application of the [North Carolina] Rules of Civil Procedure dictates a result different from that arrived at in a pre-rules case, the Rules should be applied[.]" 163 N.C. App. at 426, 594 S.E.2d at 153. Therefore, the Court concluded "that the pertinent Rule of Civil Procedure, Rule 13, does not support defendant's assertion that his counterclaim should be deemed to 'relate back' to the date that plaintiff filed its original action." *Id.* at 427, 594 S.E.2d at 153. The Court specifically declined to follow our Supreme Court's much earlier decision *Brumble v. Brown*, 71 N.C. 513 (1874), which held the opposite—that a counterclaim "refers to the commencement of the action . . . [a]nd if not barred by the statute at that time, it does not become so afterwards during the pending of the action." 71 N.C. at 516.

¶ 10 Defendant argues that we should decline to follow *PharmaResearch* for several reasons, most significantly because the Court in *PharmaResearch* erroneously overruled a previous decision of our Court, *In re Gardner*, 20 N.C. App. 610, 202 S.E.2d 318 (1974), in violation of *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989).

¶ 11 The Court in *In re Gardner* adopted the rule in *Brumble* and held that the counterclaim at issue related back and was therefore not barred by the applicable statute of limitations. 20 N.C. App. at 618, 202 S.E.2d at

324. The Court did so despite the new, amended Rules of Civil Procedure becoming effective on 1 January 1970, prior to the filing of the original complaint on 16 June 1971. *Id.* at 617-18, 202 S.E.2d at 323-24. While we acknowledge the conflicting holdings, we are unable to overrule *PharmaResearch* in favor of *In re Gardner*. "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. at 384, 379 S.E.2d at 37.

> Thus, *In re Civil Penalty* stands for the proposition that, where a panel of this Court has decided a legal issue, future panels are bound to follow that precedent. This is so even if the previous panel's decision involved narrowing or distinguishing an earlier controlling precedent—even one from the Supreme Court—as was the case in *In re Civil Penalty*. Importantly, *In re Civil Penalty* does not authorize panels to overrule existing precedent on the basis that it is inconsistent with earlier decisions of this Court.

State v. Gonzalez, 263 N.C. App. 527, 531, 823 S.E.2d 886, 888-89 (2019).

¶ 12 The Supreme Court "has authorized us to disregard our own precedent in certain rare situations[,]" such as "when two lines of irreconcilable precedent develop independently—meaning the cases never acknowledge each other or their conflict[.]" *Id.* at 531, 823 S.E.2d at 889. This exception does not apply to the case at bar. The Court in *PharmaResearch* specifically acknowledged *In re Gardner* and determined its holding did not apply as it "was super[s]eded by the adoption of our Rules of Civil Procedure." *PharmaResearch*, 163 N.C. App. at 427 n.1, 594 S.E.2d at 153 n.1.

¶ 13 Accordingly, we hold that the rule delineated in *PharmaResearch*—that counterclaims do not relate back to the date the plaintiff's action was filed—applies to this case. Therefore, Defendant's counterclaim filed on 20 December 2018 was barred by the three-year statute of limitations provided in N.C. Gen. Stat. § 1-52(16).

III. Conclusion

¶ 14 For the foregoing reasons, we affirm the trial court's order granting Plaintiff's motion for summary judgment on Defendant's counterclaim and dismissing the counterclaim with prejudice.

AFFIRMED.

Judge DIETZ concurs.

Judge MURPHY concurs in result only.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 MAY 2022)

CAMPOS v. HAUSLER 2022-NCCOA-302 No. 21-521	Cabarrus (21CVS409)	Affirmed.
CECIL HOLCOMB RENOVATIONS, INC. v. LAW FIRM OF WILSON & RATLEDGE, PLLC 2022-NCCOA-303 No. 21-65-2	Wake (13CVS16189)	Affirmed
CRAIGE JENKINS LIIPFERT & WALKER, LLP v. WOODS 2022-NCCOA-304 No. 21-95	Forsyth (20CVS2255)	Dismissed
DAVIS v. SMARTOP, INC. 2022-NCCOA-305 No. 21-470	Carteret (18CVS721)	REVERSED AND REMANDED FOR A NEW TRIAL ON DAMAGES
DEP'T OF TRANSP. v. McLENDON HILLS PROP. OWNERS' ASS'N 2022-NCCOA-306 No. 21-235	Moore (19CVS849)	Affirmed
DOZIER v. DOZIER 2022-NCCOA-307 No. 21-298	Durham (14CVD1272)	Affirmed
FUCHS v. STORRY 2022-NCCOA-308 No. 21-719	Catawba (19CVD3653)	Affirmed
HUFFMAN v. HUFFMAN 2022-NCCOA-309 No. 21-104	Wilkes (16CVD1465)	Affirmed
HUTCHINS v. CVS PHARMACY, INC. 2022-NCCOA-310 No. 21-345	Forsyth (17CVS4176)	Affirmed
IN RE J.H. 2022-NCCOA-311 No. 21-667	Perquimans (19JT12)	Vacated and Remanded.
IN RE K.D.H. 2022-NCCOA-312 No. 21-599	Buncombe (17JT372) (19JT8)	Affirmed

IN RE K.L.M.F.J. 2022-NCCOA-313 No. 21-571	Onslow (20JA191)	Affirmed
IN RE L.M. 2022-NCCOA-314 No. 21-344	Cumberland (19JA386-388)	VACATED AND REMANDED IN PART; REVERSED IN PART
IN RE M.M.G. 2022-NCCOA-315 No. 21-626	Forsyth (18JB173)	Affirmed
IN RE N.M.M. 2022-NCCOA-316 No. 21-499	Forsyth (20J102)	Affirmed
IN RE P.L. 2022-NCCOA-317 No. 21-555	Jackson (20JA31)	Affirmed
IN RE R.C.C.L. 2022-NCCOA-318 No. 21-640	Burke (19JT174)	Affirmed
IN RE PROPOSED FORECLOSURE OF SLOK, LLC 2022-NCCOA-319 No. 21-352	Mecklenburg (19SP3244)	Affirmed
JOHNSON v. GYURISKO 2022-NCCOA-320 No. 21-86	Moore (17CVD1015)	Reversed
MAIWALD v. MAIWALD 2022-NCCOA-321 No. 21-542	Catawba (20CVD1275)	Dismissed
McKERNAN v. E. CAROLINA UNIV. 2022-NCCOA-322 No. 21-572	Pitt (20CVS2648)	Dismissed
MILLS v. JACKSON 2022-NCCOA-323 No. 21-325	Nash (20CVS472)	Affirmed
STATE v. DAVENPORT 2022-NCCOA-325 No. 20-628	Martin (16CRS50059)	New Trial

STATE v. DAVIS 2022-NCCOA-326 No. 21-73	Lincoln (14CRS53438-39) (14CRS53442)	NO PLAIN ERROR
STATE v. IRELAND 2022-NCCOA-327 No. 21-611	Henderson (20CRS52)	No Error
STATE v. TAYLOR 2022-NCCOA-328 No. 21-277	Duplin (17CRS52248-50)	No Error
STATE v. THOMAS 2022-NCCOA-329 No. 21-396	Cumberland (19CRS50445)	No Error
STATE v. VANN 2022-NCCOA-330 No. 20-907	New Hanover (16CRS56562)	New Trial
STATE v. WILLIAMS 2022-NCCOA-331 No. 21-550	Johnston (18CRS1493) (18CRS54891-93)	Reversed and Remanded
WILLIAMS v. HELPING HANDS MISSION 2022-NCCOA-332 No. 21-424	N.C. Industrial Commission (18-715547)	Affirmed

BIRCHARD v. BLUE CROSS & BLUE SHIELD OF N.C., INC.

[283 N.C. App. 329, 2022-NCCOA-333]

KATHERINE BIRCHARD, PLAINTIFF
v.
BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, INC., THE NORTH CAROLINA STATE HEALTH PLAN A/K/A NORTH CAROLINA STATE HEALTH PLAN, A BODY POLITIC AND CORPORATE, AND THE BOARD OF TRUSTEES OF THE STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, DEFENDANT

No. COA21-729

Filed 17 May 2022

Public Officers and Employees—State Health Plan—subject matter jurisdiction—review of denial of requested coverage—psychiatric residential treatment center

Where plaintiff, who was a member of the State Health Plan, filed a complaint alleging breach of contract and unfair and deceptive trade practices against Plan-related defendants based on the denial of her request for certification to allow her to access coverage for treatment in a psychiatric residential treatment center, the trial court's dismissal of the complaint for lack of subject matter jurisdiction was affirmed because the matter belonged before the Industrial Commission pursuant to N.C.G.S. § 58-50-61.

Appeal by plaintiff from order entered 2 July 2021 by Judge Alyson Adams Grine in Orange County Superior Court. Heard in the Court of Appeals 26 April 2022.

Barry Nakell for plaintiff-appellant.

Gallivan, White & Boyd, P.A., by Christopher M. Kelly and Kelsey N. Dorton, for defendant-appellee Blue Cross and Blue Shield of North Carolina, Inc.

TYSON, Judge.

¶ 1 Katherine Birchard ("Plaintiff") appeals the trial court's order dismissing her complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted in favor of Blue Cross and Blue Shield of North Carolina, the North Carolina State Health Plan, and the Board of Trustees for the State Health Plan for Teachers and State Employees (collectively "Defendants"). We affirm.

I. Background

¶ 2 Plaintiff was a member of a medical insurance plan entitled "State Health Plan for Teachers and State Employees Enhanced 80/20 PPO Plan" ("Plan"). The Plan was made available to Plaintiff pursuant to N.C. Gen. Stat. §§ 135-48.1 *et seq*. and 135-75.2 (2021), because of her employment at the University of North Carolina School of Medicine as a licensed physician and faculty member of the Radiology Department.

¶ 3 The Plan is administered under a state contract with Defendant, Blue Cross Blue Shield of North Carolina ("BCBSNC"). BCBSNC is a private North Carolina corporation and serves as the contract administrator of the Plan. BCBSNC also separately provides medical insurance to other subscribers and members in the State of North Carolina. The Plan requires a member to request "certification from the Mental Health Case Manager" before accessing coverage and benefits for care in a "Psychiatric Residential Treatment Center." The Plan specifically states there is no coverage for services "that are: Not medically necessary."

¶ 4 Plaintiff requested certification from BCBSNC of coverage and benefits for her to be treated and monitored for severe depression and suicidal ideation in a "Psychiatric Residential Treatment Center." Defendant denied Plaintiff's request in December 2017 after finding the request was "Not medically necessary" in accordance with Beacon NMNC 1.101.02. These standards require: first, the patient shows "symptoms consistent with a DSM or corresponding ICD diagnosis"; second, the "member's psychiatric condition requires 24-hour medical/psychiatric and nursing services and of such intensity that needed services can only be provided in an acute psychiatric hospital"; third, "[i]npatient psychiatric services are expected to significantly improve the member's psychiatric condition within a reasonable period of time so that acute, short-term 24-hour inpatient medical/psychiatric and nursing services will no longer be needed"; and, fourth, the "symptoms do not result from a medical condition that would be more appropriately treated on a medical/surgical unit."

¶ 5 Plaintiff filed her original complaint in superior court in January 2021 alleging breach of contract, in violation of N.C. Gen. Stat. § 59-3-220 (2021), and unfair and deceptive trade practices against only BCBSNC. BCBSNC filed motions to dismiss for lack of subject matter jurisdiction and failure to assert a claim by law pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6).

¶ 6 Plaintiff filed her First Amended Complaint on 14 April 2021 and added Defendants, North Carolina State Health Plan, and the Board of

Trustees of the State Health Plan for Teachers and State Employees, as parties. Plaintiff alleged breach of contract, violation of N.C. Gen. Stat. § 59-3-220, unfair and deceptive trade practices, and bad faith refusal to pay health or medical insurance benefits against Defendants. Plaintiff never asserted any claim before the Industrial Commission. Defendants filed a motion to dismiss Plaintiff's First Amended Complaint for lack of subject matter jurisdiction and for failure to state a claim for which relief can be granted.

¶ 7 The trial court granted Defendants' Rules 12(b)(1) and 12(b)(6) motions to dismiss. Plaintiff appeals.

II. Jurisdiction

¶ 8 Appellate review is proper pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Issues

¶ 9 Plaintiff raises two issues of whether the trial court erred by: (1) dismissing her First Amended Complaint against Defendants under Rule 12(b)(l) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction in the superior court; and, (2) dismissing her First Amended Complaint against Defendants under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

IV. Analysis

A. Standard of Review

¶ 10 A trial court's order granting a motion to dismiss under Rule 12(b)(1) and under Rule 12(b)(6) is reviewed *de novo* on appeal. *Corwin as Tr. for Beatrice Corwin Living Irrevocable Tr. v. Brit. Am. Tobacco PLC*, 371 N.C. 605, 611, 821 S.E.2d 729, 734 (2018).

B. Procedural Status

¶ 11 Plaintiff argues the superior court possessed jurisdiction to review BCBSNC's decision to deny her certification.

> [Part 4. Health Benefit Plan External Review] applies to all insurers that offer a health benefit plan and that provide or perform utilization review pursuant to G.S. 58-50-61, the *State Health Plan for Teachers and State Employees*, and any optional plans or programs operating under Part 2 of Article 3A of Chapter 135 of the General Statutes.

N.C. Gen. Stat. § 58-50-75(b) (2021) (emphasis supplied).

¶ 12 The statutes provide several definitions applicable here. The standard of external utilization review provides "a covered person" may file for review within 120 days of notice and be assigned an independent review organization. N.C. Gen. Stat. § 58-50-80 (2021). A " '[u]tilization review organization' [is] an entity that conducts utilization review under a managed care plan, but does not mean an insurer performing utilization review for its own health benefit plan." N.C. Gen. Stat. § 58-50-61(a)(18) (2021).

¶ 13 N.C. Gen. Stat. § 58-50-61(a)(12) provides,

> "Medically necessary services or supplies" means those covered services or supplies that are:
>
> a. Provided for the diagnosis, treatment, cure, or relief of a health condition, illness, injury, or disease.
>
> b. Except as allowed under G.S. 58-3-255, not for experimental, investigational, or cosmetic purposes.
>
> c. Necessary for and appropriate to the diagnosis, treatment, cure, or relief of a health condition, illness, injury, disease, or its symptoms.
>
> d. Within generally accepted standards of medical care in the community.
>
> e. Not solely for the convenience of the insured, the insured's family, or the provider.
>
> For medically necessary services, nothing in this subdivision precludes an insurer from comparing the cost-effectiveness of alternative services or supplies when determining which of the services or supplies will be covered.

N.C. Gen. Stat. § 58-50-61(a)(12) (2021).

¶ 14 Under the statute: " 'noncertification' means a determination by an insurer or its designated utilization review organization that an admission, availability of care, continued stay, or other health care service has been reviewed and, based upon the information provided, does not meet the insurer's requirements for medical necessity[.]" N.C. Gen. Stat. § 58-50-61(a)(13) (2021).

¶ 15 BCBSNC is the Plan's designated "utilization review organization" ("URO") to which "a covered person" must seek review of all "medically necessary" care under the Plan. *Id.*

¶ 16 The General Assembly specifically determined the "utilization review" for coverage and benefits under the Plan is regulated by Chapter 58. *See* N.C. Gen. Stat. § 58-50-75(b) (2021). The General Assembly created an avenue to review external "utilization review" claims under the State Health Plan before the Industrial Commission. *See* N.C. Gen. Stat. § 58-50-61; N.C. Gen. Stat. § 143-291(a) (2021).

¶ 17 When this Court reviews a statute, "it is presumed the legislature acted with full knowledge of prior and existing law, and with care and deliberation. Every statute is to be interpreted in light of the . . . laws as they were understood at the time of the enactment at issue." *Dare Cty. Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371 (1997) (citations and internal quotation marks omitted).

¶ 18 The parties stipulated this dispute involves contract claims and not negligence claims. "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).

¶ 19 BCBSNC's role as the Plan's URO, conducted two rounds of internal reviews, Plaintiff then sought an appeal of those decisions *via* external review by an independent review organization, which was assigned pursuant to N.C. Gen. Stat. § 58-50-80(b)(5).

¶ 20 "An external review decision is binding on the insurer." N.C. Gen. Stat. § 58-50-84(a) (2021). "[A]n independent review organization . . . shall not be liable for damages to any person for any opinions rendered during or upon completion of an external review conducted under this Part, unless the opinion was rendered in bad faith or involved gross negligence." N.C. Gen. Stat. § 58-50-89 (2021).

¶ 21 Plaintiff exhausted her remedies by seeking the external review by the independent review organization, and by failing to seek further review before the Industrial Commission. Plaintiff and BCBSNC are both bound by the decision to uphold the denial of coverage by the independent review organization. Plaintiff could have sought review with the Industrial Commission, if she sought to challenge the external independent review organization's decision. Plaintiff does not allege negligence or bad faith in the decision levied by the independent review organization. We are bound as is BCBSNC, and any asserted contract claim against BCBSNC is improper regarding the external review organization's decision to deny coverage.

C. *Meyer v. Walls*

¶ 22 Plaintiff relies upon *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997), and argues the superior court possesses jurisdiction to adjudicate these claims. In *Meyer*, the plaintiff committed suicide while under the care of the county department of social services. *Id.* at 102, 489 S.E.2d at 883. Plaintiff therein filed negligence claims against the county and the individuals involved. *Id.* at 103, 489 S.E.2d at 883. The Court reasoned, "[a] plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice *for common-law negligence*." *Id.* at 108, 489 S.E.2d at 886 (emphasis supplied). The court denied the defendants' 12(b)(1) motion. *Id.* at 109, 489 S.E.2d at 887.

¶ 23 The Court's holding in *Meyer* does not support Plaintiff's contract arguments here under the State Tort Claims Act:

> The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon *tort claims* against the State Board of Education, the Board of Transportation, *and all other departments, institutions and agencies of the State.* The Industrial Commission shall determine whether or not each individual claim arose as a result of 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. If the Commission finds that there was *negligence* on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury and that there was no contributory *negligence* on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages that the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the

> payment of damages as provided in subsection (a1) of this section[.]

N.C. Gen. Stat. § 143-291(a) (2021) (emphasis supplied).

¶ 24 Plaintiff's amended complaint against BCBSNC alleges breach of contract and unfair and deceptive trade practices, not negligence. *Meyer* allows a negligence claim against an agent of the state in superior court that is separate from the state agency asserted before the Industrial Commission under the State Tort Claims Act. *Meyer*, 347 N.C. at 108, 489 S.E.2d at 886.

¶ 25 The holding in *Meye*r is inapplicable here. Plaintiff's right to review the independent review organization's decision lies by statute with the Industrial Commission. BCBSNC is bound by that decision. Plaintiff did not assert claims against or join the independent review organization as a party, nor did they pursue review of their decision before the Industrial Commission.

¶ 26 The General Assembly is presumed to have "acted with full knowledge" when they opted to not further waive North Carolina's sovereign immunity or choice of forum, and to create further liability for the taxpayers of the State and its agencies regarding contract coverage disputes over treatments and payments of Plan benefits. *Sakaria*, 127 N.C. App. at 588, 492 S.E.2d at 371. The superior court does not possess subject matter jurisdiction to review the decision made by the independent review organization or the State Health Plan and claims against BCBSNC are properly dismissed.

¶ 27 Even if Plaintiff was entitled to further review the denial of coverage, she did not initiate nor invoke the statutory "utilization review" process the General Assembly expressly provided before the Industrial Commission. N.C. Gen. Stat. § 58-50-61 (2021). The trial court's order specifically found and concluded "Plaintiff concedes jurisdiction for this case lies in the Industrial Commission rather than in the superior court[.]" Plaintiff's arguments are overruled. In light of our holding on this issue, we need not reach Plaintiff's remaining arguments.

V. Conclusion

¶ 28 Plaintiff bears the burden on appeal of showing the superior court possessed subject matter jurisdiction over her claims review, or alternatively, she is entitled to another review for her admittedly contractual and statutory claims. Plaintiff has failed to meet this burden.

¶ 29 Plaintiff failed to utilize the statutory review process provided to her by Chapter 58. N.C. Gen. Stat. § 58-50-61. She is not entitled to further review in the superior court pursuant to our statutes. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges WOOD and GRIFFIN concur.

ANN HERRING FOX, INDIVIDUALLY AND ON BEHALF OF THE P.G. FOX, JR. REVOCABLE TRUST AND RUSSELL LEE STEPHENSON, III ON BEHALF OF THE P.G. FOX, JR. REVOCABLE TRUST, PLAINTIFFS

v.

SARAH WESLEY FOX AND CRAIG B. WHEATON, INDIVIDUALLY, AND IN THEIR REPRESENTATIVE CAPACITIES AS TRUSTEES OF THE P.G. FOX, JR. REVOCABLE TRUST; AND SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN, L.L.P., DEFENDANTS

No. COA21-534

Filed 17 May 2022

1. Statutes of Limitation and Repose—revocable trust—challenge to its validity

In an action brought by a decedent's wife (plaintiff) against the decedent's daughter and son-in-law (defendants) regarding the decedent's revocable trust, under which defendants were trustees and co-beneficiaries with plaintiff, plaintiff's claim challenging the trust's validity was properly dismissed as time-barred where plaintiff did not raise the claim until three years after the statute of limitations for challenging revocable trusts had passed.

2. Fraud—constructive—fiduciary relationship as matter of fact—pleading

In an action brought by a decedent's wife (plaintiff) against the decedent's daughter and son-in-law (defendants) regarding the decedent's revocable trust—which defendants, being attorneys, had prepared themselves and under which they were trustees and co-beneficiaries with plaintiff—plaintiff's claim for constructive fraud against defendants in their individual capacities was properly dismissed where her complaint failed to allege a fiduciary relationship between the parties as a matter of fact. Plaintiff's allegations that she held a "special confidence and trust" in defendants based

on their close familial relationship to her, their status as trustees, and their profession as licensed attorneys were mere conclusory assertions that were not supported by detailed factual allegations giving rise to a fiduciary relationship.

3. Conspiracy—civil—derivative of other claims—other claims dismissed—dispute regarding revocable trust

In an action brought by a decedent's wife (plaintiff) against the decedent's daughter and son-in-law (defendants) regarding the decedent's revocable trust, under which defendants were trustees and co-beneficiaries with plaintiff, plaintiff's claim for civil conspiracy against defendants in their individual capacities was properly dismissed where the claim was derivative of other claims (also against defendants as individuals) that had also been dismissed, and civil conspiracy is not an independent basis of liability under North Carolina law.

4. Trusts—breach of trust—sufficiency of pleading—trustees' abuse of discretionary powers—violation of mandatory trust provision

In an action brought by a decedent's wife (plaintiff) against the decedent's daughter and son-in-law (defendants) regarding the decedent's revocable trust, under which defendants were trustees and co-beneficiaries with plaintiff, the trial court erred in dismissing plaintiff's two claims for breach of trust for failure to state a claim where plaintiff sufficiently pleaded, under one claim, that defendants abused their discretionary powers as trustees by making unauthorized trust distributions to themselves and their children while wrongfully withholding distributions from plaintiff, and, under another claim, that defendants violated their mandatory duty under the trust to share in the cost of maintaining the home that plaintiff and the trust jointly owned. Further, resolution of plaintiff's claims would require consideration of evidence outside the pleadings, including the ample documentation of defendants' distributions, which the trial court did not consider when reviewing defendants' motion to dismiss.

5. Fraud—constructive—by trustees of revocable trust—sufficiency of pleading

In an action brought by a decedent's wife (plaintiff) against the decedent's daughter and son-in-law (defendants) regarding the decedent's revocable trust—which defendants, being attorneys, had prepared themselves and under which they were trustees and

co-beneficiaries with plaintiff—the trial court erred in dismissing (under Civil Procedure Rules 9 and 12) plaintiff's claim for constructive fraud against defendants in their capacities as trustees. Plaintiff's complaint sufficiently alleged that—either by mistake or by ploy—the trust designated plaintiff's ex-husband as a co-trustee; defendants induced him to resign on the pretext that his son would be appointed to replace him, knowing all the while that this would not actually happen; and defendants, upon assuming control of the trust, exercised their discretionary powers under the trust in ways that benefitted them to plaintiff's detriment.

6. Conspiracy—civil—derivative of other claims—other claims adequately pled—dispute regarding revocable trust

In an action brought by a decedent's wife (plaintiff) against the decedent's daughter and son-in-law (defendants) regarding the decedent's revocable trust, under which defendants were trustees and co-beneficiaries with plaintiff, the trial court improperly dismissed—for failure to state a claim—plaintiff's civil conspiracy claim against defendants in their capacities as trustees, where the claim was derivative of plaintiff's claims for breach of trust and constructive fraud (also against defendants as trustees), the pleadings for which were legally sufficient.

Appeal by Plaintiffs from orders entered on 23 April 2021 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 22 March 2022.

Rossabi Law Partners, by Amiel J. Rossabi and Gavin J. Reardon, for Plaintiff-Appellant Ann Herring Fox.

Penry Riemann PLLC, by J. Anthony Penry, for Defendant-Appellees Sarah Wesley Fox and Craig B. Wheaton as trustees, and Nelson Mullins Riley & Scarborough, LLP, by Mark A. Stafford, for Defendant-Appellees Sarah Wesley Fox and Craig B. Wheaton individually.

JACKSON, Judge.

¶ 1 Ann Herring Fox ("Plaintiff") appeals from the trial court's orders dismissing her complaint under Rules 9 and 12 of the North Carolina Rules of Civil Procedure. Plaintiff Russell Lee Stephenson, III, with the other parties' consent, moved to voluntarily dismiss his appeal from

the orders on 23 November 2021, which our Court allowed the following day. Plaintiff also moved on 23 November 2021 to voluntarily dismiss her appeal from one of the trial court's 23 April 2021 orders of dismissal, which dismissed the case against Defendant Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P. ("Smith Anderson"). That motion was also allowed by our Court on 24 November 2021. Accordingly, Plaintiff is the sole remaining appellant and Defendants Sarah Wesley Fox and Craig B. Wheaton ("Defendants") are the two remaining appellees. After careful review, we affirm the order of the trial court in part, reverse it in part, and remand the case for further proceedings.

I. Background

¶ 2 This is a dispute about P.G. Fox, Jr., M.D.'s ("Dr. Fox") revocable trust and a home the trust owns jointly with Plaintiff. In late 2012 or early 2013, Dr. Fox engaged Smith Anderson, a law firm, to prepare his will and trust. The will and trust revoked all prior wills and trusts. On 28 January 2013, Dr. Fox executed the will and trust. On 22 February 2014, Dr. Fox died.

¶ 3 At the time of his death, Plaintiff was married to Dr. Fox. She was his third wife, and they had been married for 24 years. She lives in a home she purchased jointly with Dr. Fox as tenants in common, in which she owns an 11 percent interest, reflecting the proportion of the purchase price she paid with her separate funds. Dr. Fox's trust owns the remaining 89 percent of the home, reflecting the proportion of the price Dr. Fox paid for the home.

¶ 4 Defendant Fox is Dr. Fox's daughter and Defendant Wheaton is her husband. Both are lawyers, and at the time Dr. Fox engaged Smith Anderson to prepare the will and trust, Defendants were employed by Smith Anderson.

¶ 5 Plaintiff, Defendant Fox, and Defendants' children are the beneficiaries of the trust.[1] The trust terms appoint Defendants and Russell Lee Stephenson, Jr., ("Mr. Stephenson") as Dr. Fox's successor trustees. Mr. Stephenson is Plaintiff's former husband. On 8 July 2015, Mr. Stephenson resigned as a trustee, apparently on the understanding (1) that his appointment as a successor trustee was a mistake; (2) that Dr. Fox had intended to appoint Mr. Stephenson's son, Russell Lee Stephenson, III, ("Lee") as a successor trustee, not Mr. Stephenson; and

1. All of Dr. Fox's issue are beneficiaries, so any of Dr. Fox's great-grandchildren also would be.

(3) that Lee would be appointed as a trustee by a majority of Dr. Fox's surviving issue upon Mr. Stephenson's resignation, which the trust terms authorized. Lee is Plaintiff and Mr. Stephenson's son.

¶ 6 After Dr. Fox passed away, Defendant Wheaton began making distributions from the trust to his wife and children for their health, maintenance, and support, as purportedly authorized by the terms of the trust. No distributions were made to Plaintiff for her health, maintenance, or support, however, despite trust terms authorizing such distributions. Instead, Defendants attributed distributions to Plaintiff for continuing to live in the home, essentially charging her rent for continuing to live in the home and treating the rent Plaintiff was not paying as a recurring distribution for Plaintiff's health, maintenance, and support.

¶ 7 In 2016, Plaintiff engaged counsel and requested an accounting of the trust for the first time. The trust terms require Defendants to provide an accounting of the trust at least annually upon the request of a beneficiary.

¶ 8 The trust terms also require Defendants to pay for the trust's share—that is, 89 percent—of the cost of maintaining the home for as long as the home remains trust property. In 2017, Defendants refused to reimburse Plaintiff for certain expenses she claimed were incurred to maintain the home because they believed the expenses either were not incurred to maintain the home or were inadequately documented. They also notified Plaintiff that they wanted to sell the home. In 2019, Defendants again refused to reimburse Plaintiff for expenses she claimed were incurred to maintain the home because of what they considered inadequate documentation.

¶ 9 On 7 August 2019, Plaintiff filed a petition to remove Defendants as trustees with the Wake County Clerk of Superior Court. On 29 May 2020, Plaintiff filed this suit. The petition to remove Defendants as trustees was still pending at the time Plaintiff filed suit.

¶ 10 In her complaint, Plaintiff asserts eight claims: (1) breach of fiduciary duty; (2) reformation of trust based on either unilateral mistake induced by fraud or mutual mistake; (3) legal malpractice; (4) civil conspiracy; (5) constructive fraud; (6) intentional infliction of emotional distress; (7) negligent infliction of emotional distress; and (8) conversion. In her prayer for relief, Plaintiff requests actual and punitive damages; reformation or modification of the trust; disgorgement of all distributions to Defendant Fox and Defendants' children and their return to the trust; and costs and attorney's fees.

¶ 11 On 5 August 2020, Defendants moved to dismiss Plaintiff's complaint under Rules 9 and 12 of the North Carolina Rules of Civil Procedure. Smith Anderson filed a motion to dismiss under Rules 9 and 12 the same day. The motions came on for hearing before the Honorable G. Bryan Collins, Jr., in Wake County Superior Court on 15 September 2020. The trial court granted the motions in two orders entered on 23 April 2021.

¶ 12 Plaintiff timely noticed appeal on 14 May 2021.

II. Analysis

¶ 13 Plaintiff's complaint asserts numerous causes of action against Defendants as trustees and individuals and many of these claims overlap, are incorrectly captioned, and are time-barred. Several appear to lack any merit. Nevertheless, we hold that Plaintiff's complaint states two valid claims for breach of trust, one valid claim for constructive fraud against Defendants as trustees, and one valid claim for civil conspiracy against Defendants as trustees.

¶ 14 Specifically, the valid claims for breach of trust are (1) for allegedly making unauthorized distributions for health, maintenance, and support to Defendant Fox and her children while wrongfully withholding distributions for health, maintenance, and support from Plaintiff and (2) for failing to fully reimburse Plaintiff for the trust's share of the cost to maintain the home Plaintiff owns jointly with the trust. The claim for constructive fraud against Defendants as trustees is based on an alleged error in Dr. Fox's trust appointing Mr. Stephenson as a successor trustee and Defendant Wheaton inducing Mr. Stephenson to resign as a trustee on the pretext that Lee would be appointed after Mr. Stephenson's resignation. The valid claim for civil conspiracy against Defendants as trustees is that Defendants agreed to take control of the trust through Mr. Stephenson's resignation and make the allegedly improper distributions while withholding distributions from Plaintiff as part of a deliberate, premeditated plan. Because these are valid claims, the trial court erred in dismissing them. We therefore reverse the trial court's order in part and remand the case for further proceedings.

A. Introduction and Standard of Review

¶ 15 "A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Sterner v. Penn*, 159 N.C. App. 626, 628, 583 S.E.2d 670, 672 (2003) (citation omitted).

> A Rule 12(b)(6) motion will be granted (1) when the face of the complaint reveals that no law supports plaintiff's claim; (2) when the face of the complaint

> reveals that some fact essential to plaintiff's claim is missing; or (3) when some fact disclosed in the complaint defeats plaintiff's claim. We treat all factual allegations of the pleading as true but not conclusions of law. In sum, a Rule 12(b)(6) motion asks the court to determine whether the complaint alleges the substantive elements of a legally recognized claim.

Id. at 628-29, 583 S.E.2d at 872 (cleaned up). In determining whether to grant a Rule 12 motion, exhibits attached to a complaint are considered a part thereof "because '[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.' " *Krawiec v. Manly*, 370 N.C. 602, 606, 811 S.E.2d 542, 546 (2018) (quoting N.C. Gen. Stat. § 1A-1, Rule 10(c)). However, "matters outside the complaint are not germane to a Rule 12(b)(6) motion." *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 203, 652 S.E.2d 701, 707 (2007). Moreover, "[g]eneral allegations of wrongdoing, which do not specify the alleged wrongful act or omission, such as the allegation that the defendant did other things not authorized by the laws of North Carolina in the management of a fiduciary estate, are mere conclusions of law." *Kuykendall v. Proctor*, 270 N.C. 510, 514-15, 155 S.E.2d 293, 298 (1967) (internal marks omitted).

¶ 16 On appeal, our review is de novo. *Spoor on behalf of JR Int'l Holdings, LLC v. Barth*, 257 N.C. App. 721, 724, 811 S.E.2d 609, 612 (2018). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Fields v. H & E Equip. Servs.*, 240 N.C. App. 483, 486, 771 S.E.2d 791, 793 (2015) (citation omitted).

B. Plaintiff's Claims

¶ 17 This is an action against Defendants in both their individual capacities and as trustees of Dr. Fox's trust. We address the claims against Defendants individually first. Then we turn to the claims against them as trustees.

1. Individual Capacity Claims

a. The Challenge to the Validity of the Trust Is Time-Barred

¶ 18 **[1]** As noted previously, Plaintiff asserts claims against Defendants for breach of fiduciary duty, constructive fraud, and civil conspiracy.[2]

2. Although Plaintiff also asserted claims against Defendants for reformation of trust, legal malpractice, intentional infliction of emotional distress, negligent infliction

However, certain allegations in Plaintiff's breach of fiduciary duty claim cannot be construed as a claim against Defendants individually because the allegations are based on alleged failures by Defendants to fulfill their duties as trustees. While "it is clear that the trustee of a trust has a fiduciary obligation to the beneficiary of the trust[,]" *Melvin v. Home Fed. Sav. & Loan Ass'n*, 125 N.C. App. 660, 664, 482 S.E.2d 6, 8 (1997), under the North Carolina Uniform Trust Code, "[a] violation by a trustee of a duty the trustee owes under a trust is a breach of trust[,]" N.C. Gen. Stat. § 36C-10-1001(a) (2021).

¶ 19 Paragraph 52 of Plaintiff's complaint alleges:

> 52. Despite the fiduciary duties owed, Defendants have breached their fiduciary duties to Plaintiffs by, among other things:
>
> (a) denying Mrs. Fox distributions owed to her under the Trust;
>
> (b) attributing to Mrs. Fox "rent" from the Trust that she has not received;
>
> (c) making distributions to themselves, their children and others in violation of the express and implied terms of the Trust;
>
> (d) devising, perpetrating and continuing to perpetrate the Scheme;[3]

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of emotional distress, and conversion, Plaintiff does not argue any error in the dismissal of these claims, thereby abandoning them. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

3. The "Scheme" is defined in paragraph 10 of Plaintiff's complaint as follows:

> 10. Upon information and belief, in or about 2012, Defendant Fox and Defendant Wheaton, together with one or more lawyers at Defendant Smith Anderson, formulated a scheme by which they would cause to be created and signed by Dr. Fox a trust document which would:
>
> (a) contain ambiguous language that Defendant Fox and Defendant Wheaton could use, together with their inequitable bargaining power and superior knowledge of the law over Plaintiffs, illicitly, to construe in their favor and deprive Mrs. Fox of assets Dr. Fox intended her to have;
>
> (b) nullify Dr. Fox's intent and plan to have Lee serve as a co-trustee of the Trust; and
>
> (c) misinterpret and violate the terms of the Trust (hereinafter, the "Scheme").

(e) harassing and intimidating Plaintiffs, including about the sale of the Primary Residence;

(f) failing to appoint Lee as a co-trustee; and

(g) failing to provide, at all and/or in a timely manner, accountings of the Trust.

¶ 20 In essence, Plaintiff's claim for breach of fiduciary duty is two separate claims: (1) a claim challenging the validity of the trust based on the perpetration of what Plaintiff characterizes as a "scheme" to change Dr. Fox's estate plan to wrongfully benefit Defendants and their children at Plaintiff's expense; and (2) a claim for breach of trust for alleged failures to make required distributions, making unauthorized distributions, and failure to provide timely accountings.[4] The claim challenging the validity of the trust is a claim against Defendants individually because it is based on alleged actions by Defendants outside their capacities as trustees, which allegedly occurred before they were appointed as trustees. The claim based on alleged failures to make required distributions, making unauthorized distributions, and failing to provide accountings is a claim for breach of trust against Defendants as trustees, not as individuals. *See* N.C. Gen. Stat. § 36C-10-1001(a) (2021).

¶ 21 The statute of limitations for a claim contesting the validity of a revocable trust is three years after the settlor's death or, at the trustee's election, 120 days after the settlor's death if the trustee gives proper notice. *Id.* § 36C-6-604(a). The claim challenging the validity of the trust is time-barred because Dr. Fox died on 22 February 2014 and Plaintiff did not bring this suit until 29 May 2020, over six years after Dr. Fox's death—over three years after the statute of limitations had run. This suit is the first time the validity of the trust has been challenged: notably, Plaintiff did not challenge the validity of the trust in the 7 August 2019 petition to remove Defendants as trustees filed with the Clerk of Superior Court of Wake County by her former counsel, nor does any of her counsel take the position that the trust is invalid in any of the correspondence included in the record on appeal.

4. Plaintiff also alleges that attributing distributions to her for continuing to live in the home she jointly owns with the trust constitutes a breach of fiduciary duty. We consider attributing distributions to Plaintiff for continuing to live in the home that allegedly was unauthorized to be a subcategory of alleged failures to make required distributions.

b. The Complaint Does Not State a Claim for Constructive Fraud Against Defendants Individually

¶ 22 **[2]** Plaintiff's claim for constructive fraud against Defendants individually fails because the allegations in the complaint do not adequately allege a fiduciary relationship between Plaintiff and Defendants as a matter of fact.

¶ 23 "It is axiomatic that '[f]or a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties.' " *Howe v. Links Club Condominium Assoc., Inc.*, 263 N.C. App. 130, 147, 823 S.E.2d 439, 453 (2018) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)). "In the event that a party fails to allege any special circumstances that could establish a fiduciary relationship, dismissal of a claim which hinges upon the existence of such a relationship would be appropriate." *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 599, 821 S.E.2d 711, 725 (2018) (cleaned up).

> Though difficult to define in precise terms, a fiduciary relationship is generally described as arising when 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. A fiduciary relationship may exist in law or in fact. For that reason, even when a fiduciary relationship does not arise as a matter of law, that is, due to the legal relations between two parties, it may yet exist as a matter of fact in such instances when there is confidence reposed on one side, and the resulting superiority and influence on the other.

Id. at 599-600, 821 S.E.2d at 725 (cleaned up).

¶ 24 However, "detailed factual allegations, rather than mere conclusory assertions, are necessary to demonstrate the existence of a fiduciary relationship as a matter of fact." *Id.* at 600, 821 S.E.2d at 726 (citation omitted). Moreover, "it has long been established that the finding of a familial relationship alone does not create a fiduciary relationship." *Holloway v. Holloway*, 221 N.C. App. 156, 165, 726 S.E.2d 198, 204-05 (2012) (citation omitted). "Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the 'special circumstance' of a fiduciary relationship has arisen." *Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A.*, 219 N.C. App. 615, 621, 730 S.E.2d 763, 767 (2012) (citation omitted).

¶ 25 The most Plaintiff's complaint does to allege that a fiduciary relationship existed between her and Defendants as a matter fact is to allege that Defendant Fox is Dr. Fox's daughter and Defendant Wheaton is her husband, and that Plaintiff "reposed special confidence and trust in Defendants because of the close familial relationship with Defendant[s] . . . and because of their status as co-trustees and attorneys licensed to practice law in the State of North Carolina." These allegations are mere conclusory assertions that are not supported by any allegations regarding any special circumstance giving rise to a fiduciary relationship between Plaintiff and Defendants as a matter of fact. While attorneys "owe a fiduciary duty to their clients[,]" *N.C. State Bar v. Gilbert*, 151 N.C. App. 299, 311, 566 S.E.2d 685, 692 (2002), they do not to non-clients, *see Noblot v. Timmons*, 177 N.C. App. 258, 263-64, 628 S.E.2d 413, 415-16 (2006), and there is no allegation in this case that Defendants or any other attorney associated in practice with either of them has ever represented Plaintiff.[5] Accordingly, the trial court did not err in dismissing the claim for constructive fraud against Defendants individually.

c. Civil Conspiracy Is Not an Independent Basis of Liability

¶ 26 **[3]** Plaintiff's claim for civil conspiracy against Defendants individually fails because it is derivative of Plaintiff's other claims against Defendants individually and all of Plaintiff's other individual capacity claims against Defendants fail.

¶ 27 "A civil action for conspiracy is an action for damages resulting from acts committed by one or more of the conspirators pursuant to the formed conspiracy, rather than the conspiracy itself." *Burton v. Dixon*, 259 N.C. 473, 476, 131 S.E.2d 27, 30 (1963).

> To create civil liability for conspiracy there must have been a wrongful act resulting in injury to another committed by one or more of the conspirators pursuant to the common scheme and in furtherance of

5. As we observed in *Piraino Brothers, LLC v. Atlantic Financial Group, Inc.*, 211 N.C. App. 343, 349-50, 712 S.E.2d 328, 333 (2011),

> [t]he Courts of this State have held attorneys liable for actions that impact non-client third parties in only a few limited situations . . . . *See Title Ins. Co. of Minn. v. Smith*, *Debnam*, *Hibbert & Pahl*, 119 N.C. App. 608, 459 S.E.2d 801 (1995), *affirmed and modified in part*, 342 N.C. 887, 467 S.E.2d 241 (1996) (duty applies where the attorney renders a title opinion upon which the non-client is entitled to rely); *Jenkins v. Wheeler*, 69 N.C. App. 140, 316 S.E.2d 354 (1984) (duty applies where there is a complete unity of interests between the attorney's client and the non-client).

> the objective. This is because a conspiracy charged does no more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under the proper circumstances the acts of one may be admissible against all. Therefore, we have determined that a complaint sufficiently states a claim for civil conspiracy when it alleges (1) a conspiracy, (2) wrongful acts done by certain of the alleged conspirators in furtherance of that conspiracy, and (3) injury as a result of that conspiracy.

Krawiec, 370 N.C. at 613-14, 811 S.E.2d at 550-51 (cleaned up).

¶ 28 However, "there is not a separate civil action for civil conspiracy in North Carolina." *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005). Because conspiracy is a mode of liability rather than a cause of action, it is derivative of the other claims against a party, and if the other claims fail, so does the conspiracy claim. *Piraino Bros., LLC v. Atlantic Fin. Grp., Inc.*, 211 N.C. App. 343, 350, 712 S.E.2d 328, 333-34 (2011). Accordingly, the trial court did not err in dismissing Plaintiff's claim for civil conspiracy against Defendants individually because the individual capacity claim challenging the validity of the trust is time-barred and the individual capacity claim for constructive fraud fails to adequately allege a fiduciary relationship as a matter of fact.

2. Defendants as Trustees

a. The Complaint States Two Valid Claims for Breach of Trust

¶ 29 **[4]** As previously noted, we hold that Plaintiff's complaint states two valid claims for breach of trust: one for allegedly making unauthorized distributions for health, maintenance, and support to Defendant Fox and her children while wrongfully withholding distributions for health, maintenance, and support from Plaintiff; and a second for failing to fully reimburse Plaintiff for the trust's share of the cost to maintain the home Plaintiff owns jointly with the trust.

¶ 30 The duties and powers of trustees are codified in Article 8 of the North Carolina Uniform Trust Code. *See* N.C. Gen. Stat. § 36C-8-801 (2021), *et seq*. These duties include the duties of good faith, loyalty, impartiality, and prudence. *See id.* §§ 36C-8-801, -802, -803, -804. In general, while "the extent to which a . . . trustee violated his or her fiduciary duty is a separate, and broader, question than the issue of whether he or she violated a specific provision of a written trust instrument[,]" *In re Skinner*, 370 N.C. 126, 144, 804 S.E.2d 449, 461 (2017), violation of

a specific provision of a trust constitutes a breach of trust unless the terms of the trust are inconsistent with a trustee's fiduciary duties, *see* N.C. Gen. Stat. §§ 36C-10-1001(a), -1-105(b)(2), (3) (2021).

¶ 31 "Trustees . . . must act in good faith. They can never paramount their personal interest over the interest of those for whom they have assumed to act." *Miller v. McLean*, 252 N.C. 171, 174, 113 S.E.2d 359, 362 (1960) (citations omitted). In addition, a trustee must "maintain complete loyalty to the interests of his beneficiaries." *Howe*, 263 N.C. App. at 149, 823 S.E.2d at 454 (quoting *Wachovia Bank & Trust Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967)) (internal marks omitted). "Should there be any self-interest on the trustee's part in the administration of the trust which would interfere with this duty of complete loyalty, a beneficiary may seek the trustee's removal." *In re Wills of Jacobs*, 91 N.C. App. 138, 143, 370 S.E.2d 860, 864 (1988). In North Carolina, such an action must be brought before the Clerk of Superior Court. N.C. Gen. Stat. § 36C-2-203(a)(1) (2021).

¶ 32 Not all self-dealing by trustees is categorically prohibited, however. As the official commentary to N.C. Gen. Stat. § 36C-8-802 notes, "it is not uncommon that the trustee will also be a beneficiary." N.C. Gen. Stat. § 36C-8-802, off. cmt. (2021). "The grant to a trustee of authority to make a distribution to a class of beneficiaries that includes the trustee implicitly authorizes the trustee to make distributions for the trustee's own benefit." *Id.*

¶ 33 "The powers of a trustee are either mandatory or discretionary." *Woodard v. Mordecai*, 234 N.C. 463, 471, 67 S.E.2d 639, 644 (1951). "A power is mandatory when it authorizes and commands the trustee to perform some positive act." *Id.* "A power is discretionary when the trustee may either exercise it or refrain from exercising it, or when the time, or manner, or extent of its exercise is left to his discretion." *Id.* (cleaned up). While a court "will always compel the trustee to exercise a mandatory power[,] . . . [it] will not undertake to control the trustee with respect to the exercise of a discretionary power, except to prevent an abuse by him of his discretion." *Id.*

> The trustee abuses his discretion in exercising or failing to exercise a discretionary power if he acts dishonestly, or if he acts with an improper even though not a dishonest motive, or if he fails to use his judgment, or if he acts beyond the bounds of a reasonable judgment.

Id. (citations omitted).

> Whether a power is mandatory or discretionary depends upon the intent of the settlor as evidenced by the terms of the trust. The intent of a settlor is determined by the language he chooses to convey his thoughts, the purposes he seeks to accomplish and the situation of the parties benefitted by the trust. Use by the settlor of words of permission or option, or reference to the discretion of the trustee, in describing the trustee's power indicates that the settlor intended that the power be discretionary, whereas use of directive or commanding language indicates that a mandatory power was intended.

Linebacker v. Stout, 79 N.C. App. 292, 297, 339 S.E.2d 103, 107 (1986) (cleaned up). "Under a true discretionary trust, the trustee may withhold the trust income and principal altogether from the beneficiary and the beneficiary, as well as the creditors and assignees of the beneficiary, cannot compel the trustee to pay over any part of the trust funds." *Id.* at 296, 339 S.E.2d at 106.

¶ 34 The terms of Dr. Fox's trust demonstrate that it is a discretionary trust as to distributions for health, maintenance, and support to the beneficiaries, but mandatory with respect to the trust's share of the cost of maintaining the home it owns jointly with Plaintiff and certain other decisions related to the home. Article III, Section One of the trust directs the trustees until Plaintiff's death or remarriage "to distribute all or any portion of the trust property to [] [Plaintiff] in such amounts and at such times as the Trustee deems necessary for her health, maintenance or support" and to "distribute all or any portion of the trust property to any of [Dr. Fox's] issue in such amounts and at such times as the Trustee deems necessary for the health, maintenance or support in reasonable comfort of any of them." Defendants' powers as trustees to make distributions for Plaintiff's health, maintenance, and support, as well as distributions for the health, maintenance, and support of Dr. Fox's issue are discretionary because of Dr. Fox's "[u]se . . . of words of permission or option," *id.* at 297, 339 S.E.2d at 107, to wit—"*all or any portion* of the trust property"—with the time, manner, and extent of the exercise of this discretion left to the trustees, *see Woodard*, 234 N.C. at 471, 67 S.E.2d at 644. (Emphasis added.)

¶ 35 The trust creates three important discretionary powers to be exercised by the trustees in connection with the home the trust owns jointly with Plaintiff. Article III, Section Six provides in relevant part that the trustees *may* retain the 89 percent interest in the home and permit

Plaintiff "to use and occupy the residence rent free" until her death or remarriage. In addition, this section authorizes the trustees to "sell, rent or otherwise dispose of the trust's interest in the residence if [they] determine[] that occupancy of such residence by [] [Plaintiff] *is contrary to her best interests* and the interests of the beneficiaries succeeding to the trust property after her death or remarriage." (Emphasis added.) Finally, this section authorizes the trustees, in the event of a sale of the home, "to purchase an interest in a replacement residence using such portion of the principal of the trust, including, but not limited to, the trust's share of net proceeds from any sale or other disposition of the trust's interest in the residence[,]" at Plaintiff's election.

¶ 36 The trust terms that are mandatory relate to the cost of maintaining the home and to sale or rental of the home at Plaintiff's election. For as long as the home remains trust property, Article III, Section Six directs the trustees to "pay out of the trust that percentage of all expenses incurred in connection with carrying, upkeep, maintenance and repair of the residence including, without limitation, taxes, assessments, utilities, insurance and repairs, which is equal to the trust's percentage ownership[.]" That section additionally directs the trustees to "sell or rent the trust's interest in the residence within a reasonable time upon receipt of signed instructions from [] [Plaintiff] to that effect."

¶ 37 There is considerable documentation in the record on appeal of distributions to beneficiaries other than Plaintiff for health, maintenance, and support and to Plaintiff for the trust's share of the cost of maintaining the home, as well as an appraisal of the home completed after Dr. Fox's death that Defendants apparently used to determine a rental value of the home.[6] However, *none* of this documentation would have been properly considered by the trial court at the hearing on Defendants' motion to dismiss, and nothing in the record indicates that the court so considered it, thereby converting the motion to dismiss into one for summary

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6. The terms of the trust neither expressly authorize nor prohibit attributing distributions to Plaintiff for health, maintenance, and support for continuing to live in the home. As noted above, the trustees enjoy a discretionary power to permit Plaintiff to continue living in the home unless she informs them in writing that she wants them to sell or rent the trust's interest in the home. Because the trustees' powers to make distributions to the beneficiaries for health, maintenance, and support, including to Plaintiff, are wholly discretionary, on the undeveloped record before us, we cannot say as a matter of law that attributing distributions to Plaintiff for health, maintenance, and support for continuing to live in the home was an abuse of discretion by the trustees or constituted a breach of trust. Nothing in this opinion is intended to suggest or imply what the correct resolution of this issue is in further proceedings on remand, however, which will require considering matters outside the pleadings.

judgment without notice to Plaintiff, which would have been improper. *See, e.g.*, N.C. Gen. Stat. § 1A-A, Rule 12(b) (2021) ("If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."). Indeed, in the order of dismissal, the trial court states that it considered only "the complaint and attachments filed by plaintiffs, along with the brief served by defendants and the material served by plaintiffs, as well as the arguments of counsel."

¶ 38 Determining whether Defendants are liable for making unauthorized distributions for health, maintenance, and support to Defendant Fox and their children while withholding distributions for health, maintenance, and support from Plaintiff and for failing to fully reimburse Plaintiff for the trust's share of the cost to maintain the home Plaintiff jointly owns with the trust will require a developed factual record of all distributions of trust property and potentially other evidence, such as evidence in the form of expert opinion regarding whether attributing distributions to Plaintiff for health, maintenance, and support for continuing to live in the home was consistent with the trustees' duties to administer the trust in good faith, loyally, impartially, and prudently with respect to the interests of *all* beneficiaries, including Plaintiff. Because Plaintiff's claims for breach of trust are legally sufficient, and resolution of these claims will require consideration of matters outside the pleadings and the exhibits thereto, we hold that the trial court erred in dismissing these claims.

b. The Complaint States a Valid Claim for Constructive Fraud Against Defendants as Trustees

¶ 39 **[5]** Plaintiff's claim for constructive fraud against Defendants as trustees is likewise legally sufficient.

¶ 40 "In order to maintain a claim for constructive fraud, [a] plaintiff[] must show that [she] and [the] defendants were in a relation of trust and confidence which led up to and surrounded the consummation of the transaction in which [the] defendant is alleged to have taken advantage of his position of trust to the hurt of [the] plaintiff." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (internal marks and citation omitted).

> Constructive fraud differs from actual fraud in that it is based on a confidential relationship rather than

> a specific misrepresentation. Implicit in the requirement that a defendant take advantage of his position of trust to the hurt of plaintiff is the notion that the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself.

Id. (cleaned up).

¶ 41 "Although the elements of constructive fraud and breach of fiduciary duty overlap, each is a separate claim under North Carolina law." *Chisum v. Campagna*, 376 N.C. 680, 706, 2021-NCSC-7 ¶ 47 (internal marks and citation omitted).

> A successful claim for breach of fiduciary duty requires proof that (1) the defendants owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff. A successful claim for constructive fraud requires proof of facts and circumstances (1) which created the relation of trust and confidence between the parties, and (2) which 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.

Id. at 706, 2021-NCSC-7 ¶ 48 (cleaned up). "Intent to deceive is not an element of constructive fraud." *White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004) (citation omitted). Thus, "[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." *Ironman Med. Props. v. Chodri*, 268 N.C. App. 502, 513, 836 S.E.2d 682, 691 (2019) (citing *White*, 166 N.C. App. at 294, 603 S.E.2d at 156).

¶ 42 Article V, Section Three of the trust appoints Defendants and Mr. Stephenson as successor trustees. That section also provides that if any one or two of the trustees cease to act, the remaining trustee or trustees can continue to serve without a successor being appointed and that a majority of Dr. Fox's adult issue who are living and competent *may* appoint a successor trustee. These terms thus confer a discretionary power on Defendant Fox and her children to appoint a successor trustee, assuming they are all competent.

¶ 43 Paragraph 82 of Plaintiff's complaint alleges:

> 82. Defendant Fox and Defendant Wheaton obtained their present control over the Trust and its assets, mismanaged the trust and its assets, and misappropriated to themselves and others Funds from the Trust by breaching their fiduciary positions as alleged herein, including by:
>
> (a) causing Mr. Stephenson's name, rather than Lee's, to be listed in the Trust as co-trustee;
>
> (b) inducing Lee to secure Mr. Stephenson's resignation as co-trustee under false pretenses;
>
> (c) falsely representing to Lee, with the intent that he would be convinced and Lee would convince Mrs. Fox, that Lee would be appointed as a co-trustee;
>
> (d) misappropriating and depleting funds from the Trust through the Scheme and as otherwise alleged herein; and
>
> (e) violating the terms of the Trust and preventing Mrs. Fox from receiving distributions from the Trust to which she was entitled.

¶ 44 In essence, this claim is that including Mr. Stephenson as a successor trustee rather than Lee in Article V, Section Three was either a simple mistake or some kind of ploy and that Defendant Wheaton induced Mr. Stephenson to resign as a trustee on the pretext that Lee would be appointed upon Mr. Stephenson's resignation while knowing full well that a majority of Dr. Fox's adult issue—his wife and his children—would refuse to appoint Lee as a successor trustee, which they in turn refused to do once Mr. Stephenson resigned.

¶ 45 Mr. Stephenson was the only obstacle to Defendants' control of the trust before his resignation. Once he resigned, it is alleged that Defendants exercised the discretionary powers created by the trust and conferred upon them as trustees in a manner that breached their duties to Plaintiff as trustees, thereby benefitting Defendant Fox and their children at Plaintiff's expense. We hold that the allegations in paragraph 82 of Plaintiff's complaint state a valid claim for constructive fraud against Defendants as trustees. Accordingly, the trial court erred in dismissing it.

c. The Complaint States a Valid Claim for Civil Conspiracy Against Defendants as Trustees

¶ 46 **[6]** Because Plaintiff's complaint states two valid claims for breach of trust and one valid claim for constructive fraud against Defendants as trustees, Plaintiff's claim for civil conspiracy against Defendants as trustees, which is derivative of the valid claims against them as trustees, should have survived Defendants' motion to dismiss. Plaintiff alleges in her complaint that Defendants "agreed among themselves to take the actions complained of herein[,]" and, "[a]s a proximate result of Defendants' conspiracy, Plaintiff[] and the Trust have been damaged by: (a) failure to properly administer the Trust; (b) misuse and misappropriation of Trust funds; and (c) loss of money to which they are entitled." We hold that these allegations state a valid claim for civil conspiracy against Defendants as trustees because they allege that Defendants agreed to take control of the trust by securing Mr. Stephenson's resignation and then made allegedly improper distributions while withholding distributions from Plaintiff as part of a deliberate, premeditated plan. Accordingly, the trial court erred in dismissing this claim.

3. Amendment of Complaint

¶ 47 In her final argument on appeal, Plaintiff contends that she should be allowed an opportunity to amend her complaint to state her claims more fully. We hold that this issue has not been preserved for appellate review.

¶ 48 While generally speaking, "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served," N.C. Gen. Stat. § 1A-1, Rule 15(a) (2021), otherwise, "a party can only amend a pleading with the consent of the trial judge[,]" *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986) (citation omitted). A trial court's refusal to allow amendment of a complaint is reviewed for an abuse of discretion. *Id.*

¶ 49 Moreover, to preserve an issue for appellate review, a party must both (1) "present[] to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling . . . desired . . . if the specific grounds [are] not apparent from the context" and (2) "obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10(a). Relatedly, "[u]nder North Carolina Rules of Appellate Procedure 7, 9, and 11, the burden is placed upon the appellant to commence settlement of the record on appeal, including providing a verbatim transcript

if available." *State v. Berryman*, 360 N.C. 209, 216, 624 S.E.2d 350, 356 (2006) (citations omitted). Thus, Plaintiff, "as the appellant, bore the burden . . . of ensuring that the record on appeal . . . [was] complete, properly settled, in correct form, and filed[.]" *Id.* at 217, 624 S.E.2d at 356.

¶ 50 Plaintiff has chosen not to include a transcript of the hearing on Defendants' motion to dismiss in the record on appeal on the grounds that no evidence was presented at the hearing and the hearing consisted only of arguments of counsel and colloquy with the court. Plaintiff asserts in her appellate brief that she made an express request for findings of fact and conclusions of law pursuant to Rule 52 of the North Carolina Rules of Civil Procedure to support the trial court's dismissal of her claims, but Defendants dispute this assertion, and there is nothing in the record that indicates such a request was made at the hearing. Because Plaintiff chose not to include a transcript of the hearing in the record, and neither the alleged Rule 52 request nor any ruling on this alleged request are in the record, the issue of whether the trial court abused its discretion by refusing to grant a request that might or might not have been made has not been preserved for appellate review. As the appellant, Plaintiff bore the burden of including any Rule 52 request in the record.

III. Conclusion

¶ 51 We affirm the trial court's dismissal of Plaintiff's individual capacity claims against Defendants. We reverse the trial court's dismissal of Plaintiff's claims for breach of trust for (1) making unauthorized distributions to Defendant Fox and her children while withholding distributions from Plaintiff and for (2) failing to fully reimburse Plaintiff for the trust's share of the cost to maintain the home. In addition, we reverse the trial court's dismissal of Plaintiff's claim for constructive fraud and civil conspiracy against Defendants as trustees for securing control of the trust by inducing Mr. Stephenson to resign as a trustee and then making allegedly improper distributions to Defendant Fox and their children while withholding distributions from Plaintiff. We remand the case for further proceedings on these four claims.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Chief Judge STROUD and Judge HAMPSON concur.

IN RE N.L.M.

[283 N.C. App. 356, 2022-NCCOA-335]

IN THE MATTER OF N.L.M., T.R.M. IV, N.S.W., C.M.

No. COA21-608

Filed 17 May 2022

1. Child Abuse, Dependency, and Neglect—reasonable efforts to prevent placement—findings of fact—children's health and safety

The trial court did not err in a child abuse and neglect case by concluding that the department of social services had made reasonable efforts to prevent the children's out-of-home placement where the findings, which respondent-mother did not challenge on appeal, showed the department's reasonable efforts—including presentation of an out-of-home family services agreement, foster care case management, child forensic evaluations, referrals of services for the parents, record requests for the parents' treatment providers, contact with the parents, and review of child protective services records. These efforts took into consideration the children's health and safety as the paramount concern where respondent had starved one of the children and physically abused her in other ways.

2. Child Abuse, Dependency, and Neglect—motion to continue—pointed questions—due process

In a child abuse and neglect case, the trial court did not violate respondent-mother's due process rights by allegedly denying her motion to continue and showing bias by asking pointed questions, where respondent-mother in fact did not make a motion to continue and where she did not preserve the issue regarding bias for appellate review. Even if she had preserved that issue, the trial court's pointed questions and comments were directed to all parties and were based on the evidence it heard during the hearing; there was no showing of bias or prejudice to her case.

3. Child Abuse, Dependency, and Neglect—visitation—trial court's discretion—health and safety of children

In a child abuse and neglect case, the trial court did not abuse its discretion by allegedly believing it lacked discretion to grant respondent-mother visitation with her children, where the trial court made findings of fact, not challenged on appeal, that the mother had a pending criminal charge for child abuse and that it would be contrary to the health and safety of the children to have visitation with her.

4. Child Abuse, Dependency, and Neglect—visitation—denial—best interests of children—child abuse—case plan

In a child abuse and neglect case, the trial court did not abuse its discretion by suspending respondent-father's visitation with his children where the court concluded that it was not in the children's best interests to have visitation with their father, and the unchallenged findings showed that the father created or allowed to be created a substantive risk of serious physical injury and serious emotional damage for one of the children, that all of the children had witnessed the abuse of their sister, that the father had complied with only some of his case plan tasks, that he did not follow through with recommended psychiatric care, that he would not sign releases to allow the department of social services to learn about his participation in counseling, and that he had a pending criminal charge for felony aiding and abetting child abuse.

5. Child Abuse, Dependency, and Neglect—visitation plan—notification of right for review—harmless error analysis

In a child abuse and neglect case, while the trial court erred by failing to inform respondent-father of his right to file a motion for review of the visitation plan, the error was harmless because the trial court immediately scheduled the next permanency planning hearing and the father was aware of that hearing date.

Appeal by Respondent-Mother and Respondent-Father from order entered 2 August 2021 by Judge Angela C. Foster in Guilford County District Court. Heard in the Court of Appeals 26 April 2022.

Mercedes O. Chut for Petitioner-Appellee Guilford County Department of Social Services.

Stam Law Firm, PLLC, by R. Daniel Gibson, for Respondent-Appellant Mother.

Richard Croutharmel for Respondent-Appellant Father.

Keith Karlsson for Guardian ad Litem.

COLLINS, Judge.

¶ 1 Respondent-Mother and Respondent-Father appeal the trial court's order adjudicating one of their children abused and neglected and their

three other children neglected, ordering the children to remain in the legal and physical custody of the Guilford County Department of Social Services, ordering the parents to comply with the case plan to effect reunification, and maintaining the suspension of the parents' visitation rights with all four juveniles. We affirm.

I. Background

¶ 2 Mother and Father are the parents of four children: Naomi, Timothy, Nancy, and Cameron.[1] Mother and Father are not married, and Father does not live in the home with Mother and the four children, but he does visit the home daily and cooks for the family members. In 2015, Nancy was adjudicated neglected, placed in foster care, and eventually returned to her parents' custody in March 2017.

¶ 3 On 27 February 2019, Guilford County Department of Social Services ("DSS") received a report stating that: Nancy was abused and neglected; Mother did not have a bond with Nancy and punishes and mistreats Nancy for bonding with a white foster mother when she was in foster care; Nancy "may be autistic, being that she does not cry when hit by [Mother]"; Nancy was being "burned by a flat iron and cigarettes, being locked in her room all day and she is only let out to go to the bathroom where she is left sitting for hours at a time"; Nancy was not being fed for days; and Mother is "believed to be an avid heroin user and keeps the drugs and the straw inside her [bra] and that she sells drugs as well."

¶ 4 That same day, a DSS social worker examined Nancy and reported that Nancy was very small for her age, weighing only 19 pounds at the age of four. The social worker noticed that there were two small scars on the top of Nancy's shoulder and burn marks on her body. The social worker also spoke with the other three children, who disclosed that Nancy "is left in her bedroom all the time and would eat there" and "want[s] to come downstairs, but she was not allowed to."

¶ 5 On 1 March 2019, DSS received a second report alleging that Nancy was receiving improper medical and remedial care, had not been seen by a doctor since November 2016, and had not gained any weight since returning to Mother's custody when she was approximately 18-24 months old. That day, Nancy had been admitted to the hospital for severe malnutrition "and there were also concerns as to her having significant developmental delays." Nancy was diagnosed with "Severe Protein Malnourishment, Failure to Thrive, Developmental Delays and

1. Pseudonyms are used to protect the identities of the minor children.

Norovirus." She gained four pounds while in the hospital and was eventually released into the care of her paternal grandmother. Mother stated, "I've been starving my child," but said she never meant to cause Nancy any harm.

¶ 6 Following Nancy's hospitalization, a DSS social worker spoke twice with Naomi and once with Timothy. Naomi stated that Nancy was "treated like a prisoner," that Father cooked food for Nancy and Mother brought it up to Nancy's room and they did not know what happens after the food is taken upstairs to Nancy, that Nancy was left alone on the toilet for hours at a time, and that Nancy had not left the home in 2019 until the hospitalization on 1 March 2019. She also stated that she witnessed Mother and Mother's friends drink and "have needles with a 'white powdery stuff' " and that Mother told her they "use water to inject it and it helps [Mother] stay awake." Timothy also stated that he was "unsure if Nancy was getting the food" that Mother took upstairs, that Nancy "was not allowed outside of her bedroom unless she was going to the bathroom," and that Mother left Nancy on the toilet for hours at a time, and one time forgot Nancy was there.

¶ 7 DSS filed juvenile petitions on 8 March 2019 alleging that Nancy was abused and neglected and that Cameron was neglected. On 12 March 2019, DSS filed petitions alleging that Naomi and Timothy were neglected. The trial court ordered forensic examinations of Naomi and Timothy, and it ordered Mother and Father to have no contact with Nancy and Cameron. All four children were placed into an emergency placement with their paternal grandmother. The forensic examinations took place in April 2019. Sometime around 11 May 2019, Mother was charged with felony child abuse inflicting serious bodily injury and Father was charged with aiding and abetting felony child abuse inflicting serious bodily injury.

¶ 8 In July 2019, the trial court continued the matter for various reasons and ordered that neither parent have visitation. The matter was continued again in September 2019 when Mother requested to represent herself, signed a waiver of counsel, and stated that she would be hiring her own counsel; her court-appointed attorney was released. The matter was continued again in December 2019 when Mother stated that she was no longer able to retain private counsel; the trial court appointed new counsel for Mother. Mother's appointed counsel sought and was granted another continuance in January 2020 to prepare for the case. There were additional continuances granted throughout 2020 due to the COVID-19 pandemic, but the trial court found on 19 January 2021 that it had continued the matter several times at the request of Mother and that "this shall

be the final continuance allowed at the request of [Mother]." The matter was continued twice more in early 2021 because the attorneys were not available.

¶ 9 The adjudication hearing was held on 26 May 2021, during which Nancy was adjudicated abused because her parents created or allowed to be created a substantive risk of serious physical injury to her, and all four children were adjudicated neglected as they did not receive proper care, supervision, and discipline from their parents and lived in an environment injurious to their welfare. The trial court proceeded directly to the dispositional hearing and found that it was in the best interests of the children to remain in DSS custody and remain in the kinship placement with their grandmother. The trial court maintained the suspension of visitation as to both parents. Mother and Father timely appealed.

II. Discussion

A. Mother's Appeal

1. Reasonable Efforts

¶ 10 **[1]** Mother first argues that because she "took responsibility for her mistakes and was willing to correct them, the trial court erred in concluding that DSS made reasonable efforts to prevent placement."

¶ 11 The reasonable efforts determination is a conclusion of law because it "require[s] the exercise of judgment." *In re Helms*, 127 N.C. App. 505, 510-11, 491 S.E.2d 672, 676 (1997). "Our review of a trial court's conclusion of law is limited to whether they are supported by the findings of fact." *Id.* at 511, 491 S.E.2d at 676 (citing *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). Unchallenged findings of fact are "deemed to be supported by the evidence and are binding on appeal." *In re J.C.M.J.C.*, 268 N.C. App. 47, 51, 834 S.E.2d 670, 673-74 (2019) (citation omitted).

¶ 12 N.C. Gen. Stat. § 7B-903(a3) states that an order shall contain

> specific findings as to whether the department has made reasonable efforts to prevent the need for placement of the juvenile. . . . The court may find that efforts to prevent the need for the juvenile's placement were precluded by an immediate threat of harm to the juvenile. A finding that reasonable efforts were not made by [DSS] shall not preclude the entry of an order authorizing the juvenile's placement when the

> court finds that placement is necessary for the protection of the juvenile.

N.C. Gen. Stat. § 7B-903(a3) (2021).

¶ 13 N.C. Gen. Stat. § 7B-101(18) defines reasonable efforts as the "diligent use of preventative or reunification services by [DSS] when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-101(18) (2021). Additionally, while our statutes do not include a definitive list of the services which may be provided as a part of reasonable efforts, there is a

> federal regulation setting forth a nonexclusive list of services which may satisfy the reasonable efforts requirement. . . . i.e., crisis counseling, individual and family counseling, services to unmarried parents, mental health counseling, drug and alcohol abuse counseling, homemaker services, day care, emergency shelters, vocational counseling, emergency caretaker . . . .

In re DM, 211 N.C. App. 382, 386, 712 S.E.2d 355, 357 (2011) (quoting *In re Helms*, 127 N.C. App. at 512 n. 3, 491 S.E.2d at 677 n. 3).

¶ 14 Here, Mother does not challenge any of the trial court's findings of fact; they are thus binding on appeal. The trial court's relevant findings of fact include, *inter alia*, that:

> 32. On March 12, 2019, the juveniles were placed in a court approved kinship placement with their paternal grandmother, Annie McClenton. . . .
>
> 33. [Timothy] celebrated his 14th birthday on May 16, 2020. On July 13, 2020, [Timothy] completed the Casey Life Skills Assessment and his initial Transitional Living Plan was created with him. [Timothy's] Transitional Living Plan has been updated every 90 days.
>
> . . .
>
> 50. On August 20, 2019 a referral was completed to Family Solutions. On August 26, 2019, Megan Oaks with Family Solutions, confirmed the referral was received and that she will reach out to the caregiver

to schedule. . . . On September 16, 2019, a referral was completed to Saved Foundation. On September 21, 2019, [Cameron] completed a Comprehensive Clinical Assessment with Rhonda Blackburn. [Cameron] was diagnosed with Generalized Anxiety Disorder and outpatient therapy was recommended. [Cameron] participated in therapy with Ms. Blackburn and was successfully discharged on November 25, 2019.

. . . .

52. The mother entered into a case plan with the Department on January 28, 2020. The current case plan contains the following components:

> **Parenting Skills: The mother agrees to participate in a parenting psychological assessment and comply with any recommendations; successfully complete the Parenting Assessment Training and Education (PATE) Program; attend all visits, as scheduled, and comply with the visitation expectations once allowed by the court; and enter into a voluntary support agreement with Child Support Enforcement.** On January 28, 2020, the Department submitted a referral to the Guilford County Department of Health and Human Services Clinical Team for the mother to participate in a parenting psychological assessment and PATE Classes. On that date, the mother indicated to the Department that she was not willing to participate in a psychological with the Department. It was explained to her that the Department would pay for the assessment [if] she uses a Department Clinician; however, the mother declined indicating that she will hire a clinician to complete the assessment. The mother was asked that she provide the Department with the contact information of the Clinician of her choosing, so that they can be properly vetted. It was explained to the mother that any delay in identifying a clinician could be a delay in reunifying with her children. The mother participated in a parenting psychological assessment through

the Department in 2015 for her previous foster care assessment. As of today's date, the mother has not completed a recent parenting psychological assessment. The Department emailed PATE facilitator, Demetria Powell-Harrison on February 23, 2020 to follow up on the status of the mother's referral. An update was requested from Ms. Powell-Harrison on July 20, 2020. Ms. Powell-Harrison reported that she mailed a copy of the pre-test to the mother to complete on May 19, 2020 and the mother was scheduled to be seen virtually on May 26, 2020. However, the mother claimed that she did not receive the pre-test or the invitation to the virtual meeting. The appointment was rescheduled for June 9, 2020. The mother participated in the appointment on June 9, 2020; however, she talked about COVID-19 and reported that she had not finished the pre-test. Another appointment was scheduled for June 10, 2020; however, the mother did not participate. On July 21, 2020, Ms. Powell-Harrison reported to the Department that she spoke with the mother on this date and the mother advised that she was not going to complete the PATE due to her attorney advising her not to do so because it will be admitting that she is guilty. On January 21, 2021, Ms. Powell-Harrison reported that she has not had any contact with the mother since July 21, 2020. The Department requested an update from Ms. Powell-Harrison; however, has received no response as of May 17, 2021.

Substance Abuse: The mother agrees to participate in a substance abuse assessment and follow all recommendations; refrain from the use of any substances, legal or illegal, including alcohol, for the purposes of intoxication. If pain medication is needed, the mother agrees to request a non-narcotic medication; and participate in random drug and alcohol screens at the request of the Department. On January 28, 2020, the Department made a referral to the Department's

Clinician for a Substance Abuse Assessment for the mother. The mother declined services from the Department, indicating that she will find an[] independent clinician. The mother agreed to provide the identification and contact information of the clinician of her choosing for the purposes of vetting and was explained that any delay in providing this information can result in a delay of reunification with the juveniles. As of today's date, the mother has not provided any identifying information as to any clinical services. On January 28, 2020, the mother denied any recent illegal drug use although she admitted that she used marijuana when she was a teenager. She also denied taking any medication that is not prescribed to her. However, she alleged she is prescribed Percocet's for back pain and a hernia by Dr. Williams, but she is transferring her care to Bethany's Pain Clinic. The Department requested that the mother sign consents for Dr. Williams and Bethany's Pain Clinic. [Mother] has not provided any signed consents as of today's hearing. The Department requested that the mother participate in a random drug screen on the following dates:

- November 1, 2019 – did not submit
- January 28, 2020 – submit by 12 pm, January 29, 2020. The mother reported that she would test positive for Percocet's only. Did not submit.
- April 1, 2020 – Governor's state wide stay at home order put in place on March 27, 2020. The Department was advised that Social Workers should not direct parents to report to drug labs for the purpose of submitting drug screens while the order was in effect.
- June 10, 2020 – Social Worker Supervisor Haik received a voicemail message from [Mother] on June 9, 2020 at 5:16pm. [Mother's] speech was difficult to understand – slurring and at

times incoherent. Social Worker Supervisor Haik called [Mother] and left a voicemail message requesting that she complete a random drug screen no later than 11:25am on June 11, 2020; did not submit.

- July 22, 2020 – The Department mailed [Mother] six random drug screen forms to be used for future drug screen requests.
- August 4, 2020 – submit by August 5, 2020. [Mother] advised that she is not going to do a drug screen and she does not know why the Department continues to ask her to go. Did not submit.
- August 6, 2020 – The mother's attorney, Jaren Dickerson, reported that [Mother] has refrained from the use of any substances, legal or illegal, including alcohol, for the purposes of intoxication.
- October 6, 2020 – Request complete drug screen within 24 hours. [Mother] responded "I'm not doing shit or answering questions" then disconnected the call. Did not submit.
- November 19, 2020 – Requested complete a random drug screen within 24 hours. After making this request, [Mother] disconnected the call. Did not submit.
- January 21, 2021 – Requested complete a random drug screen within 24 hours. After making this request, [Mother] asked Social Worker Boyd to stop contacting her and she will not do anything until the case is adjudicated. Did not submit.
- February 26, 2021 – the Department contacted [Mother], but the phone recording stated to contact her at [] due to her phone not working. Social Worker Boyd called and spoke with [Mother]. She asked who was calling, Social Worker told her name and Title and she hung up the phone. Did not submit.

- In May 2020, the Department received information, from a source who requested to remain anonymous reporting that he had personal knowledge of [Mother] and [Father] dealing drugs and pills through the mail to South Carolina. The anonymous source claimed that [Father] buys prescription medication from other people (pain pills, Percocet, Hydrocodone, Oxymorphone). The source claims that [Mother] pays half of the street cost to buy them in bulk and then she sells them to the residents in Hampton Homes. The source made additional claims that [Mother] and [Father] have been allowed to visit with the children since they have been placed with Annie McClenton.

Domestic Violence/Family Relationships: the mother will not violate the terms of any new or existing 50-B protective orders; successfully complete the Domestic Violence Intervention Program (hereinafter "DVIP") for Women at Family Service of the Piedmont (hereinafter "FSOP"); the mother will terminate any existing relationships that involve domestic violence, when it is safe to do so; and agree to notice the Department of any incidents of domestic violence. On January 28, 2020, the mother denied any Domestic Violence since 2013; however, she agrees to participate in an assessment with FSOP to determine her need, if any for Domestic Violence services. The mother stated that she and [Father] are no longer in a relationship and they have not been in a relationship since prior to the children coming into foster care. [Mother] has not provided any information about her participation in services through FSOP or any other agency. On March 22, 2021, Social Worker Boyd contacted FSOP and left a voice message for Gabrielle Marcoccia, DVIP group leader. On May 19, 2021, a voicemail was left for Audrey Sa, Adult victim coordinator. On

that same date, Audrey Sa returned the call to the Department indicating that she will check to see if the mother is enrolled in any classes and has a release on file, then she will send the Department an email with her findings. On June 12, 2020, [Mother] reported the following to Social Worker Supervisor Haik:

- I've never cut him [Father]. He cut himself.
- He beat me up so bad that day he knew he was going to go to jail.
- There was an incident on Valentine's Day this year {2020}, [Father] jumped on me and tried to choke me. There was a guy that I let stay in my house – helping him out – I kicked him out and he was staying in the woods – he ended up in the hospital. It was out of the blue. He cannot have an adult conversation.
- He is going to end up killing me or I am going to kill him.
- He chased me from Greensboro to Randolph County in my car – bumping my car. There was a guy driving my car. The guy was the same guy that saw [Father] with my kids at Annie's house.
- He keeps coming back around and acting like we're together.
- If I am not with him, he wants me to suffer.

On August 6, 2020, the mother's attorney, Jaren Dickerson, reported that [Mother] has not violated the terms of any 50B Protective Orders. Attorney Dickerson also reported that there have been no new incidents of domestic violence since the mother entered into her case plan and she is not in a relationship that involves domestic violence. According to the 911 Log on February

8, 2021 there was a call to the home of [Mother] at [] for shots fired at them in their vehicle. On March 5, 2021, Social Worker Boyd completed a community visit to the home and saw the Volvo that was identified by John McClenton as the car [Mother] drives. There was a Volvo outside of the residence when Social Worker arrived. Social Worker observed that the driver's side tail light was missing from the vehicle. On March 22, 2021, social worker spoke with Chris Patterson, Chief Administrator about a possible police report. She stated that 2021-0208106 is the case report number for the incident. On March 22, 2021, Social Worker requested the 911 log for the home of [Mother] which was received.

Mental Health: the mother will participate in a mental health assessment and/or psychiatric assessment to determine her need for mental health services and comply with all recommendations; take any medication that is prescribed to her in the manner that it is prescribed. On January 28, 2020, the mother reported that she is not currently participating in any mental health services and she has never been diagnosed with any mental health disorder. She also reported that she is not currently prescribed any medication for mental health reasons. Social Work Supervisor Haik inquired if the mother will participate in an assessment at FSOP or Monarch to determine her need, if any for mental health services. The mother reported that she probably needs the service, but she is not sure if she is willing to participate in an assessment or service. The Department discussed with the mother that FSOP and Monarch are options for this service and both providers have walk-in hours to initiate services. On May 7, 2020, the mother reported that she has not participated in any services due to COVD-19. The mother was advised by that Monarch is able to work with clients via telephone or virtually. The mother stated that she will contact Monarch so that they can

document her thoughts. As of today's date, the mother has not provided any information regarding her participation in mental health services.

. . . .

64. The barriers to achieving reunification are:

- CPS history including prior foster care cases
- severity of medical neglect for [Nancy]
- the mother executed an Out of Home Family Services agreement; however she has declined to work with [DSS], contracted providers and elected to hire independent providers. The mother has not engaged in any services
- both parents have pending criminal charges in relation to the abuse and neglect that [Nancy] suffered
- The father has incurred additional criminal charges since the children have been in foster care
- [Father] has failed to admit that he has been the perpetrator of domestic violence despite the criminal convictions for Felony Assault by Strangulation and Assault on a Female
- The parents have provided conflicting information about the status of their relationship and engagement in domestic violence
- Both parents fail to acknowledge the abuse/neglect that the juveniles have suffered
- Both parents fail to acknowledge their role in the abuse/neglect that the juveniles have suffered.

65. Since the filing of the Petition and assumption of custody of the juvenile, [DSS] has made the following reunification efforts:

- Foster Care Case Management
- Child Forensic Evaluation

- Kinship assessment and placement
- CFT meetings
- Presentation of Out of Home Family Services Agreement
- Referrals of Services for the parents
- Record requests for parent's treatment providers
- Contact with the parents
- Review of CPS records

66. The above-referenced efforts are reasonable.

¶ 15 These unchallenged findings support the trial court's conclusion of law that DSS "made reasonable efforts to prevent the need for placement, taking into consideration the juveniles' health and safety as the paramount concern, and the Department made and should continue to make reasonable efforts toward reunification." *See In re Rholetter*, 162 N.C. App. 653, 662, 592 S.E.2d 237, 242-43 (2004).

¶ 16 Mother further argues that Nancy was "not at an imminent risk of harm" because the petition alleged abuse and "the only evidence of physical harm to Nancy" were hearsay statements made by Naomi and Timothy. Mother argues that "the trial court erred by admitting those statements because they were hearsay that did not fall within an exception." However, the trial court's unchallenged findings show that a DSS social worker observed that Nancy was "very small" for her age and only weighed 19 pounds at the age of four, she had "two small scars on the top of [Nancy's] right shoulder, her skin was very dry, and there were burn marks observed on her." Additionally, the findings show that Nancy was admitted to the hospital and diagnosed with severe protein malnourishment, failure to thrive, developmental delays, and Norovirus and that "[a]ll medical testing results were consistent that [Nancy] was suffering from severe malnutrition deficits." These findings support the trial court's conclusion that DSS made reasonable efforts to prevent placement while taking into consideration Nancy's health and safety as the paramount concern.

2. Due Process

¶ 17 **[2]** Mother next argues that (1) the denial of her motion to continue denied her effective counsel and violated her due process and (2) the trial court's commentary and questions denied Mother an impartial hearing.

¶ 18 First, Mother misrepresents what took place at the hearing, as Mother never made a motion to continue. At the beginning of the adjudicatory hearing, Mother's court-appointed attorney informed the trial court that Mother did not want him to be her attorney for the hearing or moving forward and Mother confirmed that she wished to release her attorney and represent herself at the hearing. The trial court then engaged in a colloquy with Mother about her choice to proceed pro se; Mother confirmed and stated, "Yes. I feel like that's in my best interest." The trial court informed Mother of how the hearing would be conducted and confirmed with Mother again that she understood the process; Mother confirmed that she understood and replied, "Awesome."

¶ 19 At the beginning of the dispositional hearing, the trial court and Mother again engaged in a discussion of whether she would represent herself or whether she would like to retain her court-appointed attorney for assistance. The trial court told Mother that she would not be getting additional time, and Mother stated to the trial court that she was "not asking for extra time." When the trial court stated that it would not grant a continuance in the future unless there was an exceptional circumstance, Mother replied, "You know, you misunderstood me," and then she clearly stated that she was ready to go forward with disposition. As Mother did not make a motion to continue, the trial court could not have erred by denying her motion. Accordingly, the trial court did not deny her effective counsel or violate her due process rights.

¶ 20 We next address Mother's argument that the trial court's commentary and questions denied her an impartial hearing. Mother argues that the trial court "violated her constitutional rights" by "denying [her] due process by denying her a fundamentally fair hearing." We note that Mother did not raise this issue at the trial court and has thus failed to properly preserve this issue for appeal. As Mother failed to present "to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make," as required by N.C. R. App. P. 10(a)(1), she has waived appellate review of the issue. *See In re A.B.*, 272 N.C. App. 13, 16, 844 S.E.2d 368, 371 (2020) (determining that "mother's failure to raise a timely objection" was a failure to properly preserve the issue for appeal and "thus waives the issue on appeal").

¶ 21 Furthermore, even if we did consider Mother's argument, it is without merit. Trial courts have "broad discretionary power to supervise and control the trial" which we will not disturb absent an abuse of discretion. *State v. Mack*, 161 N.C. App. 595, 598, 589 S.E.2d 168, 171 (2003) (citation omitted). This Court has held that even "extremely pointed" comments

by the trial court did not "show a preexisting bias against plaintiff or a prejudging of her case" when its opinions and remarks were based upon evidence at trial. *Hancock v. Hancock*, 122 N.C. App. 518, 528, 471 S.E.2d 415, 421 (1996).

¶ 22 Mother contends that various remarks by the trial court showed a bias against her, but we disagree. Our review of the record shows that the trial court's remarks, even if considered "pointed," were made to all parties, including a DSS social worker who testified at the hearing, and not just Mother. Moreover, the comments pertained to the proceedings in her case and were based on the evidence it heard during the hearing; the trial court's comments did not show a bias against her or a prejudging of her case. *Hancock*, 122 N.C. App. at 528, 471 S.E.2d at 421.

3. Visitation

¶ 23 **[3]** Mother lastly argues that "the trial court had discretion to grant [Mother] visitation. But it believed it did not, so it erred by denying [Mother's] visitation."

¶ 24 We review disposition orders for abuse of discretion only. *In re CM*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007). "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." *In re J.B.*, 172 N.C. App. 1, 14, 616 S.E.2d 264, 272 (2005) (citation omitted).

¶ 25 "An order that . . . continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." N.C. Gen. Stat. § 7B–905.1(a) (2021). The order must establish a visitation plan for parents unless the trial court finds "that the parent has forfeited their right to visitation or that it is in the child's best interest to deny visitation." *In re T.H.*, 232 N.C. App. 16, 34, 753 S.E.2d 207, 219 (2014) (quotation marks and citation omitted). This Court has previously held that a trial court did not abuse its discretion in denying visitation when the "Mother was awaiting trial on criminal charges for her alleged [] abuse" of her child and when "the court received evidence that Mother remained subject to a no contact order in her criminal case." *In re T.W.*, 250 N.C. App. 68, 78, 796 S.E.2d 792, 798 (2016).

¶ 26 While Mother's argument is not clear, we construe her argument to be that the trial court's remarks from the bench indicate that it acted under a misapprehension of law when "it believed it lacked discretion to grant [Mother] visitation." Mother specifically notes that the trial court

stated that "there cannot be any visitation due to what's set forth by superior court" and claims that this misapprehension of law constitutes an abuse of discretion. However, we do not construe the trial court's remarks as an indication that it acted under a misapprehension of law, particularly in light of its unchallenged findings of fact which are binding on appeal.

¶ 27 The trial court made the following relevant findings of fact:

> 53. [Mother] does not have any court ordered visitation with the juveniles. Neither the Department nor the Guardian ad Litem are recommending a change in the visitation. It is not in the juveniles' best interests to have visitation with the mother as it would be contrary to the health and safety of the juveniles.
>
> . . . .
>
> 56. The mother has pending criminal charges in Randolph County as follows: Unsafe Movement (2counts); DWLR Not Impaired Revocation (2 counts) with a pending trial date of June 14, 2021; and Child Abuse in which the last court date was held on April 22, 2021. The Child Abuse charge is related to the allegations contained in the Petition. . . .
>
> . . . .
>
> 63. On March 17, 2021, ADA Thompson informed Social Worker Boyd that she is preparing plea offers and discovery for the Felony Child Abuse case. She is moving forward to fully prosecute [Mother]. . . .

¶ 28 The trial court then concluded as law that it was "not in the best interests of the juveniles to have visitation with the mother or father pursuant to N.C. Gen. Stat. § 7B-905.1." As the trial court's findings of fact support its conclusion of law support that it was not in the best interests of the children to see Mother, the trial court did not abuse its discretion when it declined to grant visitation to Mother. *See In re T.H.*, 232 N.C. App. at 34, 753 S.E.2d at 219.

B. Father's Appeal

1. Visitation

¶ 29 **[4]** Father first argues that the trial court abused its discretion when it suspended Father's visitation with the children "because the evidence failed to support the suspension of his visits with those children."

¶ 30 We review disposition orders for abuse of discretion only. *In re CM*, 183 N.C. App. at 215, 644 S.E.2d at 595. "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." *In re J.B.*, 172 N.C. App. at 14, 616 S.E.2d at 272 (citation omitted). Unchallenged findings of fact are "deemed to be supported by the evidence and are binding on appeal." *In re J.C.M.J.C.*, 268 N.C. App. at 51, 834 S.E.2d at 673-74 (citation omitted).

¶ 31 A disposition order must establish a visitation plan for parents unless the trial court finds "that the parent has forfeited their right to visitation or that it is in the child's best interest to deny visitation." *In re T.H.*, 232 N.C. App. at 34, 753 S.E.2d at 219 (quotation marks and citation omitted). An order denying visitation must contain sufficient findings to explain why visitation is not in the child's best interests. *In re N.K.*, 274 N.C. App. 5, 11, 851 S.E.2d 389, 394 (2020). This Court has affirmed orders denying visitation when parents have failed to comply with mental health and substance abuse treatment services. *See In re T.W.*, 250 N.C. App. 68, 796 S.E.2d 792. And this Court has recognized that a parent's pending criminal charge can justify a denial of visitation where the charge arose from the alleged abuse of the parent's child. *Id.* at 78, 796 S.E.2d at 798.

¶ 32 Father challenges portions of finding of fact 64; the remaining unchallenged findings are binding on appeal. The trial court's relevant, unchallenged findings of fact include:

> 27. Based on the above Findings of Fact, the juvenile [Nancy] is ADJUDICATED ABUSED, as the parents created or allowed to be created a substantive risk of serious physical injury to the juvenile by other than accidental means. In addition, the parents have created or allowed to be created serious emotional damage to the juvenile. Testimony was uncontroverted that the juvenile was diagnosed with severe malnourishment, failure to thrive with significant cognitive delays and non-verbal issues. [Nancy] gained four pounds during her hospitalization and it was not medically possible for her to have lost the amount of weight due to Norovirus. There was no medical reason for [Nancy's] lack of gaining weight while in the custody of [Mother and Father] and she gained weight during her hospital stay.
>
> 28. Based on the above Findings of Fact, the juveniles: [Naomi, Timothy, and Cameron] are ADJUDICATED

NEGLECTED, as the juveniles did not receive proper care, supervision and discipline from the parents, and live in an environment injurious to their welfare. [Naomi] did not receive appropriate medical care and the juveniles were in the home when [Nancy] was malnourished and kept in her room. [Naomi, Timothy, and Cameron] all witnessed their sister's maltreatment and both [Timothy and Naomi] gave statements as to the mistreatment.

. . . .

36. [Timothy] completed a Comprehensive Clinical Assessment (CCA) on June 21, 2019 with Danielle Harper. On April 29, 2019, a forensic interview was completed indicating the allegations contained in the petition were true and charges have since been filed on both parents. . . .

. . . .

57. The father entered into a case plan with the Department on July 15, 2019; and most recently updated on April 12, 2021. The current case plan contains the following components:

- **Parenting Skills: Participate in a parenting psychological assessment and comply with any recommendations; successfully complete the Parenting Assessment Training and Education (PATE) Program; attend all visits, as scheduled, and comply with the visitation expectations once allowed by the court; and enter into a voluntary support agreement with Child Support Enforcement.** . . . [Father] has not provided a copy of [his] assessment nor signed a Release of Information in order for the Department to obtain this information. . . . As of today's date, no consents have been provided to the Department. . . .

  . . . .

  On July 9, 2020, [Father] was arrested and charged for possession of drug paraphernalia.

> . . . [Father] has indicated that he will not change his narcotic medication.
>
> . . . .
>
> On August 15, 2019, Social Worker . . . spoke with Benita Hoover, Program Coordinator of DVIP. Ms. Hoover confirmed that the last time [Father] participated in DVIP was in 2010 and he did not complete the program at that time, as he would not admit to being the perpetrator of abuse. [Father] indicated that he will still not admit to being the perpetrator of abuse. . . . [Father] has failed to admit that he has been the perpetrator of domestic violence despite criminal convictions for Felony Assault by Strangulation and Assault on a Female.
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> . . . .
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> . . . .
>
> 62. [Father] is currently on probation and has pending criminal charges with upcoming hearing dates as follows: Aiding and Abetting and Child Abuse-Inflicting Serious Mental or Physical. . . . .
>
> 63. On March 17, 2021, ADA Thompson informed Social Worker Boyd that she is preparing the plea offers and discovery for the Felony Child Abuse case. She is moving forward to fully prosecute [Mother]. She stated that [Father's] case is not dropped or dismissed. He is still facing the charges of Aiding and Abetting Child Abuse. ADA Thompson stated that she does not have any intent of dropping the case. . . .

¶ 33 The trial court then concluded as law that it was "not in the best interests of the juveniles to have visitation with the mother or father pursuant to N.C. Gen. Stat. § 7B-905.1." The findings show that: Father created or allowed to be created a substantive risk of serious physical injury and serious emotional damage for Nancy; Naomi, Timothy, and Cameron all witnessed Nancy's mistreatment and malnourishment; Father had complied with only some of his case plan tasks; Father did not follow through with recommended psychiatric care; Father would

not sign releases to allow DSS to learn about Father's participation in counseling; and that Father had a pending criminal charge for felony aiding and abetting child abuse. These unchallenged findings of fact amply support the trial court's conclusion of law that visitation with Father was not in the best interests of the juveniles, and we thus determine that the trial court did not abuse its discretion in denying visitation. *See In re T.H.*, 232 N.C. App. at 34, 753 S.E.2d at 219.

2. Review of Visitation Plan

¶ 34 **[5]** Father lastly argues that "the trial court reversibly erred by failing to inform [Father] of his right to move for a review of the trial court's visitation plan."

¶ 35 This Court reviews de novo whether a trial court correctly adhered to a statutory mandate and, if there was error, whether such error was harmless. *In re E.M.*, 263 N.C. App. 476, 478-79, 823 S.E.2d 674, 676 (2019).

¶ 36 At the time of the hearing on 26 May 2021, N.C. Gen. Stat. § 7B-905.1(d) required that if "the court retains jurisdiction, all parties shall be informed of the right to file a motion for review of any visitation plan[.]" N.C. Gen. Stat. § 7B-905.1(d) (effective until 30 September 2021). It also required the trial court review the case "within 90 days from the date of the initial dispositional hearing[.]" N.C. Gen. Stat. § 7B-905(b) (effective until 30 September 2021). This Court has held that failing to inform the parties of their right to file a motion for review is reversible error, even though the trial court is required to hold a hearing within 90 days in any case. *In re K.W.*, 272 N.C. App. 487, 497, 846 S.E.2d 584, 591 (2020). Recognizing the inconsistency, the General Assembly amended the statute; it now provides, "If 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[.]" N.C. Gen. Stat. § 7B-905.1(d) (effective 1 October 2021) (emphasis added).

¶ 37 We agree with Father that the trial court was required to, but did not, inform him of his right for review of any visitation plan; however, this error was harmless because the trial court immediately scheduled the next hearing date and Father was aware of the newly scheduled hearing date. The trial court did not fail to inform Father of his right for review *and* waive permanency planning hearings, a situation for which the updated statute contemplates and provides. Thus, while the trial court erred in failing to inform Father of his right for review of any visitation plan, the error was harmless. *In re E.M.*, 263 N.C. App. at 479-80, 823 S.E.2d at 676-77.

III. Conclusion

¶ 38 The trial court's unchallenged findings of fact support its conclusions of law that DSS made reasonable efforts to prevent placement of the juveniles outside the home and that it was not in the best interest of the juveniles to have visitation with Mother and Father. Additionally, while the trial court erred in failing to inform Father of his right for review of visitation, such error was harmless.

AFFIRMED.

Judges HAMPSON and GORE concur.

IN THE MATTER OF

TERRELL McILWAIN, PETITIONER

No. COA21-434

Filed 17 May 2022

Sexual Offenders—registration—out-of-state conviction—substantially similar to N.C. offense

The trial court's order requiring defendant to register in the state as a sex offender based on an out-of-state conviction for possession or promotion of lewd visual material depicting a child was affirmed where the out-of-state offense was substantially similar to the North Carolina offense of second-degree exploitation of a minor—an offense requiring registration. The offenses, which had obvious essential parallels, did not need to precisely match in order to be deemed substantially similar.

Appeal by Petitioner from order entered 22 March 2021 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 9 February 2022.

Appellate Defender Glenn Gerding and Assistant Appellate Defender Andrew DeSimone for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Alex R. Williams, for the State-Appellee.

COLLINS, Judge.

¶ 1 Petitioner Terrell McIlwain appeals the trial court's order requiring him to register in North Carolina as a sex offender based on a Texas conviction for possession or promotion of lewd visual material depicting a child. Petitioner argues that the trial court erred by concluding that the Texas offense of possession or promotion of lewd visual material depicting a child is substantially similar to the North Carolina offense of second-degree exploitation of a minor. We conclude that the offenses are substantially similar and we affirm the trial court's order.

I. Background

¶ 2 Petitioner Terrell McIlwain was convicted in July 2020 of possession or promotion of lewd visual material depicting a child, under Texas Penal Code § 43.262 ("Texas offense"). Petitioner was notified in December 2020 that he was required by law to register in North Carolina as a sex offender, based on his out-of-state conviction, and of his right to contest the requirement to register.

¶ 3 Petitioner filed a petition, pursuant to N.C. Gen. Stat. § 14-208.12B, contesting his required registration. The matter came on for hearing on 22 March 2021. The trial court found the Texas offense was substantially similar to the North Carolina offense of second-degree exploitation of a minor, under N.C. Gen. Stat. § 14-190.17(a) ("North Carolina offense"), a conviction requiring a person to register in North Carolina as a sex offender. The trial court entered a written order requiring Petitioner to register as a sex offender.

¶ 4 Petitioner timely appealed.

II. Discussion

¶ 5 Petitioner argues the trial court erred by finding that the Texas offense is substantially similar to the North Carolina offense and thus, erred by ordering him to register as a sex offender.

A. Standard of Review

¶ 6 Whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law, reviewed de novo on appeal. *State v. Fortney*, 201 N.C. App. 662, 669, 687 S.E.2d 518, 524 (2010).

B. Analysis

¶ 7 A conviction requiring a person to register in North Carolina as a sex offender ("reportable conviction") includes "[a] final conviction in

another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense" as defined in Section 14-208.6(5). N.C. Gen. Stat. § 14-208.6(4)(b) (2020). Second-degree sexual exploitation of a minor is a sexually violent offense. *See id.* §§ 14-208.6(5), 14-190.17 (2020). When a person files a petition for a judicial determination regarding whether they must register in North Carolina as a sex offender based on an out-of-state conviction, the trial court must determine whether the conviction for the out-of-state offense "is substantially similar to a reportable conviction" in North Carolina. *Id.* § 14-208.12B(d) (2020). At the hearing on the petition, the State "has the burden to prove by a preponderance of the evidence, that the person's out-of-state . . . conviction is for an offense, which if committed in North Carolina, was substantially similar to a sexually violent offense, or an offense against a minor." *Id.* § 14-208.12B(c) (2020). "The person may present evidence in support of the lack of substantial similarity between the out-of-state" offense and the North Carolina offense, and "[t]he court may review copies of the relevant out-of-state . . . criminal law and compare the elements of the out-of-state . . . offense to those purportedly similar to a North Carolina offense." *Id.* "If the presiding superior court judge determines the out-of-state . . . conviction is substantially similar to a reportable conviction, the judge shall order the person to register as a sex offender[.]" *Id.* § 14-208.12B(d).

¶ 8 The determination of whether an out-of-state conviction is for an offense that is substantially similar to a North Carolina offense "is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014) (quotation marks and citation omitted) (analyzing the similarity between an out-of-state statute and a North Carolina statute in the context of sentencing points for prior convictions). We do not "look beyond the elements of the offenses" to consider the underlying facts of a defendant's out-of-state conviction or the legislative purpose of the respective statutes defining the offenses. *Id.* at 719, 766 S.E.2d at 333. The requirement set forth in N.C. Gen. Stat. § 14-208.12B(d) "is not that the statutory wording precisely match, but rather that the offense be 'substantially similar.' " *State v. Sapp*, 190 N.C. App. 698, 713, 661 S.E.2d 304, 312 (2008).

¶ 9 In Texas, a person commits the offense of possession or promotion of lewd visual material depicting a child

> if the person knowingly possesses, accesses with intent to view, or promotes visual material that:

> (1) depicts the lewd exhibition of the genitals or pubic area of an unclothed, partially clothed, or clothed child who is younger than 18 years of age at the time the visual material was created;
>
> (2) appeals to the prurient interest in sex; and
>
> (3) has no serious literary, artistic, political, or scientific value.

Tex. Penal Code § 43.262(b) (2020).

¶ 10 In comparison, in North Carolina, a person commits the offense of second-degree sexual exploitation of a minor

> if, knowing the character or content of the material, he:
>
> (1) Records, photographs, films, develops, or duplicates material that contains a visual representation of a minor engaged in sexual activity; or
>
> (2) Distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity.

N.C. Gen. Stat. § 14-190.17 (2020). The definition of "sexual activity" includes the "lascivious exhibition of the genitals or pubic area of any person." *Id.* § 14-190.13(5)(g) (2020). The term "lascivious" has been defined as "tending to arouse sexual desire." *State v. Corbett*, 264 N.C. App. 93, 100, 824 S.E.2d 875, 880 (2019) (citations omitted).

¶ 11 Both offenses include an element of the defendant's knowledge. Furthermore, the "visual material" prohibited in Texas is nearly identical to the "visual representation" prohibited in North Carolina: both graphically depict the genital or pubic area of a child who is under the age of 18 in a manner that appeals to and arouses sexual desires. *See* The American Heritage Dictionary 771 (5th ed. 2022) (defining "lewd" as "preoccupied with sex and sexual desire; lustful; obscene; indecent"; and defining "lascivious" as "given to or expressing lust . . . exciting sexual desires; salacious"). Moreover, the criminalized behavior of possessing, accessing with intent to view, or promoting the "visual material" in Texas is comparable to the criminalized behavior of recording, photographing, filming, developing, duplicating, distributing, transporting, exhibiting, receiving, selling, purchasing, exchanging, or soliciting the "visual representation" in North Carolina. Based on a comparison

of the elements of the Texas offense of possession or promotion of lewd visual material depicting a child and the North Carolina offense of second-degree sexual exploitation of a minor, we hold that the two offenses are substantially similar.

¶ 12 Our holding is in line with *State v. Graham*, wherein the North Carolina Supreme Court determined that the defendant's conviction for the Georgia offense of statutory rape was substantially similar to a North Carolina Class B1 felony for the purpose of calculating prior record level points for criminal sentencing. 379 N.C. 75, 2021-NCSC-125, ¶ 18. The Supreme Court compared the elements of the two offenses and agreed with this Court "that the trial court did not err in finding the two offenses substantially similar as Ga. Code Ann. § 16-6-3 outlaws statutory rape of a person who is under the age of sixteen and N.C. [Gen. Stat.] § 14-27.25 prohibits statutory rape of a person who is fifteen years of age or younger." *Id.* at ¶ 8 (quotation marks and citation omitted). The Court then addressed the defendant's argument that

> the Georgia statutory rape statute and the North Carolina statutory rape statute are not substantially similar in addressing the criminal offenses which they respectively prohibit in that there is no age difference element in the Georgia law, because unlike the North Carolina law which identifies specific age differences in its felony classifications, defendant notes that "the Georgia statute applies equally to all persons under the age of 16 years." He expounds upon this "lack of an age difference element in the Georgia statutory rape statute" by offering hypothetical examples of sexual intercourse which he posits would constitute the offense of statutory rape in Georgia but would not constitute the offense of statutory rape in North Carolina. Defendant submits that in a comparison of a North Carolina statute with another state's statute in order to determine substantial similarity between the two, if the difference between the two statutes renders the other state's law narrower or broader, "or if there are differences that work in both directions, so that each statute includes conduct not covered by the other, then the two statutes will not be substantially similar for purposes of the statute." Additionally, defendant asserts that the Georgia law under examination here is not substantially similar

> to the North Carolina enactment to which it is being paralleled because the Georgia law can be violated "by conduct that is only a Class C felony . . . in North Carolina."

Id. at ¶ 10. The Court found these arguments "unpersuasive," and explained as follows:

> Defendant's position conflates the requirement that statutes subject to comparison be substantially similar to one another with his erroneous perception that the two statutes must have identicalness to each other. As we previously noted in our recognition of *Sapp*, 190 N.C. App. at 713, 661 S.E.2d 304, the statutory wording of the Georgia provision and the North Carolina provision do not need to precisely match in order to be deemed to be substantially similar. Likewise, defendant's stance that the Georgia statute and the North Carolina statute cannot be considered to be substantially similar because not every violation of the Georgia law would be tantamount to the commission of a Class B1 felony under the comparative North Carolina law is unfounded.

Id. at ¶ 11. The Court further expounded as follows:

> There are so many iterations of so many similar laws written in so many different ways, in North Carolina and in the forty-nine other states in America, that the courts of this state must necessarily possess the ability to operate with the flexibility that the phrase "substantially similar" inherently signifies in determining whether statutes which are being compared share the operative elements in the evaluation. While such an exercise is predictably challenging, we are confident that the courts of this state have sufficient guidance and flexibility to properly conduct the prescribed analysis of the statutes' respective elements.

Id. at ¶ 16.

¶ 13 Petitioner raises similar arguments to those rejected in *Graham*. First, Petitioner argues that the Texas offense is not substantially similar to the North Carolina offense because the Texas offense prohibits a visual depiction of the "lewd exhibition of the genitals or pubic area of

[a] . . . *clothed child*" while the North Carolina statute, which prohibits the "lascivious exhibition of the genitals or pubic area of any person," does not apply to the "mere exhibition of the genitals or pubic area of a clothed child." We disagree for two reasons. First, according to its plain terms, the statute applies to the "lascivious exhibition of the genitals or pubic area of any person" and nothing in these terms limits its application to the exhibition of the genitals or pubic area of a clothed child. "[I]t is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *State v. Heelan*, 263 N.C. App. 275, 281, 823 S.E.2d 106, 111 (2018) (citation omitted). Furthermore, even if the North Carolina statute does not apply to visual depictions of the genitals or pubic area of a clothed child, substantial similarity between the two offenses is not a "requirement of exactitude." *Graham*, 2021-NCSC-125, ¶ 12.

¶ 14 Petitioner also argues that the offenses are not substantially similar because the Texas statute applies to any "child who is younger than 18 years of age," Tex. Penal Code § 43.262(b)(1), while the North Carolina statute applies to any child younger than eighteen who is "not married or judicially emancipated," N.C. Gen. Stat. § 14-190.13(3) (2020).[1] "Defendant's position conflates the requirement that statutes subject to comparison be substantially similar to one another with his erroneous perception that the two statutes must have identicalness to each other." *Graham*, 2021-NCSC-125, ¶ 11. The statutory wording of the Texas statute and the North Carolina statute "do not need to precisely match in order to be deemed to be substantially similar." *Id.*

III. Conclusion

¶ 15 The "obvious essential pertinent parallels" between the Texas offense and the North Carolina offense lead us to hold that the possession or promotion of lewd visual material depicting a child under Texas Penal Code § 43.262 is substantially similar to second-degree exploitation of a minor under N.C. Gen. Stat. § 14-190.17. *See Graham*, 2021-NCSC-125, ¶ 12. Accordingly, we affirm the trial court's order requiring Petitioner to register in North Carolina as a sex offender.

AFFIRMED.

Judges ZACHARY and CARPENTER concur.

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1. The definition of "minor" in North Carolina is "[a]n individual who is less than 18 years old and is not married or judicially emancipated." N.C. Gen. Stat. § 14-190.13(3).

LAKINS v. W. N.C. CONF. OF THE UNITED METHODIST CHURCH

[283 N.C. App. 385, 2022-NCCOA-337]

MICHAEL LAKINS, PLAINTIFF
v.
THE WESTERN NORTH CAROLINA CONFERENCE OF THE UNITED METHODIST CHURCH (A/K/A WESTERN NORTH CAROLINA CONFERENCE); AND THE CHILDREN'S HOME, INCORPORATED (A/K/A THE CHILDREN'S HOME, A/K/A THE CROSSNORE SCHOOL & CHILDREN'S HOME, A/K/A CROSSNORE CHILDREN'S HOME), DEFENDANTS

No. COA21-415

Filed 17 May 2022

1. Appeal and Error—interlocutory orders—substantial right—transfer to three-judge panel of Wake County Superior Court—ecclesiastical entanglement doctrine

Defendants' interlocutory appeal of the trial court's order transferring their motion to dismiss to a three-judge panel of the Wake County Superior Court, which the trial court did not certify for immediate appellate review pursuant to Rule 54(b), did not affect venue and therefore did not affect a substantial right, so it was not immediately appealable. In addition, because the trial court had not yet ruled on defendants' Rule 12(b)(1) motion to dismiss asserting immunity from the suit based on the ecclesiastical entanglement doctrine, that doctrine could not provide the basis for the substantial right to confer immediate appellate jurisdiction. However, defendants' petition for writ of certiorari was allowed where defendants showed good and sufficient cause and that error was probably committed below.

2. Constitutional Law—challenge to legislative act—transfer to three-judge panel—as-applied challenge—remand

Where defendants challenged a legislative act extending the statute of limitations for civil actions based on sexual abuse that occurred while the victim was a minor, the trial court's order determining that defendants' challenge was facial rather than as-applied and transferring their motion to dismiss to a three-judge panel of the Wake County Superior Court—even though defendants' motion repeatedly argued that the act was unconstitutional as applied to defendants—was vacated and remanded for reconsideration in light of a Court of Appeals decision that was released after the trial court's order was entered.

3. Constitutional Law—challenge to legislative act—transfer to three-judge panel—subject matter jurisdiction—ecclesiastical entanglement doctrine

Where defendant church conference challenged a legislative act extending the statute of limitations for civil actions based on sexual abuse that occurred while the victim was a minor, Rule 42(b)(4) required the trial court to rule on defendant's motion to dismiss for lack of subject matter jurisdiction based on the ecclesiastical entanglement doctrine before transferring the constitutional challenge to a three-judge panel of the Wake County Superior Court.

Appeal by defendants, by writ of certiorari, from order entered 22 March 2021 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 February 2022.

Janet Janet & Suggs, LLC, by Richard Serbin and Matthew White, for plaintiff-appellee.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Kelly S. Hughes, and Ashley P. Cuttino, pro hac vice, for defendant-appellant The Western North Carolina Conference of the United Methodist Church (a/k/a Western North Carolina Conference).

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus, G. Gray Wilson, and D. Martin Warf, for defendant-appellant The Children's Home, Incorporated (a/k/a The Children's Home, a/k/a The Crossnore School & Children's Home, a/k/a Crossnore Children's Home).

ZACHARY, Judge.

¶ 1 Defendants The Western North Carolina Conference of the United Methodist Church ("UMC") and The Children's Home, Incorporated ("TCH") appeal from the trial court's order granting Plaintiff Michael Lakins's motion to transfer Defendants' motions to dismiss, which raised constitutional challenges to a portion of the Sexual Assault Fast Reporting and Enforcement Act, to a three-judge panel of the Wake County Superior Court pursuant to N.C. Gen. Stat. §§ 1-267.1(a1), 1-81.1(a1), and 1A-1, Rule 42(b)(4) (2021) (collectively, the "three-judge panel provisions"). After careful review, we vacate and remand to the trial court for further proceedings.

Background

¶ 2 The Sexual Assault Fast Reporting and Enforcement Act ("the Act") was enacted in 2019 to "strengthen and modernize" our sexual assault laws. *See* An Act to Protect Children from Sexual Abuse and to Strengthen and Modernize Sexual Assault Laws, S.L. 2019-245, 2019 N.C. Sess. Laws 1231. Among other revisions, the Act extended to ten years the statute of limitations for a civil action based on sexual abuse suffered while a minor. *Id.* § 4.1, 2019 N.C. Sess. Laws at 1234; *see* N.C. Gen. Stat. §§ 1-17(d), 1-52(16). Further, it provided that "a plaintiff may file a civil action within two years of the date of a criminal conviction for a related felony sexual offense against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age." S.L. 2019-245, § 4.1, 2019 N.C. Sess. Laws at 1234; *see* N.C. Gen. Stat. § 1-17(e). The Act also contained a provision, effective from 1 January 2020 to 31 December 2021, that revived "any civil action for child sexual abuse otherwise time-barred under G.S. 1-52 as it existed immediately before" the Act's passage. *See* S.L. 2019-245, § 4.2(b), 2019 N.C. Sess. Laws at 1235 (the "revival section").

¶ 3 On 15 April 2020, Plaintiff filed a complaint against UMC and TCH, an orphanage that Plaintiff alleged in his complaint was opened and operated by UMC. Plaintiff sought damages for injuries resulting from sexual abuse by his "house parents," which allegedly occurred at TCH when Plaintiff was a minor in the 1970s and residing at the orphanage. In his complaint, Plaintiff asserted claims for negligence; negligent hiring, retention, and supervision; breach of fiduciary duty; and constructive fraud. Plaintiff also maintained that his otherwise time-barred claims were revived by the Act.

¶ 4 Defendants UMC and TCH filed their respective motions to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on 26 and 30 June 2020, challenging, *inter alia*, the constitutionality of the Act's revival section as applied to Defendants. UMC further asserted that the claims should be dismissed pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction.

¶ 5 On 15 December 2020, Plaintiff filed a motion to transfer Defendants' motions to dismiss challenging the Act's constitutionality to a three-judge panel of the Wake County Superior Court, pursuant to the three-judge panel provisions. On 22 February 2021, Plaintiff's motion to transfer came on for hearing in Mecklenburg County Superior Court. On 22 March 2021, the trial court entered an order granting Plaintiff's motion to transfer, determining that "[t]he constitutional challenges

contained in [D]efendants['] respective motions to dismiss under Rule 12(b)(6) raise facial challenges" to the constitutionality of the Act. The trial court declined to rule on Defendants' remaining unnoticed and unscheduled Rule 12(b)(6) motions and UMC's unnoticed and unscheduled Rule 12(b)(1) motion, and ordered "a stay of these proceedings pending a ruling from the three-judge panel." Defendants timely filed notices of appeal.

Grounds for Appellate Review

¶ 6 As a preliminary matter, we address this Court's jurisdiction to review Defendants' appeals of the trial court's order granting Plaintiff's motion to transfer. Plaintiff maintains that Defendants' appeals should be dismissed as interlocutory. Defendants concede that the appeals are interlocutory, but each initially contended that the trial court's order affected substantial rights and therefore was immediately appealable.[1] In the event that this Court determines that the trial court's orders do not affect a substantial right, Defendants have filed separate petitions for writ of certiorari, asking this Court to assert jurisdiction and address the merits of their arguments.

I. Interlocutory Appeals

¶ 7 **[1]** Generally, this Court only hears appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). By contrast, "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* at 362, 57 S.E.2d at 381. Because an interlocutory order is not yet final, with few exceptions, "no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge[.]" *N.C. Consumers Power v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974).

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1. As discussed below, during the pendency of this case, this Court addressed the substantial right that TCH initially alleged was affected by the trial court's order in *Cryan v. National Council of Young Men's Christian Association of the United States of America*, 2021-NCCOA-612, ¶ 16. TCH candidly admitted in its reply to Plaintiff's motion to dismiss this appeal that *Cryan* "foreclosed" its substantial right argument. Accordingly, TCH now relies upon its petition for writ of certiorari as its sole avenue for invoking this Court's jurisdiction.

¶ 8 Nonetheless, an interlocutory order may be immediately appealed if "the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal[,]" *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009), or if "the order affects some substantial right and will work injury to [the] appellant if not corrected before appeal from final judgment[,]" *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citation omitted); *accord* N.C. Gen. Stat. §§ 1-277(b), 7A-27(b)(3)(a). Our Supreme Court has defined a "substantial right" as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right." *Oestreicher v. Am. Nat'l Stores Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (citation omitted). The burden is on the appellant to affirmatively establish this Court's jurisdiction to accept an interlocutory appeal. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

¶ 9 In the instant case, the trial court did not certify for immediate appellate review the order granting Plaintiff's motion to transfer, pursuant to Rule 54(b). *See Turner*, 363 N.C. at 558, 681 S.E.2d at 773. Nevertheless, Defendants initially argued that the interlocutory order from which they appeal affects a substantial right and should be immediately reviewed.

¶ 10 Originally, both Defendants contended that the trial court's order affected their substantial right to have the case heard in the proper venue. However, as TCH promptly acknowledged in its reply to Plaintiff's motion to dismiss this appeal as interlocutory, this Court recently addressed the issue of whether the transfer of a motion to dismiss to a three-judge panel of Wake County Superior Court implicated a substantial right. *Cryan*, 2021-NCCOA-612, ¶ 16.

¶ 11 In *Cryan*, the defendant argued that appellate jurisdiction was proper in this Court because the trial court's order changed the venue of the case, thereby affecting a substantial right. *Id.* ¶ 10. Although the defendant was "correct in its contention that the right to venue established by statute is a substantial right[,]" the *Cryan* Court concluded that an order transferring a defendant's motion to dismiss to a three-judge panel of the Wake County Superior Court does "not grant, deny, change, or otherwise affect venue, and therefore d[oes] not affect a substantial right." *Id.* ¶ 13. Thus, in the instant case, Defendants' argument to the contrary is unavailing.

¶ 12 UMC presents an alternative substantial-right argument: UMC posits that the trial court effectively denied its Rule 12(b)(1) motion by holding the motion in abeyance, thus threatening UMC's First Amendment right to immunity "from judicial meddling in ecclesiastical disputes" and warranting immediate appeal as a matter of subject-matter jurisdiction.

¶ 13 Indeed, there are numerous appellate decisions holding that, although interlocutory, the denial of a Rule 12(b)(1) motion to dismiss grounded in the ecclesiastical-entanglement doctrine is immediately appealable. *See*, *e.g.*, *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007); *Doe v. Diocese of Raleigh*, 242 N.C. App. 42, 46–47, 776 S.E.2d 29, 34 (2015). However, unlike those cases, in the present case the trial court has not yet ruled on whether the ecclesiastical-entanglement doctrine provides UMC with immunity from this suit; UMC's Rule 12(b)(1) motion remains pending. *See* N.C. R. App. P. 10(a)(1) ("It is . . . necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion" in order to preserve an issue for appellate review.). Thus, the ecclesiastical-entanglement doctrine cannot provide the basis for the substantial right needed to confer jurisdiction upon this Court to enable our review of UMC's interlocutory appeal.

¶ 14 Accordingly, and consistent with our precedent, we allow Plaintiff's motion to dismiss this appeal. However, this does not end our inquiry. We now turn to Defendants' petitions for writ of certiorari requesting review of the trial court's order.

II. Petitions for Writ of Certiorari

¶ 15 In their petitions, Defendants maintain that the trial court erred in finding that their motions to dismiss challenged the facial validity of the Act, prompting an erroneous decision to transfer to a three-judge panel; hence, it is proper and in the interest of justice for this Court to issue a writ of certiorari. For the reasons explained below, we allow Defendants' petitions for writ of certiorari to permit review of Defendants' arguments.

¶ 16 Pursuant to Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure, this Court may in its discretion issue a writ of certiorari "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals . . . when no right of appeal from an interlocutory order exists[.]" N.C. R. App. P. 21(a)(1). Such "appropriate circumstances" exist when "review will serve the expeditious administration of justice or some other exigent purpose." *Amey v. Amey*, 71 N.C. App. 76, 79, 321 S.E.2d 458, 460 (1984) (citation omitted). Further, the writ of certiorari "is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111

S.E.2d 1, 9 (1959), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). "A petition for the writ must show merit or that error was probably committed below." *Id.*

¶ 17 For the reasons that follow, we conclude that Defendants' appeals present the appropriate circumstances contemplated by Rule 21(a)(1), and that Defendants have shown the requisite "good and sufficient cause" for this Court to issue the writ. *Id.* Thus, in our discretion, we allow Defendants' petitions for writ of certiorari pursuant to Rule 21(a)(1), and proceed to the merits of their appeals.

Discussion

¶ 18 On appeal, Defendants argue that the trial court erred by concluding that they raised facial constitutional challenges to the Act. UMC further argues that the trial court erred by granting Plaintiff's motion to transfer prior to hearing UMC's Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction.

I. Standard of Review

¶ 19 Under the three-judge panel provisions, when a party properly advances a facial challenge to the constitutionality of a statute, the trial court lacks jurisdiction to rule on the facial challenge "because sole jurisdiction to decide that matter resides with the Superior Court of Wake County, and the matter is required to be heard and determined by a three-judge panel of the Superior Court of Wake County," as provided by N.C. Gen. Stat. § 1-267.1(b2). *Holdstock v. Duke Univ. Health Sys., Inc.*, 270 N.C. App. 267, 281, 841 S.E.2d 307, 317 (2020) (citation and internal quotation marks omitted). The trial court's order thus raises issues concerning subject-matter jurisdiction and statutory construction, each of which this Court reviews de novo. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). When conducting de novo review, the appellate court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation and internal quotation marks omitted).

II. The Three-Judge Panel Provisions

¶ 20 The three-judge panel provisions create special procedures for hearing facial challenges to the constitutionality of certain acts of our General Assembly.

¶ 21 Section 1-267.1(a1) provides that, except for actions challenging an act that apportions or redistricts state legislative or congressional districts, "any facial challenge to the validity of an act of the General

Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of" that court. N.C. Gen. Stat. § 1-267.1(a1). Section 1-81.1(a1) similarly provides that venue for such facial challenges "lies exclusively with the Wake County Superior Court" in accordance with §§ 1-267.1(a1) and 1A-1, Rule 42(b)(4). *Id.* § 1-81.1(a1).

¶ 22 Rule 42(b)(4)—which "is written in such a manner that not all its requirements are clear on a first reading[,]" *Holdstock*, 270 N.C. App. at 272, 841 S.E.2d at 312—sets forth the procedural requirements for the transfer of a facial challenge to an act of the General Assembly to a three-judge panel. Rule 42(b)(4) provides, in pertinent part:

> Pursuant to G.S. 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 if a claimant raises such a challenge in the claimant's complaint or amended complaint in any court in this State, or if such a challenge is raised by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading. In that event, the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case. The court in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity. For a motion filed under Rule 11 or Rule 12(b)(1) through (7), the original court shall rule on the motion, however, it may decline to rule on a motion that is based solely upon Rule 12(b)(6). If the original court declines to rule on a Rule 12(b)(6) motion, the motion shall be decided by the three-judge panel. The original court shall stay all matters that are contingent upon the outcome of the challenge to the act's facial validity pending a ruling on that challenge and until all appeal rights are exhausted.

N.C. Gen. Stat. § 1A-1, Rule 42(b)(4).

III. Facial or As-Applied Challenge

¶ 23 **[2]** Prior to invoking the three-judge panel provisions, "it is the duty of the trial court to first determine whether [the party] raised a facial challenge" to the validity of a statute in accordance with Rule 42(b)(4). *Holdstock*, 270 N.C. App. at 281, 841 S.E.2d at 317 (internal quotation marks omitted). "A facial challenge is an attack on a statute itself as opposed to a particular application." *Id.* at 272, 841 S.E.2d at 311 (quoting *City of Los Angeles v. Patel*, 576 U.S. 409, 415, 192 L. Ed. 2d 435, 443 (2015)). "[A]n as-applied challenge represents a [party]'s protest against how a statute was applied in the particular context in which [the party] acted or proposed to act, while a facial challenge represents a [party]'s contention that a statute is incapable of constitutional application in any context." *LeTendre v. Currituck Cty.*, 259 N.C. App. 512, 534, 817 S.E.2d 73, 89 (2018), *appeal dismissed*, *supersedeas and disc. review denied*, 372 N.C. 54, 822 S.E.2d 641 (2019).

¶ 24 On appeal, Defendants argue that the trial court erred by concluding that they raised facial, rather than as-applied, challenges to the constitutionality of the Act in their motions to dismiss. For example, UMC alleged, in pertinent part:

> 1. Plaintiff's claims are time-barred. While he alleges that this is a revival action brought pursuant to [the Act], the Act does not salvage Plaintiff's untimely claims. The Act impermissibly amends pre-existing (and expired) limitations and repose periods. *See* N.C. Gen. Stat. §§ 1-17(e), 1-52(5), (16), and (19), and 1-56 (2019). As such, these sections of the Act should be declared unconstitutional *as applied to* [*UMC*] *under the facts as alleged in this case*, and . . . Plaintiff's claims should be dismissed pursuant to Rule 12(b)(6) as barred under the statutes of limitations and repose.
>
> 2. The plain language of the statutory amendments establishes that the Act reopens any statutes of limitations or repose to bring claims against the alleged abusers <u>only</u> for the assault and abuse, and not against third parties for ancillary claims, and so Plaintiff's claims against [UMC] fail.
>
> 3. Plaintiff makes no allegation that either of his alleged abusers has a criminal record, and so he

> cannot meet a condition precedent to pleading his claims under N.C. Gen. Stat. § 1-17(e).

(First emphasis added).

¶ 25 Similarly, in its motion to dismiss, TCH moved the trial court "for an order decreeing that the General Assembly's 2019 amendments" to N.C. Gen. Stat. §§ 1-52 and 1-56(b) "are unconstitutional *as applied to this defendant*[.]" (Emphasis added). In support of its motion to dismiss, TCH alleged, in pertinent part:

> 1. Plaintiff's claims are time barred and thus fail as a matter of law. The General Assembly amended portions of, *inter alia*, N.C. Gen. Stat[.] §§ . . . 1-52 and 1-56 in [the Act]. These statutory amendments purport to revive civil claims that were otherwise time barred under the preexisting statutes of limitation and repose.
>
> 2. In this case, the General Assembly's amendments to [N.C. Gen. Stat.] §§ 1-52 and 1-56(b), are *unconstitutional only as applied to this defendant on the particular facts of this case* because they contravene fundamental state substantive due process requirements enshrined in N.C. CONST. Art. 1, § 19 and N.C. CONST. Art. IV, § 13(2).
>
> 3. Specifically, under these portions of the North Carolina Constitution, [TCH] has a vested constitutional right to freedom from civil liability after an existing statutory limitation or repose period on claims has already expired. Here, the preexisting three-year limitation and ten-year repose periods applicable to [P]laintiff's claims filed against [TCH] have long since expired. Even liberally construing the complaint, that pleading conclusively establishes that the events alleged therein occurred between 1970 and 1973. Such previously terminated civil liability cannot be revived now by an act of the General Assembly without violating North Carolina's substantive due process protections, particularly when such revival attempts to reinstate claims against [TCH] that are almost fifty years old.
>
> 4. Accordingly, [P]laintiff's claims against [TCH] are barred by the applicable statutes of limitations

> and repose codified in N.C. Gen. Stat. §§ 1-52(5), (16), (19), and 1-56(a) prior to the enactment of the legislation *which is subject to this applied state constitutional challenge.*
>
> **WHEREFORE**, [TCH] respectfully prays the Court for an order decreeing that the 2019 amendments to N.C. Gen. Stat. §§ 1-52 (Session Laws 2019-245 s. 4(b)[)] and 1-56(b) are unconstitutional *as applied to* [*TCH*] *in this case* . . . .

(Second and third emphases added).

¶ 26 In each of these motions to dismiss, Defendants repeatedly state that their constitutional challenges are as-applied. UMC argued that the relevant provisions "of the Act should be declared unconstitutional *as applied to* [*UMC*] *under the facts as alleged in this case*," and specifically contended that "the Act reopens any statutes of limitations or repose to bring claims against the alleged abusers *only* for the assault and abuse, and not against third parties for ancillary claims[.]" (First emphasis added). UMC thus did not contend that the Act "is incapable of constitutional application in any context." *LeTendre*, 259 N.C. App. at 534, 817 S.E.2d at 89 (citation omitted). Rather, UMC argued "against how [the Act] was applied in the particular context" of Plaintiff's claims. *Id.* (citation omitted).

¶ 27 Similarly, TCH moved the trial court to dismiss on the grounds that the Act was "unconstitutional as applied to this defendant[.]" TCH further argued that the Act was "*unconstitutional only as applied to this defendant on the particular facts of this case*" and explained its specific objections to Plaintiff's invocation of the Act as applied to the facts of this case. As with UMC, TCH plainly argued "against how [the Act] was applied in the particular context" of the present case and did not assert that the Act was "incapable of constitutional application in any context." *Id.* (citation omitted).

¶ 28 Nevertheless, the trial court concluded that "[t]he constitutional challenges contained in [D]efendants[']' respective motions to dismiss under Rule 12(b)(6) raise facial challenges" to the Act. Yet in *Cryan*—which was released *after* the trial court entered its transfer order in this case and which opinion the court accordingly did not have the benefit of reviewing when it ruled on this issue—this Court reversed a trial court's determination that a defendant had raised a facial challenge to N.C. Gen. Stat. § 1-17(e) where the defendant "d[id] not challenge the authority of the General Assembly to create disabilities as a means of extending

the time during which a sufferer of sexual abuse may sue. Rather, [the d]efendant only challenge[d] subsection (e)'s application to claims *that had already become time-barred* prior to its enactment in 2019." *Cryan*, 2021-NCCOA-612, ¶ 22.

¶ 29 Defendants urge us to conclude that the constitutional challenges raised in their motions to dismiss were as-applied challenges and not facial challenges. However, to the extent that this Court's opinion in *Cryan* provides new and additional insight on this question of law, the proper disposition is for our Court to vacate the trial court's order and remand for the trial court's reconsideration in light of *Cryan*. *See Blitz v. Agean, Inc.*, 197 N.C. App. 296, 312, 677 S.E.2d 1, 11 (2009) ("Where a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light." (citation omitted)), *disc. review and cert. denied*, 363 N.C. 800, 690 S.E.2d 530 (2010). Accordingly, we vacate the trial court's order and remand for reconsideration of Plaintiff's motion to transfer in light of *Cryan*.

IV. UMC's Rule 12(b)(1) Motion

¶ 30 **[3]** Below, UMC moved to dismiss Plaintiff's action pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction, but did not notice or schedule it for hearing. In its appellate brief to this Court, UMC explains that "for a judge or a jury to determine what, if any, employment relationship existed" between UMC and the individuals who Plaintiff alleges abused him as a minor, that judge or jury "will have to engage in examinations of *The Book of Discipline*, religious doctrine, doctrines and practices regarding ordination of clergy, Christian principles, and governing structures and processes of The United Methodist Church in 1970."

¶ 31 Because the trial court declined to rule on UMC's Rule 12(b)(1) motion, we express no opinion on the merits of UMC's ecclesiastical-entanglement argument. As UMC acknowledges, the merits of this argument are "not the point at this juncture." Rather, UMC merely argues on appeal that, as a challenge to the trial court's subject-matter jurisdiction to even hear this action, its Rule 12(b)(1) motion is "not contingent upon the outcome of the challenge to the act's facial validity." *Holdstock*, 270 N.C. App. at 278, 841 S.E.2d at 315 (citation omitted). Accordingly, UMC argues that the trial court was required to resolve its Rule 12(b)(1) motion prior to transferring any portion of this matter pursuant to Rule 42(b)(4). We agree.

¶ 32 Once a trial court determines that a party has sufficiently raised a facial constitutional challenge in order to invoke the three-judge panel provisions, Rule 42(b)(4) sets forth the procedure that the trial court must follow in transferring the facial challenge to a three-judge panel of the Wake County Superior Court. Under Rule 42(b)(4), the trial court "shall, on its own motion, transfer that portion of the action" raising the facial challenge "if, *after all other matters in the action have been resolved*, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case." N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) (emphasis added).

¶ 33 Rule 42(b)(4) thus "requires [that] the transfer for the facial constitutional challenge should not happen until after a trial on the other unaffected claims in the lawsuit." *Hull v. Brown*, 2021-NCCOA-525, ¶ 12 (citation and internal quotation marks omitted). " 'All other matters' under Rule 42(b)(4) means 'all matters that are not contingent upon the outcome of the challenge to the act's facial validity.' " *Holdstock*, 270 N.C. App. at 278, 841 S.E.2d at 315 (citation omitted).

¶ 34 The ecclesiastical-entanglement doctrine is rooted in the First Amendment to the Constitution of the United States. "The Establishment Clause and the Free Exercise Clause of the First Amendment prohibit any 'law respecting an establishment of religion, or prohibiting the free exercise thereof.' " *Doe*, 242 N.C. App. at 47, 776 S.E.2d at 34 (quoting U.S. Const. amend. I). "As applied to the states through the Fourteenth Amendment, the First Amendment also restricts action by state governments and the servants, agents and agencies, of state governments." *Id.* (citation omitted). "As such, the civil courts of North Carolina are prohibited from becoming entangled in ecclesiastical matters and have no jurisdiction over disputes which require an examination of religious doctrine and practice in order to resolve the matters at issue." *Id.* (citation and internal quotation marks omitted). This prohibition arises under both the Free Exercise and Establishment Clauses, as "(1) by hearing religious disputes, a civil court could influence associational conduct, thereby chilling the free exercise of religious beliefs; and (2) by entering into a religious controversy and putting the enforcement power of the state behind a particular religious faction, a civil court risks establishing a religion." *Id.* at 48, 776 S.E.2d at 34 (citation and internal quotation marks omitted).

¶ 35 Accordingly, the ecclesiastical-entanglement doctrine potentially implicates the subject-matter jurisdiction of the courts of this state in this case. It is a "universal principle as old as the law" that the proceedings of a court without subject-matter jurisdiction "are a nullity."

Burgess v. Gibbs, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). "Put another way, subject[-]matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act." *4U Homes & Sales, Inc. v. McCoy*, 235 N.C. App. 427, 433, 762 S.E.2d 308, 312 (2014) (citation and internal quotation marks omitted).

¶ 36 The issue of the trial court's subject-matter jurisdiction over this case is "not contingent upon the outcome of the challenge to the act's facial validity." *Holdstock*, 270 N.C. App. at 278, 841 S.E.2d at 315 (citation omitted). Instead, the issue of the facial challenge is arguably contingent upon the outcome of the Rule 12(b)(1) motion: if the trial court determines that UMC's ecclesiastical-entanglement arguments have merit, the trial court has the "duty to take notice of the defect and stay, quash or dismiss the suit[,]" at least with respect to UMC. *Burgess*, 262 N.C. at 465, 137 S.E.2d at 808.

¶ 37 Further, Rule 42(b)(4) itself explicitly envisions Rule 12(b) motions as not being matters "contingent upon the outcome of the challenge to the act's facial validity." *Holdstock*, 270 N.C. App. at 278, 841 S.E.2d at 315 (citation omitted). Discussing the procedure for "all matters other than the challenge to the act's facial validity[,]" Rule 42(b)(4) states:

> For a motion filed under Rule 11 or Rule 12(b)(1) through (7), the original court shall rule on the motion, however, it may decline to rule on a motion that is based solely upon Rule 12(b)(6). If the original court declines to rule on a Rule 12(b)(6) motion, the motion shall be decided by the three-judge panel.

N.C. Gen. Stat. § 1A-1, Rule 42(b)(4).

¶ 38 "Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." *Cooper v. Berger*, 371 N.C. 799, 810, 822 S.E.2d 286, 296 (2018) (citation omitted). Rule 42(b)(4) specifically authorizes the trial court to decline to rule on a motion that is based solely upon Rule 12(b)(6), in which case, "the motion shall be decided by the three-judge panel." N.C. Gen. Stat. § 1A-1, Rule 42(b)(4). By implication, however, Rule 42(b)(4) does *not* authorize a trial court to decline to rule on a Rule 12(b)(1) motion, as the trial court did here. *See id.*

¶ 39 The trial court has neither heard nor ruled on UMC's Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction; instead, the

present appeal is from the trial court's order on Plaintiff's motion to transfer Defendants' motions to dismiss. However, when the trial court concluded that Defendants sufficiently raised facial challenges to warrant the invocation of the three-judge panel provisions, under the order of operations established by Rule 42(b)(4) and this Court's precedents in *Hull* and *Holdstock*, the trial court should have ruled on UMC's Rule 12(b)(1) motion prior to ordering any transfer. *See Hull*, 2021-NCCOA-525, ¶ 12; *Holdstock*, 270 N.C. App. at 278, 841 S.E.2d at 315.

Conclusion

¶ 40 For the foregoing reasons, we vacate the trial court's transfer order and remand this case to the trial court for reconsideration of Plaintiff's motion to transfer, in light of *Cryan*. On remand, the trial court shall also consider UMC's Rule 12(b)(1) motion to dismiss as a threshold issue with regard to UMC.

VACATED AND REMANDED.

Judges COLLINS and CARPENTER concur.

RACHEL LYNNE OSBORNE, Plaintiff
v.
HEATH PARIS, JORDAN ASHWORTH and GOVERNMENT EMPLOYEES INSURANCE COMPANY, Defendants

No. COA21-226

Filed 17 May 2022

1. Insurance—motor vehicle accident—uninsured and underinsured motorist coverage—amount limits—Motor Vehicle Safety and Financial Responsibility Act

In a dispute between plaintiff and her insurance provider, where the parties disputed plaintiff's motor vehicle liability coverage for injuries she sustained in a collision between an uninsured motorcycle (on which she was a passenger) and an underinsured car, and where plaintiff claimed coverage under a policy providing combined uninsured and underinsured motorist coverage, the trial court properly granted summary judgment in favor of the insurance provider on plaintiff's claim for a higher amount of underinsured coverage

than what she received. Contrary to plaintiff's argument, the Motor Vehicle Safety and Financial Responsibility Act did not mandate that she recover the highest limits of both the underinsured and uninsured coverage provided under her policy; rather, the Act (under N.C.G.S. § 20-279.21(b)(2)–(4)) requires all drivers to purchase liability coverage of at least $30,000.00, including uninsured coverage at that limit, and allows drivers the additional option of purchasing underinsured coverage greater than the minimum liability limit.

2. Insurance—motor vehicle accident—payment by tortfeasor's policy—credit against uninsured coverage—not permitted

In a dispute between plaintiff and her insurance provider, where the parties disputed plaintiff's motor vehicle liability coverage for injuries she sustained in a collision between an uninsured motorcycle (on which she was a passenger) and an underinsured car, and where plaintiff claimed coverage under three policies (two providing uninsured motorist coverage and one providing combined uninsured and underinsured motorist coverage), the Court of Appeals modified the trial court's order granting summary judgment in favor of the insurance provider after determining that the trial court erred in allowing the insurance provider to set off plaintiff's coverage by $30,000.00 after she was paid that amount from the car driver's policy with the same insurance provider. Under the Motor Vehicle Safety and Financial Responsibility Act, the insurance provider was not entitled to a credit against plaintiff's uninsured coverage in the amount paid by a tortfeasor's policy.

3. Insurance—motor vehicle accident—summary judgment—bad faith and unfair trade practices claims against insurance provider

In a dispute between plaintiff and her insurance provider over motor vehicle liability coverage for injuries she sustained in a collision between an uninsured motorcycle (on which she was a passenger) and an underinsured car, the trial court properly granted summary judgment to the insurance provider on plaintiff's claims for bad faith and unfair trade practices where plaintiff failed to forecast any evidence raising a genuine issue of material fact regarding whether the insurance provider acted in bad faith by refusing to settle plaintiff's insurance claims or engaged in unfair trade practices in denying greater coverage than what it provided her.

Appeal by Plaintiff from judgment entered 11 September 2020 by Judge Peter B. Knight in Henderson County Superior Court. Heard in the Court of Appeals 15 December 2021.

OSBORNE v. PARIS

[283 N.C. App. 399, 2022-NCCOA-338]

Whitfield-Cargile Law, PLLC, by Davis A. Whitfield-Cargile, for Plaintiff-Appellant.

Davis & Hamrick, L.L.P., by James G. Welsh, Jr., and Ann C. Rowe, for Defendant-Appellee.

INMAN, Judge.

¶ 1 This appeal arises from a dispute between an insured and her insurance provider over motor vehicle liability insurance coverage for grave injuries she sustained in a collision between an uninsured motorcycle, on which she was a passenger, and an underinsured car. Resolving the disagreement requires us to apply North Carolina statutes to three automobile insurance policies, two providing uninsured motorist coverage, and one providing combined uninsured and underinsured motorist coverage. After careful review of the insurance policies at issue, the Motor Vehicle Safety and Financial Responsibility Act ("Financial Responsibility Act"), and our caselaw, we affirm the trial court's entry of summary judgment in favor of Defendant-Appellee Government Employee's Insurance Company ("GEICO"), in part, but modify the amount GEICO must pay Ms. Osborne because it was not entitled to a credit against its uninsured motorist coverage.

¶ 2 Plaintiff-Appellant Rachel Osborne ("Ms. Osborne") argues that the trial court erred in granting summary judgment in favor of GEICO on her claim for $70,000 in underinsured motorist coverage in addition to $100,000 of uninsured motorist coverage. Ms. Osborne contends her right to recover underinsured motorist coverage was triggered when GEICO tendered Defendant Jordan Ashworth's ("Mr. Ashworth") liability limits to Ms. Osborne, and that the Financial Responsibility Act, N.C. Gen. Stat. §§ 20-279.21(b)(3) and (4) (2021), does not allow GEICO to reduce the $160,000 uninsured motorist coverage by its payment of Mr. Ashworth's $30,000 liability limit. Ms. Osborne also argues the trial court erred in granting summary judgment to GEICO on her claims of bad faith and unfair trade practices.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 3 On the night of 4 April 2017, Ms. Osborne was a passenger on a motorcycle on Crab Creek Road in Transylvania County, traveling toward Brevard. The motorcycle was operated by its owner, Defendant Heath Paris ("Mr. Paris"). Ahead of Mr. Paris on the same road, Mr. Ashworth was driving his car, also headed toward Brevard. As Mr. Ashworth approached an intersection, he allegedly signaled to turn right and slowed

his vehicle as if he was pulling over on the shoulder of the road. Anticipating the car's right turn, Mr. Paris attempted to pass on the car's left, in a non-passing zone. At the same time, Mr. Ashworth turned left, instead of right, and the motorcycle and car collided. The impact sent the motorcycle airborne. Ms. Osborne was ejected and landed on the ground a great distance from the motorcycle. She sustained serious injuries requiring several surgeries and other extensive medical treatment, and her injuries will require future surgeries and treatment.

¶ 4 Mr. Paris' motorcycle was uninsured, meaning no policy of liability insurance existed to provide coverage for the motorcycle or for Mr. Paris as a driver. Mr. Ashworth's car was insured by a liability insurance policy through GEICO, with minimum-limits bodily injury liability coverage of $30,000 per person. It is undisputed Mr. Ashworth's vehicle is an "underinsured motor vehicle" as defined by the Financial Responsibility Act.

¶ 5 GEICO tendered $30,000 to Ms. Osborne under Mr. Ashworth's policy on 6 March 2020.

¶ 6 Three days later, on 9 March 2020, Ms. Osborne, through counsel, sent a written demand to GEICO for $160,000 of uninsured motorist coverage and $70,000 of underinsured motorist coverage under three different GEICO policies. Her own liability insurance policy with GEICO, Policy no. 4416-06-95-42 ("Policy 42"), provided uninsured motorist coverage up to $30,000 per person. Because Ms. Osborne lived in the same household as her parents, Bobby and Ginger Osborne, she was also covered by their policies with GEICO. Policy no. 4325-46-40-65 ("Policy 65"), which covers two vehicles, neither of which were involved in the underlying accident, provides combined uninsured and underinsured bodily injury liability coverage of $100,000 per person and a total limit of $300,000 per accident. Policy 65 provides that the "limit of bodily injury liability shown in the Declarations for each accident for Combined Uninsured/Underinsured Motorists Coverage is [the] maximum limit of liability for all damages for bodily injury resulting from any one accident." Ms. Osborne also claims she is entitled to coverage under Policy no. 4325-46-67-06 ("Policy 06"), which insures a single motorcycle owned by Ms. Osborne's parents and not involved in the underlying accident. Policy 06 provides limits of liability for uninsured motorist bodily injury liability of $30,000 for each person, with a total limit of $60,000 per accident.

¶ 7 On 13 March 2020, four days after Ms. Osborne formally demanded payment from GEICO, she filed suit against Mr. Paris and Mr. Ashworth, alleging negligence, as well as GEICO, alleging GEICO had: (1) breached its obligation to pay underinsured motorist benefits and uninsured

motorist benefits to her; (2) displayed bad faith in its refusal to settle with Ms. Osborne on reasonable terms; and (3) engaged in unfair and deceptive trade practices. Ms. Osborne alleged that because Mr. Paris was uninsured, she was entitled to benefits under her policy's uninsured coverage, uninsured coverage under her parents' motorcycle policy, and uninsured coverage of her parents' automobile policy. She also alleged she was entitled to an additional $100,000 in underinsured coverage under her parents' automobile policy, Policy 65, because Mr. Ashworth was an underinsured motorist.

¶ 8 On 6 April 2020, GEICO remitted to Ms. Osborne three checks totaling $130,000—$100,000 combined uninsured/underinsured coverage under Policy 65, $15,000 uninsured coverage under Policy 42, and $15,000 uninsured coverage under Policy 06.[1] GEICO's counsel asserted Ms. Osborne was entitled to $130,000 of uninsured motorist coverage, the total available coverage of $160,000 under all three policies, less a $30,000 credit for the amount paid to Ms. Osborne under Mr. Ashworth's liability policy. GEICO contends this credit is required by its policy language providing that "coverage shall be reduced by all sums . . . [p]aid because of bodily injury . . . by or on behalf of persons or organizations who may be legally responsible . . . ."

¶ 9 One month later, on 12 May 2020, GEICO responded to Ms. Osborne's complaint and counterclaimed for declaratory judgment. GEICO moved for summary judgment as to all claims against it or, in the alternative, an order granting its claim for a declaratory judgment as to its duties and obligations for payments under the policies at issue. The trial court entered summary judgment in favor of GEICO on 11 September 2020. The trial court's order included a certification pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Ms. Osborne timely appealed.

II. ANALYSIS

¶ 10 Ms. Osborne argues the trial court erred in concluding she may recover only $130,000 from GEICO. She contends: (1) she is entitled to recover underinsured coverage in addition to uninsured coverage under Policy 65, and (2) GEICO improperly reduced its uninsured coverage by the amount remitted from Mr. Ashworth's policy. After careful interpretation of all relevant statutes *in pari materia*, we affirm in part and remand in part the trial court's summary judgment in favor of GEICO, as described below.

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1. As explained in further detail below, the amounts GEICO paid under Policies 42 and 06 reflect a pro rata credit distribution of the $30,000 from Mr. Ashworth's policy.

A. Standard of Review

¶ 11 We review an appeal from summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). "[S]ummary judgment is appropriate when the record establishes that there are no genuine issues of material fact and that any party is entitled to judgment as a matter of law." *Lunsford v. Mills*, 367 N.C. 618, 622, 766 S.E.2d 297, 301 (2014) (citing Rule 56(c)). We view the record "in the light most favorable to the non-movant, giving it the benefit of all inferences which reasonably arise therefrom." *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 8, 472 S.E.2d 358, 362 (1996) (citation omitted). Interpreting the Financial Responsibility Act and examining the terms of a motor vehicle insurance policy are also questions of law which we review *de novo*. *Lunsford*, 367 N.C. at 623, 766 S.E.2d at 301 (citations omitted).

¶ 12 "Statutes dealing with the same subject matter must be construed in pari materia, and harmonized, if possible, to give effect to each." *Hoffman v. Edwards*, 48 N.C. App. 559, 564, 269 S.E.2d 311, 313 (1980) (quotation marks and citation omitted). We presume that the General Assembly acts with full knowledge of prior and existing law. *Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977) (citation omitted).

B. Discussion

¶ 13 The Financial Responsibility Act requires, among other things, that drivers maintain insurance at certain mandatory *minimum* coverage limits. *See* N.C. Gen. Stat. §§ 20-279.21(b)(2)-(3) (2021). The purpose of the Financial Responsibility Act "is to compensate the innocent victims of financially irresponsible motorists. It is a remedial statute to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) (citations omitted). We must interpret the Act "to provide the innocent victim with the fullest possible protection." *Proctor v. N.C. Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 225, 376 S.E.2d 761, 764 (1989).

¶ 14 The terms of the Financial Responsibility Act are impliedly written into every policy of insurance as a matter of law. *N.C. Farm Bureau Mut. Ins. Co. v. Dana*, 379 N.C. 502, 2021-NCSC-161, ¶ 9 (citations omitted). "An insurance policy is a contract between the parties, and the intention of the parties is the controlling guide in its interpretation. It is to be construed and enforced in accordance with its terms insofar as they are not in conflict with pertinent statutes and court decisions." *Hawley v. Indem. Ins. Co.*, 257 N.C. 381, 387, 126 S.E.2d 161, 167 (1962) (citation omitted).

¶ 15 Though the purpose of the Financial Responsibility Act is to protect innocent victims of motor vehicle negligence, "that fact does not inevitably require that one interpret the relevant statutory language to produce the maximum possible recovery for persons injured as a result of motor vehicle negligence regardless of any other consideration." *N.C. Farm Bureau Mut. Ins. Co.*, ¶ 20. In this case, we must consider the amount and nature of coverage purchased under each of the three policies at issue. Ms. Osborne purchased the following coverage under Policy 42: uninsured motorist coverage up to $30,000 per person. Ms. Osborne's parents purchased the following coverage under Policy 65: combined uninsured and underinsured bodily injury liability coverage of $100,000 per person and a total limit of $300,000 per accident. And Ms. Osborne's parents purchased the following coverage under Policy 06: uninsured motorist bodily injury liability of $30,000 for each person, with a total limit of $60,000 per accident.

¶ 16 The trial court concluded that Ms. Osborne is entitled to recover $130,000 from GEICO: $160,000 of total coverage ($100,000 under Policy 65, $30,000 under Policy 42, and $30,000 under Policy 06) less the $30,000 previously paid by GEICO from Mr. Ashworth's policy. GEICO contends the trial court decided this matter correctly and directs our attention to Subsection (n) of the Financial Responsibility Act, which specifies: "Nothing in this section shall be construed to provide greater amounts of uninsured or underinsured motorist coverage in a liability policy than the insured has purchased from the insurer under this section." § 20-279.21(n).

1. Underinsured in Addition to Uninsured Coverage

¶ 17 **[1]** Because Policy 65 provides combined uninsured/underinsured coverage, GEICO contends, Ms. Osborne may not recover uninsured and underinsured coverage beyond the policy's combined coverage limits. Ms. Osborne, on the other hand, argues she is entitled to $160,000 of uninsured motorist coverage and an additional $100,000 of underinsured motorist coverage, less the $30,000 paid from Mr. Ashworth's policy, for a total of $230,000 in coverage. She argues Subsection (b)(4) of the Act mandates she recover the highest limits of *both* the underinsured *and* uninsured coverage in Policy 65, $100,000 each and totaling $200,000, because the statute provides underinsured motorist coverage shall be "in addition to" uninsured coverage.

¶ 18 Subsection (b)(4) provides that the owner's liability policy

> [s]hall, in addition to the coverages set forth in subdivisions (2) and (3) of this subsection, provide

> underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this subsection. The limits of such underinsured motorist bodily injury coverage shall be equal to the highest limits of bodily injury liability coverage for any one vehicle insured under the policy[.]

§ 20-279.21(b)(4).

¶ 19 Subsection (b)(2), cross-referenced by Subsection (b)(4), provides minimum limits of insurance coverage for any motor vehicle in the State as:

> . . . thirty thousand dollars ($30,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, sixty thousand dollars ($60,000) because of bodily injury to or death of two or more persons in any one accident, and twenty-five thousand dollars ($25,000) because of injury to or destruction of property of others in any one accident[.]"

§ 20-279.21(b)(2). Subsection (b)(3), also cross-referenced by Subsection (b)(4), provides parameters for uninsured coverage: "The limits of such uninsured motorist bodily injury coverage shall be equal to the highest limits of bodily injury liability coverage for any one vehicle insured under the policy[.]" § 20-279.21(b)(3).

¶ 20 In simpler terms, if not as written by the General Assembly, substituting "liability coverage" for (2) and "uninsured motorist coverage" for (3) in the text of Subsection (b)(4), results in the following reading: "such owner's policy of liability insurance . . . [s]hall, in addition to [liability coverage and uninsured motorist coverage], provide [underinsured motorist coverage]."

¶ 21 We are not persuaded that Subsection (b)(4) requires insurance companies to pay the combined limit amount for *both* uninsured *and* underinsured coverage regardless of the insurance policy language. Rather, we interpret Subsection (b)(4) simply to reiterate that all drivers in North Carolina must purchase liability coverage of at least $30,000, § 20-279.21(b)(2), to include uninsured coverage at those limits, § 20-279.21(b)(3), and that drivers have the additional *option* to purchase underinsured coverage greater than the minimum liability limits, in the event a negligent driver's policy does not cover the

cost of an insured's injuries or damage to their property. Pursuant to Subsection (b)(4), an uninsured/underinsured combined limits policy written for $60,000 in combined coverage, for example, would necessarily include $30,000 of uninsured coverage and an additional $30,000 of underinsured coverage, unless otherwise specified in the policy. In the event of a loss of equal to or greater than $60,000, involving both an uninsured and underinsured motorist, the insurer would be responsible for the combined limit of $60,000.

¶ 22 The terms of Policy 65 do not conflict with the Financial Responsibility Act or our caselaw. Policy 65 provides uninsured/underinsured motorist coverage with a combined limit of $100,000.[2] Ms. Osborne's parents, who purchased the policy, and GEICO entered into a contract providing that GEICO would be responsible for $100,000 total coverage, in the event of negligence of an uninsured motorist or underinsured motorist or both. The terms do not bind GEICO to provide $100,000 uninsured coverage and an additional $100,000 of underinsured coverage, for a total of $200,000. Though the purpose of the Financial Responsibility Act is "to provide protection for innocent victims of motor vehicle negligence," we will not interpret the relevant statutory language to produce the maximum possible recovery for Ms. Osborne regardless of the terms of the policy or our canons of statutory construction. *See N.C. Farm Bureau Mut. Ins. Co.*, ¶ 20; *Hoffman*, 48 N.C. App. at 564, 269 S.E.2d at 313.[3]

¶ 23 We affirm the trial court's declaratory judgment in favor of GEICO subject to the modifications we outline next.

2. Coverage Less the Amount Received from Underinsured's Policy

¶ 24 **[2]** Ms. Osborne contends the Financial Responsibility Act precludes GEICO from reducing its $160,000 uninsured coverage by the $30,000 GEICO tendered from Mr. Ashworth's policy. We agree.

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2. Though not dispositive, GEICO notes that, generally, combined uninsured/underinsured policies, like Policy 65, are funded by a single, combined premium based upon the maximum liability coverage. The State then imposes taxes based upon the the "gross premiums." *See* N.C. Gen. Stat. § 105-228.5(b)(1) (2021).

3. In reaching this conclusion, we distinguish and do not rely on this Court's decision in *Monti v. United Services Auto. Ass'n*, 108 N.C. App. 342, 423 S.E.2d 530 (1992). In *Monti*, our Court considered whether a plaintiff could collect both uninsured and underinsured coverage from a single tortfeasor. 108 N.C. App. at 344-45, 423 S.E.2d at 531. The tortfeasor in *Monti* was covered by liability limits under an out-of-state policy providing less than the minimum coverage required in North Carolina. *Id.* We held that though the tortfeasor was both uninsured and underinsured in North Carolina, the plaintiff could recover either uninsured coverage or underinsured coverage from the tortfeasor, but not both. *Id.* at 345-46, 423 S.E.2d at 531-32.

¶ 25 Subsection (b)(4) provides: "[T]he limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident." § 20-279.21(b)(4). Consistent with the statute, Ms. Osborne concedes she is entitled only to $70,000 of the total $100,000 underinsured limits under Policy 65, allowing GEICO a credit for Mr. Ashworth's $30,000 liability limits. However, she contends the Financial Responsibility Act does not authorize a set off for the amount of *un*insured coverage based on the liability payment of Mr. Ashworth, an underinsured motorist.

¶ 26 GEICO argues the terms of its policies, read in concert with the statute, entitle it to a credit for the payment Ms. Osborne received from Mr. Ashworth's liability policy. Policies 06 and 65 provide: "The limits of bodily injury liability shown in the [Schedule or] Declarations page for each person and each accident for this coverage shall be reduced by all sums: 1. Paid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible." (Alteration in original.) Policy 42 employs slightly different language, "The limit of liability otherwise applicable under this coverage shall be reduced by all sums: 1. Paid because of bodily injury . . . by or on behalf of persons or organizations who may be legally responsible," to create the same credit.

¶ 27 Interpreting Subsection (b)(4), this Court has held *under*insured carriers are entitled to set off the amount received by a claimant from a tortfeasor's liability carrier against any underinsured amounts the injured party's carrier owed. *Onley v. Nationwide Mut. Ins. Co.*, 118 N.C. App. 686, 690, 456 S.E.2d 882, 885 (1995) ("Under the terms of the statute, a[n] [underinsured] carrier is entitled to credit for the amounts paid to a claimant under the tortfeasor's liability policy." (citation omitted)); *Falls v. N.C. Farm Bureau Mut. Ins. Co.*, 114 N.C. App. 203, 208, 441 S.E.2d 583, 586 (1994) ("[T]he primary provider of [underinsured] coverage . . . is entitled to the credit for the liability coverage.").

¶ 28 For example, in *Falls*, the tortfeasor driver had the minimum amount of liability insurance mandated by our statutes at the time, $25,000, and the injured party was covered by an underinsured motorist policy with limits of liability of $50,000 per person. 114 N.C. App. at 204-05, 441 S.E.2d at 583-84. On appeal, this Court rejected the argument that the injured party's primary insurance carrier was not entitled to a credit for $25,000 in the tortfeasor's liability coverage tendered. *Id.* at 208, 441 S.E.2d at 585-86. We interpreted Subsection (b)(4) to conclude that the primary provider of underinsured coverage was entitled to a credit for

the amount received under the tortfeasor's policy. *Id.*, 441 S.E.2d at 586. More recently, in *N.C. Farm Bureau Mut. Ins. Co. v. Dana*, the Supreme Court considered the reduction of the insurer's per-person, as opposed to per-accident, liability by the amount tendered by the underinsured's policy. *N.C. Farm Bureau Mut. Ins. Co.*, ¶¶ 4-5 ("[The insurance provider] offered to pay the full per-person limit to both [injured parties], less the amount that had been received from [another provider's] liability coverage.").

¶ 29 Our Supreme Court has also held our General Statutes authorize an insurance carrier to reduce *un*insured motorist coverage available by the amount of workers' compensation benefits an injured party received. *Liberty Mut. Ins. Co. v. Ditillo*, 348 N.C. 247, 253, 499 S.E.2d 764, 768 (1998) ("[Uninsured] carriers are permitted to reduce coverage for [the estates of the decedent parties] by the amount of workers' compensation benefits paid or payable." (citing N.C. Gen. Stat. § 20-279.21(e) (1997)). Subsection (e) explicitly provides for this set off:

> Uninsured or underinsured motorist coverage that is provided as part of a motor vehicle liability policy shall insure that portion of a loss uncompensated by any workers' compensation law and the amount of an employer's lien determined pursuant to G.S. 97-10.2(h) or (j). In no event shall this subsection be construed to require that coverage exceed the applicable uninsured or underinsured coverage limits of the motor vehicle policy or allow a recovery for damages already paid by workers' compensation.

§ 20-279.21(e) (2021).

¶ 30 But the Financial Responsibility Act does *not* authorize a set off for *un*insured coverage from payment received by a tortfeasor's policy. *Compare* § 20-279.21(b)(4) (providing for a credit from underinsured coverage) *with* § 20-279.21(b)(3) (omitting the same in the uninsured provision of the statute). We cannot discern any underlying policy reason or legislative intent for this omission. However, our canons of statutory construction require us to presume that the General Assembly acts with full knowledge of prior and existing law. *See Ridge Cmty. Inv'rs, Inc.*, 293 N.C. at 695, 239 S.E.2d at 570. We therefore assume the legislature had full knowledge it provided for a credit in the uninsured context from other collateral sources, namely workers' compensation benefits, and for underinsured coverage against other liability policies, when it authored Subsection (b)(3) and did not provide the same set off for uninsured coverage.

¶ 31 We hold GEICO, providing uninsured coverage, was not entitled to a set off for payment Ms. Osborne received from Mr. Ashworth's policy. Thus, we modify the judgment of the trial court to order GEICO to pay an additional $30,000 ($160,000 total) to Ms. Osborne.

C. Bad Faith and Unfair Trade Practices Claims

¶ 32 **[3]** Ms. Osborne also argues we should reverse the trial court's grant of summary judgment on her bad faith refusal to settle and unfair practices claims because there remains a genuine issue of fact about GEICO's conduct. In the alternative, Ms. Osborne requests we remand to the trial court to allow for discovery under Rule 56(f) of our Rules of Civil Procedure to allow her to develop evidence necessary to maintain these claims. We will not.

¶ 33 As reflected by this Court's detailed analysis of the applicable statutes and the language of the policies, the absence of controlling caselaw regarding the difference between the set off allowed for underinsured motorist coverage versus uninsured motorist coverage, and the trial court's conclusion allowing a set off for the uninsured coverage provider, we cannot conclude that Ms. Osborne has raised or even forecast evidence to raise a disputed issue of genuine fact regarding whether GEICO acted in bad faith or engaged in unfair trade practices in denying further coverage.

III. CONCLUSION

¶ 34 For the reasons set forth above, we affirm the trial court's order granting summary judgment to GEICO in part and remand in part for modifications not inconsistent with this opinion.

AFFIRMED IN PART; REMANDED IN PART.

Judges ARROWOOD and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
LARRY FRITSCHE

No. COA21-473

Filed 17 May 2022

Sexual Offenders—registration—early termination—ten-year registration requirement—prior out-of-state registration—Equal Protection

The trial court's order denying defendant's petition to terminate his sex offender registration requirement was affirmed where, although defendant had been registered as a sex offender in other states for more than ten years, he did not meet the statutory requirement of maintaining at least ten years of registration in a North Carolina county. Further, the ten-year registration requirement did not violate the Equal Protection clauses of the federal or state constitutions where the requirement was rationally related to the State's legitimate interests in maintaining public safety and treated defendant the same as all other registered sex offenders who initially enrolled in another state's registry based on an out-of-state conviction.

Appeal by defendant from order entered 7 May 2021 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 22 February 2022.

No brief filed on behalf of the State.

CarnesWarwick, by Amy Lynne Schmitz and Jonathan Carnes, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Larry Fritsche appeals from the trial court's order denying his petition to terminate his sex-offender registration. After careful review, we affirm.

Background

¶ 2 On 17 November 2000, Defendant pleaded guilty in Arapahoe County, Colorado, district court to sexual exploitation of a child, in violation of Colo. Rev. Stat. § 18-6-403(3) (2000). The trial court suspended Defendant's sentence and placed him on probation. However,

after Defendant violated the terms of his probation, the court revoked Defendant's probation and activated his sentence. Defendant served eight years in prison. Upon his release, Defendant registered with the Colorado Sex Offender Registry on 26 August 2008, as required by Colorado law. *See id.* § 16-22-103(1)(c).

¶ 3 In February 2020, Defendant moved from Colorado to Florida. On 21 February 2020, Defendant registered with the Florida Sex Offender Registry, as required by Florida law. *See* Fla. Stat. § 943.0435 (2020).

¶ 4 Defendant then moved to North Carolina in October 2020 to be closer to his two children. On 28 October 2020, he filed a petition pursuant to N.C. Gen. Stat. § 14-208.12B (2020), requesting a judicial determination of his requirement to register in North Carolina as a sex offender. After the matter came on for hearing in Wake County Superior Court, the trial court entered an order on 9 April 2021 requiring that Defendant register as a sex offender on the North Carolina Sex Offender Registry. Defendant did so on the following business day, 12 April 2021.

¶ 5 On 14 April 2021, Defendant filed a petition pursuant to N.C. Gen. Stat. § 14-208.12A (2021) for termination of his requirement to register as a sex offender. The matter came on for hearing in Wake County Superior Court on 7 May 2021. The trial court denied Defendant's petition on the ground that Defendant did not satisfy all of the conditions for early termination of his requirement to register as a sex offender, in that he had not been registered as a sex offender for ten years in North Carolina, in accordance with this Court's holding in *In re Borden*, 216 N.C. App. 579, 718 S.E.2d 683 (2011). The trial court entered its order on 7 May 2021, and Defendant timely filed written notice of appeal.

Discussion

¶ 6 On appeal, Defendant argues that the trial court erred in denying his petition to terminate his requirement to register as a sex offender because *Borden* was incorrectly decided and should be overturned, or, in the alternative, because the termination statute's ten-year North Carolina registry requirement violates the Equal Protection Clause.

I. Standard of Review

¶ 7 Whether to terminate a sex offender's registration requirement is a matter left to the trial court's discretion. *In re Hamilton*, 220 N.C. App. 350, 359, 725 S.E.2d 393, 399 (2012); N.C. Gen. Stat. § 14-208.12A(a1). "[A]fter making findings of fact supported by competent evidence on each issue raised in the petition, the trial court is then free to employ its discretion in reaching its conclusion of law whether [the defendant] is

entitled to the relief he requests." *Hamilton*, 220 N.C. App. at 359, 725 S.E.2d at 399. "A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision." *State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (citations and internal quotation marks omitted), *cert. denied*, 552 U.S. 1319, 170 L. Ed. 2d 760 (2008).

¶ 8 However, "[c]onclusions of law drawn by the trial court from its findings of fact" are reviewed de novo on appeal. *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation omitted). Under de novo review, "the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 632–33, 669 S.E.2d at 294 (citation and internal quotation marks omitted).

¶ 9 "An appellate court reviews conclusions of law pertaining to a constitutional matter de novo." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010). "In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 12 (citation omitted). Furthermore, "[i]t is the burden of the proponent of a finding of facial unconstitutionality to prove beyond a reasonable doubt that an act of the General Assembly is unconstitutional in every sense." *Id.*

II. Analysis

¶ 10 A sex offender who commits certain "reportable convictions" as defined by N.C. Gen. Stat. § 14-208.6(4) is "required to maintain registration with the sheriff of the county where the person resides." N.C. Gen. Stat. § 14-208.7(a). This registration requirement generally lasts "for a period of at least 30 years following the date of initial county registration[.]" *Id.* However, "[t]en years from the date of initial county registration, a person required to register . . . may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration[.]" *Id.* § 14-208.12A(a).

¶ 11 This Court addressed § 14-208.12A(a)'s requirement that a sex offender be registered for at least ten years in the State of North Carolina in order to be eligible for termination of the registration requirement in *Borden*. In *Borden*, after his conviction in Kentucky of "Rape 1" or "Sexual Abuse 1st Degree," the defendant was ordered to register as a sex offender, which he did in 1995. 216 N.C. App. at 580, 718 S.E.2d at 684. When the defendant moved to North Carolina, he was also required to register as a sex offender, which he did. *Id.* In 2010, the defendant

received notice that he was "no longer required to register as a sex offender with the Kentucky Sex Offender Registry[.]" *Id.* The defendant thereafter petitioned for termination of his requirement to register as a sex offender in North Carolina, alleging that he was eligible for early termination because he had been registered as a sex offender for more than ten years as required by § 14-208.12A(a). *Id.*

¶ 12 However, this Court interpreted the statutory phrase "[t]en years from the date of initial county registration" as limiting eligibility for removal from the North Carolina sex-offender registry to offenders who have been registered for at least ten years from their initial date of registration *in a North Carolina county*, rather than ten years from the offender's initial date of registration in *any* jurisdiction. *Id.* at 583, 718 S.E.2d at 686.

¶ 13 The Court reasoned that allowing removal of offenders from the sex-offender registry after less than ten years of registration in this state would "contradict[ ] the intent of the statute to protect the public, maintain public safety, and assist law enforcement agencies and the public in knowing the whereabouts of sex offenders." *Id.* Thus, although the *Borden* defendant had been registered as a sex offender in his various states of residence for more than ten years altogether, he was nevertheless ineligible to terminate his sex-offender registration in North Carolina because he had not been registered on the North Carolina Sex Offender Registry for at least ten years. *Id.* at 583–84, 718 S.E.2d at 686–87.

¶ 14 In sum, § 14-208.12A(a) requires ten years of registration in North Carolina, and "the amount of time a petitioner has been registered in another state is irrelevant." *In re Bunch*, 227 N.C. App. 258, 262, 742 S.E.2d 596, 599–600, *disc. review denied*, 367 N.C. 224, 747 S.E.2d 541 (2013).

¶ 15 The facts of the case at bar are strikingly similar to those presented in *Borden*. In 2000, Defendant pleaded guilty to a sex offense that was the Colorado equivalent of a "reportable conviction" as defined by statute. *See* Colo. Rev. Stat. § 18-6-403(3); N.C. Gen. Stat. § 14-208.6(4)(b). Defendant initially registered as a sex offender in Colorado in 2008, over ten years prior to petitioning for termination of his sex-offender registration. However, he initially registered as a sex offender in North Carolina in 2021, less than a year prior to petitioning for termination of his sex-offender registration. Section 14-208.12A(a) limits the eligibility for termination of sex-offender registration to those who have been registered for at least ten years from the initial date of registration *in a North Carolina county*. *See Borden*, 216 N.C. App. at 583, 718 S.E.2d

at 686. Therefore, because Defendant does not satisfy the statute's requisite period of registration, he is ineligible for termination from the sex-offender registry at this juncture.

¶ 16 In light of this outcome, Defendant requests that we overturn *Borden*. However, we are bound by our Court's decision in that case unless and until a higher court overturns it. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

¶ 17 Defendant next asserts that N.C. Gen. Stat. § 14-208.12A(a)'s ten-year North Carolina registry requirement violates the Equal Protection Clauses of the North Carolina and United States Constitutions, in that the statute "treats defendants with initial out-of-state registrations differently from defendants with initial in-state registrations." Defendant further contends that this provision "is not rationally related to public safety[,]" which is the primary purpose underlying the sex-offender registry. *See* N.C. Gen. Stat. § 14-208.5. Again, we disagree.

¶ 18 Defendant asserted this equal-protection challenge below; when denying Defendant's petition, the trial court acknowledged Defendant's constitutional challenge and noted that Defendant had "preserved that argument by making it" at the hearing. Accordingly, as a preliminary matter, we examine the trial court's jurisdiction to rule on Defendant's constitutional challenge to N.C. Gen. Stat. § 14-208.12A(a)'s ten-year in-state registration requirement.

¶ 19 Section 1-267.1(a1) of our General Statutes provides that, with limited exceptions not relevant here, "any facial challenge to the validity of an act of the General Assembly shall be transferred . . . to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County[.]" *Id.* § 1-267.1(a1). Section 1-267.1 applies only in civil actions. *Id.* § 1-267.1(d).

¶ 20 Nevertheless, this Court has previously determined that the three-judge panel provisions are not applicable where a defendant raises a facial constitutional challenge to the validity of the satellite-based monitoring statutory regime, which is a civil matter but often arises during criminal sentencing. *See State v. Stroessenreuther*, 250 N.C. App. 772, 774 n.1, 793 S.E.2d 734, 736 n.1 (2016) ("Section 1-267.1(a1) . . . permit[s] a criminal defendant to assert [a facial] constitutional challenge before a single trial judge during sentencing without having to transfer the issue to a three-judge panel.").

¶ 21 Like satellite-based monitoring, our sex-offender registration statutes exist along that indistinct boundary between criminal and civil actions. *See, e.g.*, *Bowditch*, 364 N.C. at 352, 700 S.E.2d at 13; *State v. Abshire*, 363 N.C. 322, 330, 677 S.E.2d 444, 450 (2009); *State v. White*, 162 N.C. App. 183, 195, 590 S.E.2d 448, 456 (2004). Because § 14-208.12A(a) belongs to the same overarching sex-offender regulatory scheme as satellite-based monitoring, *see* N.C. Gen. Stat. § 14-208.5 *et seq.*; *Bowditch*, 364 N.C. at 337, 700 S.E.2d at 3, it follows, then, that facial challenges to § 14-208.12A(a) should be addressed in the same manner as facial challenges to satellite-based monitoring. Thus, we conclude that § 1-267.1(d) did not bar the trial court in the instant case from hearing Defendant's facial challenge to § 14-208.12A(a) without transferring the issue to a three-judge panel.

¶ 22 The Equal Protection Clauses of the United States and North Carolina Constitutions "forbid North Carolina from denying any person the equal protection of the laws, and require that all persons similarly situated be treated alike." *State v. Fowler*, 197 N.C. App. 1, 26, 676 S.E.2d 523, 543–44 (2009) (citations and internal quotation marks omitted), *appeal dismissed and disc. review denied*, 364 N.C. 129, 696 S.E.2d 695 (2010); *see* U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); N.C. Const. art. I, § 19 ("No person shall be denied the equal protection of the laws . . . .").

¶ 23 The analysis of an equal-protection challenge is two-pronged:

> Our state courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis. When evaluating a challenged classification, the court must first determine which of several tiers of scrutiny should be utilized. Then it must determine whether the statute meets the relevant standard of review.

Fowler, 197 N.C. App. at 26, 676 S.E.2d at 544 (citations and internal quotation marks omitted).

¶ 24 Although the Equal Protection Clause "require[s] that all persons similarly situated be treated alike[,]" *id.* (citation and internal quotation marks omitted), it "do[es] not require perfection in respect of classifications. In borderline cases, the legislative determination is entitled to great weight[,]" *State v. Greenwood*, 280 N.C. 651, 658, 187 S.E.2d 8, 13 (1972); *see also Parham v. Hughe*s, 441 U.S. 347, 351, 60 L. Ed. 2d 269, 274 (1979) ("State laws are generally entitled to a presumption of

validity against attack under the Equal Protection Clause."). The Clause "impose[s] upon law-making bodies the requirement that any legislative classification be based on differences that are reasonably related to the purposes of the Act in which it is found." *Greenwood*, 280 N.C. at 656, 187 S.E.2d at 11 (citation and internal quotation marks omitted). "In the absence of a classification that is inherently invidious or that impinges upon fundamental rights, a state statute is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate governmental ends." *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 408, 71 L. Ed. 2d 250, 256 (1982).

¶ 25 The classification of which Defendant complains—that is, an individual's residency at the time of his initial registration as a sex offender—is not inherently suspect; thus, we apply rational-basis review to determine whether the legislation violates the Equal Protection Clause. *See, e.g.*, *State v. Harris*, 242 N.C. App. 162, 166, 775 S.E.2d 31, 35 (2015); *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983) ("When a governmental classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the lower tier of equal protection analysis requiring that the classification be made upon a rational basis must be applied."). Under rational-basis review, the validity of any challenged law "depends upon its reasonable relation to the accomplishment of the State's legitimate objective[.]" *Greenwood*, 280 N.C. at 656, 187 S.E.2d at 12 (citation and internal quotation marks omitted).

¶ 26 The requirement that a defendant be registered in North Carolina as a sex offender for at least ten years in order to be eligible for early termination of sex-offender registration is rationally related to the State's legitimate interests in maintaining public safety and protection. As our Supreme Court has explained: "The North Carolina Sex Offender and Public Protection Registration Program is a public safety measure specifically designed to assist law enforcement agencies' efforts to protect communities." *State v. Bryant*, 359 N.C. 554, 560, 614 S.E.2d 479, 483 (2005) (citation and internal quotation marks omitted); N.C. Gen. Stat. § 14-208.5. "[T]he twin aims of the North Carolina Sex Offender and Public Protection Registration Program[are] public safety and protection[.]" *Bryant*, 359 N.C. at 560, 614 S.E.2d at 483. Additionally, maintaining public safety is a well-established legitimate state interest. *See, e.g.*, *id.*; *State v. Vestal*, 281 N.C. 517, 522, 189 S.E.2d 152, 156 (1972); *State v. Ballance*, 229 N.C. 764, 769–70, 51 S.E.2d 731, 735 (1949). And as this Court has concluded, allowing offenders "to be removed from the sex offender registry without being on the registry for at least ten years in

North Carolina contradicts the intent of the statutes to protect the public, maintain public safety, and assist law enforcement agencies and the public in knowing the whereabouts of sex offenders." *Borden*, 216 N.C. App. at 583, 718 S.E.2d at 686.

¶ 27 Moreover, in the instant case, Defendant was treated the same as all other registered sex offenders who initially enrolled in another jurisdiction's sex-offender registry based upon an out-of-state conviction. That Defendant, as a sex offender who initially registered in another state, is negatively impacted by an otherwise neutral law does not, alone, render N.C. Gen. Stat. § 14-208.12A(a) invalid. *See Parham*, 441 U.S. at 351, 60 L. Ed. 2d at 274 ("Legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others . . . .").

¶ 28 Thus, N.C. Gen. Stat. § 14-208.12A(a)'s ten-year North Carolina registry requirement does not violate the Equal Protection Clauses of the United States and North Carolina Constitutions. Defendant's contention to the contrary is unavailing.

Conclusion

¶ 29 Accordingly, we affirm the trial court's order denying Defendant's petition for termination of his requirement to register as a sex offender on the North Carolina Sex Offender Registry.

AFFIRMED.

Judges INMAN and GORE concur.

STATE v. WILSON

[283 N.C. App. 419, 2022-NCCOA-340]

STATE OF NORTH CAROLINA
v.
JAHZION WILSON, DEFENDANT

No. COA20-108

Filed 17 May 2022

1. Appeal and Error—abandonment of issues—Rule 28(b)(6)—failure to cite legal authority

In a juvenile defendant's appeal from convictions for first-degree murder and attempted robbery with a firearm, defendant abandoned his argument that the trial court violated his right to due process by allowing the State to prosecute him under a felony murder theory, where defendant failed to cite any legal authority in his appellate brief, pursuant to Appellate Rule 28(b)(6), indicating that a juvenile may not be convicted of felony murder.

2. Jury—selection—challenge for cause—renewal—mandatory statutory procedure—failure to preserve issue on appeal

In a juvenile defendant's prosecution for first-degree murder and attempted robbery with a firearm, defendant failed to preserve for appellate review his argument that the trial court improperly denied his challenge for cause to dismiss a juror, where defendant did not follow the mandatory procedure in N.C.G.S. § 15A-1214(h)-(i) for renewing his challenge (he neither peremptorily challenged the juror nor stated in a motion to renew his challenge for cause that he would have peremptorily challenged the juror had his peremptory challenges not been exhausted). Although a recent Supreme Court opinion held that N.C.G.S. § 15A-1214(h)–(i) conflicts with the state constitution, the Court's later decision upholding the statutory procedure in subsections (h)–(i) as mandatory had not been overruled and was therefore binding on appeal.

3. Confessions and Incriminating Statements—juvenile defendant—non-custodial interview—voluntariness—pressure by parents

In a juvenile defendant's prosecution for first-degree murder and attempted robbery with a firearm, the trial court properly denied defendant's motion to suppress incriminating statements he made during an in-home police interview. The court's unchallenged findings of fact showed that defendant's statements were voluntary where his interview—which took place at his grandmother's

home with his parents present—was non-custodial and lasted only an hour and seventeen minutes, the officers informed defendant that he was not required to answer any questions, and the officers neither restrained defendant nor used threatening interview tactics. Although defendant's parents pressured him to tell the truth throughout the interview—which defendant attributed to the fact that the officers told his parents they were only investigating a larceny—this was merely one factor to consider in the totality of the circumstances. Further, although juveniles are legally entitled to having a parent present during questioning by police, there is no prescribed standard for parents in their supervision of a juvenile's questioning.

4. Homicide—first-degree—felony murder—jury instruction on lesser-included offense—no evidentiary support

In a juvenile defendant's prosecution for first-degree murder and attempted robbery with a firearm, the trial court did not err by not instructing the jury on second-degree murder as a lesser-included offense because there was no evidence in the record showing the victim was killed other than in the course of an attempted robbery, and therefore no rational juror could possibly find defendant guilty of second-degree murder and not guilty of first-degree murder under a felony murder theory.

5. Juveniles—murder prosecution—discretionary transfer hearing—no entitlement to second hearing—failure to appeal existing transfer order

In a juvenile defendant's prosecution for first-degree murder and attempted robbery with a firearm, where the district court held a discretionary transfer hearing pursuant to N.C.G.S. § 7B-2203 and—after determining that the State's evidence established probable cause for first-degree murder—entered an order transferring the case to superior court, defendant was not entitled to a second discretionary transfer hearing. Not only had defendant already had one hearing, but he also failed to appeal the district court's transfer order pursuant to N.C.G.S. § 7B-2603 to preserve the issue for further review.

Chief Judge STROUD concurring in part and dissenting in part.

Appeal by Defendant from judgments entered 13 June 2019 and order entered 14 June 2019 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 February 2021.

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

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

GRIFFIN, Judge.

¶ 1 Defendant Jahzion Wilson appeals from an order denying his motion to suppress and from judgments entered upon jury verdicts finding him guilty of attempted robbery with a firearm and first-degree murder. Defendant argues that the trial court erred by (1) denying Defendant's challenge for cause to dismiss a juror; (2) denying Defendant's motion to suppress; (3) failing to instruct the jury on second-degree murder as a lesser-included offense of first-degree murder; (4) failing to order a transfer hearing; and (5) allowing the State to prosecute Defendant for felony murder in violation of his right to due process. After review, we conclude that Defendant received a fair trial, free from error.

I. Factual and Procedural Background

¶ 2 On 18 June 2017, Zachary Finch, barely twenty-one years old, planned to go to a park to buy a cell phone from a person he believed to be "a dad with his two kids" on Father's Day. Zachary left his home to get the phone, and his body was later found outside an apartment complex with "loose cash near him[.]" Zachary had sustained one gunshot wound to the chest and was deceased. Before his death, Zachary was using the app LetGo to arrange for the purchase of a phone. Police used the app records to get an email from the individual Zachary had been communicating with regarding the phone purchase. This email led them to Defendant.

¶ 3 On *voir dire*, Defendant's mother testified police officers contacted her and arranged to meet with Defendant at his grandmother's home, as Defendant was "a witness in a larceny case[.]" According to Defendant's mother on *voir dire*, the officer told her Defendant was "not in trouble for anything" but may "have witnessed something[.]" The officers met with Defendant and his parents. Defendant was fifteen years old at the time.

¶ 4 Defendant's parents allowed the officers into his grandmother's home to talk to Defendant, and the officers questioned Defendant in the presence of his parents. During the questioning, Defendant told the officers about arranging for the sale of a cell phone using the LetGo app.

Defendant said that he and a friend, Tink, and Monte, a relative of Tink, went to meet Zachary at the Arbor Glenn apartment complex to sell the cell phone and then left without an issue. At this point, one of the officers asked about "an incident that occurred. That's why I am here. I didn't just come here to talk to you about buying or selling phones. That doesn't make any sense. You said you will be honest with me[,] and you'll be honest with your parents, and this is where it has to start."

¶ 5 Defendant initially repeated that he had left the apartment complex without incident, and Defendant's parents both encouraged Defendant to tell the truth. Defendant's father stated, "You did it, whatever yall did it's done man up to it." Defendant continued to answer questions and ultimately stated that the "[d]eal went wrong" and Zachary "got shot." Even after Defendant admitted Zachary had been shot, his parents continued to encourage him to tell the officers what happened. Defendant's mother told him, "Don't sit here and lie[,]" and, "Finish telling this damn story. Now."

¶ 6 Defendant continued answering questions and confirmed to officers that when Zachary was "running off he g[ot] shot[.]" When asked if Tink shot Zachary, Defendant responded, "I guess." When asked why Zachary began to run, Defendant stated "he was fixin to get robbed by" Tink. Eventually, Defendant confirmed he saw Tink "pull his gun to shoot" Zachary, and thereafter Defendant stated he knew Tink took "a gun everywhere" and that Tink wanted to rob Zachary.

¶ 7 Defendant insisted his own plan was not to rob Zachary but rather to sell him the phone. Defendant said he told Tink "you ain't got to rob him just sell him the phone[.]" Finally, Defendant admitted that he too had a gun. An officer asked Defendant to explain what had happened to Zachary, and Defendant responded, "He died." The questioning then ended.

¶ 8 Per the trial court's description, before Defendant's trial he "filed multiple Motions to Suppress, including amended and duplicate motions." We need not address each motion separately, as the trial court addressed "the treatment of these motions in a single order." Ultimately, the trial court entered a nine-page order suppressing other statements made by Defendant when he was in custody but denying the motion to suppress as to the statements Defendant made during the in-home interview, his cell phone contents, and the testimony of two individuals Defendant had purportedly told about the crimes.

¶ 9 During Defendant's trial, a girl he used to date testified Defendant told her after the incident that he had shot and robbed someone. Another

friend of Defendant also testified that Defendant had told him he killed someone on Father's Day and there were no witnesses. The jury found Defendant guilty of attempted robbery with a dangerous weapon and first-degree murder. The jury found Defendant not guilty of conspiracy to commit robbery with a firearm. The trial court arrested judgment on the attempted robbery with a dangerous weapon conviction and sentenced Defendant to life imprisonment with the possibility of parole on the first-degree murder conviction. Defendant appeals.

II. Analysis

¶ 10 Defendant argues that the trial court erred by (1) denying Defendant's challenge for cause to dismiss a juror; (2) denying Defendant's motion to suppress; (3) failing to instruct the jury on second-degree murder as a lesser-included offense of first-degree murder; (4) failing to order a transfer hearing; and (5) allowing the State to prosecute Defendant for felony murder in violation of his right to due process.

¶ 11 **[1]** As to issue (5), Defendant contends the trial court violated his "right to due process by allowing the State to prosecute him under felony murder because felony murder is based on deterrence, which is not effective for juveniles and should not apply to them." Defendant directs our attention only to research regarding adolescent brain development. Defendant has failed to cite any law indicating a juvenile may not be convicted of felony murder, and thus this argument is abandoned. *See generally* N.C. R. App. P. 28(b)(6) (noting an argument should contain citations).

¶ 12 Our analysis is limited to Defendant's four remaining arguments.

A. Juror Challenge

¶ 13 **[2]** Defendant argues that "the trial court erred by denying [Defendant's] challenge for cause to [dismiss a juror] because [the juror] repeatedly stated that he could not give [Defendant] a fair trial and made clear during his voir dire testimony that he was in 'favor of the prosecution.' " We hold that Defendant failed to preserve this issue for appeal.

¶ 14 N.C. Gen. Stat. § 15A-1214(h) provides:

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) Exhausted the peremptory challenges available to him;

> (2) Renewed his challenge as provided in subsection (i) of this section; and
>
> (3) Had his renewal motion denied as to the juror in question.

N.C. Gen. Stat. § 15A-1214(h) (2019). Pursuant to subsection (i) of the statute, a defendant must follow a specific procedure when renewing his challenge to a juror for cause:

> (i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:
>
> (1) Had peremptorily challenged the juror; or
>
> (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

Id. § 15A-1214(i). "The statutory procedure is mandatory and must be followed precisely." *State v. Garcell*, 363 N.C. 10, 28, 678 S.E.2d 618, 630 (2009) (citations omitted) (holding that the defendant "failed to properly preserve" his challenge of a juror for cause because he did not follow the procedures "established by N.C.G.S. § 15A-1214(h) and (i)").

¶ 15 In this case, Defendant followed procedures (1) and (3) of N.C. Gen. Stat. § 15A-1214(h). However, Defendant did not adhere to the procedures in subsection (i) of the statute. Specifically, Defendant did not previously "peremptorily challenge the juror" or state in a motion to renew his challenge for cause "that he would have challenged that juror peremptorily had his challenges not been exhausted." N.C. Gen. Stat. § 15A-1214(i). Defendant therefore failed to preserve this argument for appeal.

¶ 16 Defendant argues that "even assuming the defense attorney did not comply with N.C. Gen. Stat. § 15A-1214(h) and (i), those provisions are not controlling because they conflict with the North Carolina Constitution[,]" citing *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007). In *Oglesby*, our Supreme Court held that "a 2003 amendment to the North Carolina Rules of Evidence" was unconstitutional because there was "a direct conflict between this evidentiary rule and North Carolina Rule of Appellate Procedure 10(b)(1)." *Id.* Because "[t]he Constitution of North Carolina expressly vests in [the Supreme Court] the 'exclusive authority to make rules of procedure and practice for the

Appellate Division[,]' " the Court reasoned that the legislature's 2003 amendment to the evidentiary rule was unconstitutional. *Id.*

¶ 17 Nonetheless, our Supreme Court specifically held two years later in *Garcell* that the statutory procedure "established by N.C.G.S. § 15A-1214(h) and (i)" was "mandatory and must be followed precisely." *Garcell*, 363 N.C. at 28, 678 S.E.2d at 630. Although the decision in *Oglesby* may conflict with its decision in *Garcell*, the holding in *Garcell* has not been overruled, and we are therefore bound to follow it.

¶ 18 "Because [D]efendant failed to preserve this issue for appellate review, this assignment of error is overruled." *Garcell*, 363 N.C. at 28, 678 S.E.2d at 630.

B. Motion to Suppress

¶ 19 **[3]** Defendant argues that "[t]he trial court erred by denying the motion to suppress[1] [Defendant]'s confession where detectives gained access to [Defendant], a [fifteen]-year-old boy, by deceiving his mother, repeatedly told [Defendant] he was lying, and capitalized on the presence of his parents to extract the confessions from him[.]"

> The standard of review in determining whether a trial court properly denied a motion to suppress is whether the trial court's findings of fact are supported by the evidence and whether its conclusions of law are, in turn, supported by those findings of fact. The trial court's findings are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. The determination of whether a defendant's statements are voluntary and admissible is a question of law and is fully reviewable on appeal. We look at the totality of the circumstances of the case in determining whether the confession was voluntary. Factors we consider include:

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1. The trial court's order denying Defendant's motion to suppress was reduced to writing and entered on 14 June 2019, the day *after* his judgments were entered. The trial court stated it was denying Defendant's motion and would "enter detailed written orders" "prior to the conclusion of this case." Defendant's counsel specifically noted he would appeal. Defendant's counsel also objected to the admission of the confession during trial. Ultimately, Defendant also orally appealed at the close of his trial. No written notice of appeal has been filed, but the State has not raised a preservation issue on this specific issue, and thus we address Defendant's appeal of the denial of his motion to suppress, as there appears to be no issue with notice, and it was the trial court's delay in filing the written order which resulted in Defendant's inability to refer to the order at the time he orally gave notice of appeal.

> whether [the] defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

A confession may be used against a defendant if it is the product of an essentially free and unconstrained choice by its maker. However, where a defendant's will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Our Supreme Court stated in *State v. Jackson* that:

> While deceptive methods or false statements by police officers are not commendable practices, standing alone they do not render a confession of guilt inadmissible. The admissibility of the confession must be decided by viewing the totality of the circumstances, one of which may be whether the means employed were calculated to procure an untrue confession.

State v. Cortes-Serrano, 195 N.C. App. 644, 654–55, 673 S.E.2d 756, 762–63 (2009) (citations, quotation marks, and brackets omitted).

¶ 20 In *State v. Martin*, citing *Cortes-Serrano*, this Court explained the factors for consideration as to the voluntariness of a defendant's confession:

> The determination of whether a defendant's statements are voluntary and admissible is a question of law and is fully reviewable on appeal. The voluntariness of a confession is determined by the totality of the circumstances. The requisite factors in the totality of the circumstances inquiry include: 1) whether the defendant was in custody at the time of the interrogation; 2) whether the defendant's *Miranda* rights were honored; 3) whether the interrogating officer made misrepresentations or deceived the defendant;

> 4) the interrogation's length; 5) whether the officer made promises to the defendant to induce the confession; 6) whether the defendant was held incommunicado; 7) the presence of physical threats or violence; 8) the defendant's familiarity with the criminal justice system; and 9) the mental condition of the defendant.

State v. Martin, 228 N.C. App. 687, 689–90, 746 S.E.2d 307, 310 (2013) (citations and quotation marks omitted).

¶ 21 Defendant raises arguments regarding several factors noted in *Martin*, *see generally id.*, including the naiveté of youth; Defendant's lack of experience with police; deception by police by informing Defendant's mother they were investigating a larceny rather than a murder; police repeatedly stating that they did not believe Defendant or that he was lying; and the pressure Defendant's parents put on him to speak truthfully with police. Defendant does not contest any of the trial court's findings of fact, which are binding on appeal. *See State v. Stanley*, 259 N.C. App. 708, 711, 817 S.E.2d 107, 110 (2018) ("When a motion to suppress is denied, this Court employs a two-part standard of review on appeal: 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. Unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal." (citation and quotation marks omitted)).

¶ 22 The binding findings of fact are:

> 4. On July 20, 2017, the police arranged for an interview with [] Defendant. They did so by contacting Defendant's mother and asking permission to speak with [] Defendant. This interview then took place in the living room of Defendant's grandmother, in the presence of his mother and father. [] Defendant and his parents were specifically told that [] Defendant was not in custody, and neither [] Defendant nor his parents were told the detectives were investigating the murder of the victim. Defendant was in familiar surroundings, was not restrained in any way and was surrounded by family members throughout the interview process. Two plain clothed detectives were present in the interview, each of whom carried a firearm, but neither officer brandished or otherwise displayed a firearm during the interview. The manner of

questioning was relaxed and was not abusive, threatening or coercive in any way.

5. The interview was audio recorded.

6. [] Defendant was able to answer the questions asked of him by the detectives, did not have to ask them to repeat or restate their questions and demonstrated understanding of the seriousness of the situation.

7. In the context of the questioning, [] Defendant demonstrated the ability to differentiate between a lie and the truth. His explanations were coherent, rational, and appropriate for his age. He did not demonstrate any signs of diminished capacity, emotional, psychological or intellectual deficiency, or impairment due to drugs or alcohol. [] Defendant appeared to act in a manner that was appropriate for his stated age of 15 years.

8. When asked during the in-home interview if [] Defendant knew why the detectives had come to speak to him, [] Defendant acknowledged he knew why they had come to speak with him.

9. While difficult to hear, [] Defendant answered the questions asked even when told by Detective Rooks that "if there is something you don't want to say even though you know the answer I would rather you say I don't want to answer than to tell me a lie." [Def.'s Tr. 4]

10. The detectives did not use coercive interview tactics, did not physically or verbally threaten [] Defendant or seek to deceive him in the course of the interview.

11. The demeanor and statements of the detectives were not coercive and not deceptive.

12. The questioning by the detectives was not coercive or deceptive [] Defendant was advised that he did not have to talk about anything he did not want to discuss and he responded when asked that he did not mind discussing the events in front of his parents. He was not physically or verbally threatened during

the questioning. [] Defendant was not prevented from leaving and never asked to stop the questioning.

13. [] Defendant's parents were with [] Defendant throughout the interview, seated in the same room and it is obvious from the record that they were paying attention to the statements that were made by both the detectives and [] Defendant.

14. [] Defendant's statements were made freely, knowingly, intelligently and were free from coercion by the detectives, his parents, and any others.

a. During the course of the interview by police detectives, [] Defendant's parents made comments from time to time and even posed questions of their own to [] Defendant. The parents also encouraged their son to be forthcoming and truthful to the police officers, but there is no evidence to suggest that [] Defendant's parents were acting on behalf of the Charlotte-Mecklenburg Police Department during the course of [] Defendant's interview.

b. The evidence presented showed that when police detectives contacted [] Defendant's parents, they agreed to meet with [] Defendant and the detectives.

c. There was no evidence to show that the parents met with the police detectives prior to the interview with [] Defendant or were coached by the detectives in order to conduct the interview.

d. The detectives asked [] Defendant if he was comfortable speaking in front of his parents and [] Defendant answered "yeah". [Def.'s Tr. 4].

e. Detective Rooks stated to [] Defendant and his parents, "we come here with no handcuffs, uh, I have no arrest warrants for you this is completely voluntary." [Def.'s Tr. 4].

f. [] Defendant's parents urged [] Defendant to tell the truth but did not threaten [] Defendant or inflict corporal punishment to induce him to talk to the detectives.

g. Despite the requests by his parents to tell the truth, [] Defendant's version of the events changed over the course of the interview and he gradually explained his involvement, demonstrating that in spite of the parents' encouragement to be truthful, [] Defendant exercised the ability to make his own choices regarding how much and what information to reveal to the detectives.

15. [] Defendant continued to answer questions throughout the interview and never indicated that he wanted to speak to his parents alone or wanted to terminate the questioning.

16. [] Defendant discussed the process of using various computer applications to buy and sell items via the internet.

17. [] Defendant admitted his LetGo username was "CA" and that he used his cell phone and the LetGo app to lead the victim to the complex where the victim was killed.

18. During the same interview, [] Defendant stated when the victim arrived he was shot and killed by an associate of [] Defendant during a failed robbery attempt. [] Defendant also acknowledged, eventually, during the interview that [] Defendant also carried a gun to the meeting and that he knew that the victim was going to be robbed.

19. The interview lasted an hour and seventeen minutes.

a. The length of the interview was not an unreasonable or coercive amount of time to discuss the events surrounding the robbery and death of Zachary Finch.

b. It is noted that [] Defendant changed his story during the interview and admitted to an increasing amount of information as the interview progressed, thereby adding to the time needed during the interview.

20. Based on information gathered during the interview at his home, [] Defendant was arrested on July

20, 2017 and taken to the Law Enforcement Center (L.E.C.) where a custodial interview took place.

21. After his arrest, CMPD Officers seized some items of clothing and shoes from his residence. Officers also received from Defendant's father possession of a cell phone used by [] Defendant. During the same time frame in which they conducted a custodial interview of [] Defendant, officers requested consent from [] Defendant to a search of that cell phone, which Defendant provided by his signature on a consent form, State's Exhibit D. As appears below, the custodial interview conducted by police officers did not comply with the North Carolina statute and, therefore, any statements made by [] Defendant during the custodial interview will not be offered or received into evidence before the jury. In spite of this statutory violation, it appears that Defendant knowingly and voluntarily consented to a search of his cell phone.

22. The State concedes that law enforcement failed to comply with N.C.G.S. 7B-2101 (b) in conducting a custodial interview of [] Defendant by allowing him to waive the presence of his parents in the custodial interview. Under G.S. 7B-2101(b) (*amended in 2015, effective December 1, 2015*), no in-custody admission or confession resulting from an interrogation may be admitted into evidence unless the confession or admission was made in the presence of a parent, guardian, custodian or attorney if the juvenile is less than 16 years of age. This statute does not address the use by police officers of other evidence obtained, even in part, as a result of such custodial interview.

23. [] Defendant purportedly "waived" his right to have his parent or attorney present during the custodial interview. This interview was recorded.

24. Defendant correctly asserts that the statements he provided after being advised of his rights at the Law Enforcement Center were not made in the presence of his parent, guardian, or attorney.

25. During his in-custody interview, [] Defendant identified Ashanti Gatewood as a source of information.

26. In the absence of his parent, guardian, custodian, or attorney, [] Defendant consented to a search of his cell phone while in the interview room at the L.E.C., signed a written consent form, and provided his cell phone password.

27. Prior to the request for consent, law enforcement officers were aware of the following:

a. The victim was lured to the scene of his murder by "CA" via a cell phone app LetGo.

b. During [] Defendant's in-home interview [] Defendant admitted he was "CA" and he used his cell phone and LetGo to communicate with the victim.

c. During the in-home interview, [] Defendant admitted that instead of selling a phone to the victim, [] Defendant and/or his associates tried to rob the victim, and the victim was shot during the robbery attempt.

28. By providing the password to his cell phone, the iPhone 7 (black in color), law enforcement officers were able to access [] Defendant's social media accounts, including but not limited to Instagram, Snapchat, text messages, emails, etc., that contained incriminating information about this homicide.

29. Based on the information downloaded from [] Defendant's cell phone, [] Defendant communicated by both calling and messaging Ashanti Gatewood immediately after the killing. Gatewood testified that on June 18, 2017, [] Defendant told her he killed someone.[2]

30. Based on the information downloaded from [] Defendant's cell phone, [] Defendant communicated through Facebook messages with Travis Moore about shooting someone. Moore testified that [] Defendant told him he shot someone.

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2. The trial court entered its written order after Defendant's trial.

¶ 23 Based on these findings of fact, Defendant was in a non-custodial setting in his grandmother's home with his parents, being questioned for approximately an hour and seventeen minutes. Defendant was informed the discussion was voluntary, was not handcuffed or otherwise restrained, and was not coerced, deceived, or threatened.

¶ 24 Defendant's main contention challenging the denial of his motion to suppress his non-custodial statements is that his "parents bullied him into confessing[,]" because they thought the crime Defendant may have committed was simply a larceny. Defendant contends his parents "cursed at him, lectured him, and ordered him to 'man up[,]' arguing that "they significantly increased the pressure that [an officer] was already applying to [Defendant] in her efforts to extract a confession."

¶ 25 Although the law cited by Defendant does give a juvenile the right to have a parent or guardian present during questioning, none of the cases or statutes presented by Defendant prescribe any standard for the parents in their supervision of a juvenile's questioning by officers. Defendant had a right to have his parents present, *see generally* N.C. Gen. Stat. § 7B-2101 (2019), and his parents were present, "seated in the same room[,]" and "paying attention to the statements that were made by both the detectives and [] Defendant."

¶ 26 Defendant also cites to *Culombe v. Connecticut*, 367 U.S. 568, 630 (1961), where Defendant contends a family member of the adult defendant was used "to produce the confession[,]" but *Culombe* is inapposite, as that case did not involve the a minor or the parents of a minor. Further, the defendant "was taken by the police and held in the carefully controlled environment of police custody for more than four days before he confessed." *Id.* at 630–31. Here, while the presence of Defendant's parents and their statements were a factor to consider in the totality of the circumstances, this factor alone cannot determine the voluntariness of Defendant's confession. S*ee Martin*, 228 N.C. App. at 689, 746 S.E.2d at 310.

¶ 27 Further, although Defendant does not challenge the findings of fact, Defendant takes issue with the trial court's use of the word "appear" as the order stated, "[Defendant] *appeared* to have a clear understanding of the questions being asked and what had actually transpired." (Emphasis added). Defendant argues that the trial court "improperly relied on appearances[,]" and although Defendant "*appeared* to understand his rights, . . . if he was unable to exercise those rights because of pressure placed on him during the interrogation or because of his own immaturity, then his confession was not voluntary." (Emphasis in

original). In the context of the findings in the order, the statement that Defendant "appeared to have a clear understanding of the questions being asked and what had actually transpired" is one way of saying that, based upon Defendant's outward appearance, actions, and words as observed by the questioning officers, Defendant understood their questions and knew about the incident involving Zachary.

¶ 28 The trial court entered an order with thirty detailed findings of fact, some of which have sub-findings. The trial court then entered four pages of conclusions of law, with many sub-conclusions, and specifically set out which motions were addressed by each part of the order. The court thoroughly explained its decision to deny the motion to suppress for Defendant's "in home" statements, but to allow suppression of his "in custody" statements. The trial court's findings of fact show that it properly considered the "totality of the circumstances" in determining Defendant's confession was voluntary. *Martin*, 228 N.C. App. at 689, 746 S.E.2d at 310.

¶ 29 As to the trial court's unchallenged findings, while "the presence or absence of one or more of these factors is not determinative[,]" *id.* at 690, 746 S.E.2d at 310 (citation, quotation marks, and brackets omitted), it is important to note that Defendant was not in custody during his questioning by the officers for the statements allowed before the jury. The trial court made findings regarding the circumstances of the questioning and concluded that Defendant was not in custody while being questioned in his home. Defendant does not challenge this conclusion. In fact, the trial court *allowed* Defendant's motion to suppress as to statements made "during a Custodial Interview occurring later . . . at the Law Enforcement Center." It was only the "statements made during an in home interview with his parents[,]" which the trial court determined was "non-custodial," that were allowed in trial.

¶ 30 Defendant filed a Memorandum of Additional Authority regarding the denial of his motion to suppress, citing one precedential[3] case, *State v. Lynch*, wherein the defendant was in custody. *See State v. Lynch*, 271 N.C. App. 532, 539–40, 843 S.E.2d 346, 351–52 (2020) ("A short time after the robbery and shooting, *Defendant was apprehended and brought into custody*. He arrived at the police station at around 6:30

3. Defendant also cites to a case from the Seventh Circuit wherein the defendant was in custody. *See United States v. Fowler*, 476 F.2d 1091, 1093 (7th Cir. 1973) ("One need only recall his own adolescence to appreciate the impact upon this boy, *alone in a jail room*, *in custody of a postal inspector*, being warned of his constitutional rights." (emphasis added)).

in the evening, where he was handcuffed and placed alone in a room, separated from his alleged accomplice who was also apprehended. At some point he was read his *Miranda* rights and did not ask for an attorney. Over six hours later, at 12:46 a.m., two interrogators entered his room, they uncuff[ed] him, and they proceeded to interrogate him." (emphasis added)). We also note that in *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), the defendant raised similar issues, but in that case the defendant specifically challenged the determination of whether he was in custody and whether his juvenile status affected that analysis. Here, Defendant makes no argument regarding the conclusion that he was not in custody when questioned in his home. *See id.* at 264 ("This case presents the question whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966).").

¶ 31 Ultimately, Defendant has not challenged any of the findings of fact upon which the trial court determined he made a voluntary, non-custodial statement. The trial court's findings of fact fully support its conclusions of law. Based upon the totality of the circumstances, we hold that Defendant's statement was voluntary, and we affirm the trial court's denial of Defendant's motion to suppress his non-custodial statement.

C. Jury Instruction

¶ 32 **[4]** Defendant next argues that the trial court erred "by failing to instruct the jury on second-degree murder" as a lesser-included offense of first-degree murder "because there was evidence that supported the instruction." We disagree.

¶ 33 "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 alternative verdicts." *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) (citation and internal quotation marks omitted). Where, as here, "the [S]tate proceeds on a first-degree murder theory of felony murder only, the trial court must instruct on all lesser-included offenses if [1] the evidence of the underlying felony supporting felony murder is in conflict *and* [2] *the evidence would support a lesser-included offense of first-degree murder*." *State v. Gwynn*, 362 N.C. 334, 336, 661 S.E.2d 706, 707 (2008) (emphasis added) (citations, quotation marks, and brackets omitted). With respect to the latter, "[a]n instruction on a lesser-included offense must be given *only* if the evidence would permit the jury rationally to find [the] defendant guilty of the lesser offense *and to acquit him of the greater*." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (emphasis added) (citation omitted).

¶ 34 If the jury could not rationally convict Defendant of second-degree murder and acquit him of felony murder, then our conclusion under prong (1) is irrelevant and Defendant is not entitled to a new trial. Accordingly, the question here is whether the evidence would have permitted the jury rationally to find Defendant guilty of second-degree murder and acquit him of felony murder. *State v. Williams*, 343 N.C. 345, 363, 471 S.E.2d 379, 389 (1996); *see also State v. Quick*, 329 N.C. 1, 28–29, 405 S.E.2d 179, 195–96 (1991); *State v. Rinck*, 303 N.C. 551, 565, 280 S.E.2d 912, 923 (1981). Because we conclude that there is no evidence in the record from which a rational juror could find Defendant guilty of second-degree murder and not guilty of felony murder, we need not address whether the evidence supporting the underlying felony of attempted robbery is in conflict.

¶ 35 "Felony murder is a murder committed in the perpetration or attempted perpetration of certain felonies[,] including . . . robbery with a dangerous weapon." *State v. Workman*, 344 N.C. 482, 508, 476 S.E.2d 301, 315 (1996) (citation omitted). "Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Thomas*, 350 N.C. 315, 346, 514 S.E.2d 486, 505 (1999) (citation omitted).

> [T]he element of malice may be established by at least three different types of proof: (1) express hatred, ill-will or spite; (2) commission of inherently dangerous acts in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief; or (3) a condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.

State v. Coble, 351 N.C. 448, 450–51, 527 S.E.2d 45, 47 (2000) (citation and internal quotation marks omitted). "[I]t is well established that malice and unlawfulness may be inferred from the intentional use of a deadly weapon which proximately results in a death." *State v. Shuford*, 337 N.C. 641, 650, 447 S.E.2d 742, 748 (1994) (citations omitted).

¶ 36 Absent the jury finding Defendant guilty of attempted robbery with a dangerous weapon and felony murder, it is exceedingly difficult to see how any rational juror could conclude that Defendant, whether by himself or pursuant to a common plan with Tink, murdered Zachary with malice. There is simply no evidence that Zachary was killed other than in the course of an attempted robbery. There are only two factual scenarios

in which Defendant could be found guilty of second-degree murder but not guilty of attempted robbery with a dangerous weapon and felony murder: (1) Defendant did not attempt to rob Zachary, but once Zachary arrived, Defendant spontaneously decided he felt like killing someone, and so he shot Zachary; or (2) Defendant did not attempt to rob Zachary, but instead he acted in concert with Tink to murder Zachary with malice, and Tink shot Zachary. The latter scenario contravenes any logical deduction to be had from any version of the evidence. The former scenario is not much better, although it is the scenario that Defendant has asked this Court to accept on appeal in support of his argument:

> Here, [Defendant]'s friend Travis testified that he chatted with [Defendant] over Facebook in June 2017. [Defendant] told Travis that he had shot and killed someone. Additionally, a forensic pathologist testified that [Zachary] died as the result of a gunshot wound. Viewed in the light most favorable to [Defendant], this evidence would have permitted a jury [] "rationally to find him guilty" of second-degree murder. Evidence that [Defendant] intentionally used a gun to kill [Zachary] was sufficient to establish malice for second-degree murder. Thus, the trial court erred by failing to instruct on second-degree murder.

(Citations omitted).

¶ 37 The problem with this argument is that it asks us, and the jury, to ignore all of the State's evidence indicating that, if Defendant did himself shoot Zachary, he did so during the course of an attempted robbery with a dangerous weapon. To hold otherwise would require this Court to accept what no rational juror could ever accept based on the evidence in the record. In order to accept Defendant's argument, the jury would have to believe Defendant's statements that he killed Zachary but disbelieve his statements and all of the other evidence indicating that he attempted to rob Zachary.[4]

¶ 38 Moreover, "[a] defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some

4. For example, Defendant called his girlfriend shortly after the crime occurred and told her that he had "just shot and robbed somebody." Defendant now asks us to accept the possibility that the jury could believe only half of his statement—that he shot someone—but disbelieve the other half indicating that he attempted to rob Zachary. The jury would also have to believe that Defendant shot Zachary not because he was attempting to rob him, but because he abruptly decided to kill someone.

of the State's evidence but not all of it." *State v. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991) "Defendant cannot have it both ways. He cannot tell the jury that he was innocent of the crime" of attempted robbery "and that [his] inculpatory statements were not true and also demand to have the jury instructed on second-degree murder . . . based on portions of his inculpatory statements which [a]re favorable to him when taken out of context." *State v. Corbett*, 339 N.C. 313, 336, 451 S.E.2d 252, 264 (1994). Such an unfounded "possibility of the jury's piecemeal acceptance of the State's evidence will not support the submission of a lesser included offense." *State v. Maness*, 321 N.C. 454, 461, 364 S.E.2d 349, 353 (1988) (citations omitted); *see also Thomas*, 350 N.C. at 347, 476 S.E.2d at 506 (holding that a defendant charged with first-degree murder was not entitled to an instruction on second-degree murder because "the only evidence offered by [the] defendant to negate first-degree murder was his own testimony denying his involvement in the crime").

¶ 39 Simply stated, "[a] defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support that lesser-included offense." *Thomas*, 350 N.C. at 346, 476 S.E.2d at 505 (citation omitted); *see also State v. Brewer*, 325 N.C. 550, 577, 386 S.E.2d 569, 584 (1989) (stating that where "there is no positive evidence of a lesser offense[,] . . . the jury need only decide whether [the] defendant was the perpetrator of the crime charged" (citation omitted)). There is no evidence in this case to support a conviction of second-degree murder and an acquittal of felony murder. Defendant is not entitled to a new trial.

D. Transfer Hearing

¶ 40 **[5]** Defendant contends that "[t]he trial court erred by failing to order a discretionary transfer hearing because the juvenile petition only alleged that [he] committed second-degree murder[,] and a discretionary hearing was required as a matter of due process." Defendant argues that "[t]he juvenile petition did not contain facts indicating that [he] committed first-degree murder and, so, a discretionary transfer hearing should have occurred as required under N.C. Gen. Stat. § 7B-2203." Defendant requests that this Court remand "for a court to determine whether [Defendant's] case warranted transfer under a discretionary scheme." However, Defendant already had a transfer hearing in district court, and Defendant did not appeal the district court's order to superior court as required by N.C. Gen. Stat. § 7B-2603 (2017),[5] so Defendant is not entitled to further review of this issue.

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5. N.C. Gen. Stat. § 7B-2603 was amended in 2019, effective December 1, but both versions of the statute note that a juvenile must appeal a transfer from district to superior

¶ 41 Juvenile petitions were filed alleging Defendant had committed a Class A felony in violation of N.C. Gen. Stat. § 14-17, as he "did unlawfully, willfully and feloniously . . . and of malice aforethought kill and murder Zachary Finch[,]" and a Class D felony in violation of North Carolina General Statute § 14-87, as he "did unlawfully, willfully and feloniously steal, take, and carry away another's personal property[.]" The district court held a transfer hearing on 8 January 2018 and heard extensive arguments regarding the evidence against Defendant as well as the factors relevant to a discretionary transfer under N.C. Gen. Stat. § 7B-2203. *See* N.C. Gen. Stat. § 7B-2203 (2019). Defendant argued that the State's evidence did not establish probable cause for first-degree murder, particularly a lack of evidence that Defendant was the shooter, and asked for the district court to find no probable cause for first-degree murder and to exercise its discretion to order that Defendant remain in juvenile court as to second-degree murder. The district court entered an order regarding the transfer hearing on the same day finding "probable cause to believe that the juvenile committed . . . first degree murder G.S. 14-17 [and] robbery with a dangerous weapon G.S. 14-87." (Capitalization altered). The district court determined that "[f]irst degree murder is a class A felony and the court is required to transfer the matter to superior court pursuant to NC Statute G.S. 7B-2200." (Capitalization altered). Again, a transfer order under N.C. Gen. Stat. §§ 7B-2201 and 2203 must be appealed to superior court. This was properly reflected on the transfer form order, AOC-J-442, Rev. 12/17, noting "If the Transfer Order is appealed, use form AOC-G-115 to order a transcript of the juvenile proceeding transferred to superior court." Defendant did not appeal the transfer order to superior court.

¶ 42 Defendant is not entitled to another transfer hearing, as he already had one, and, as the State notes, Defendant failed to appeal the transfer order and preserve this issue under N.C. Gen. Stat. § 7B-2603 (2017).[6] *See* N.C. Gen. Stat. § 7B-2603(a) ("[A]ny order transferring jurisdiction of the district court in a juvenile matter to the superior court may be appealed to the superior court for a hearing on the record. Notice of the appeal must be given in open court or in writing within 10 days after entry of the order of transfer in district court."). This argument is without merit.

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court. *See generally* N.C. Gen. Stat. § 7B-2603 (2021) ("[A]ny order transferring jurisdiction of the district court in a juvenile matter to the superior court may be appealed to the superior court for a hearing on the record. Notice of the appeal must be given in open court or in writing within 10 days after entry of the order of transfer in district court.").

6. N.C. Gen. Stat. § 7B-2603 was amended in 2019, effective December 1, but both versions of the statute note that a juvenile must appeal a transfer from district to superior court. *See generally* N.C. Gen. Stat. § 7B-2603.

III. Conclusion

¶ 43 For the foregoing reasons, we hold that Defendant received a fair trial, free from error.

NO ERROR.

Judge MURPHY concurs.

Chief Judge STROUD concurs in part and dissents in part by separate opinion.

STROUD, Chief Judge, concurring in part and dissenting in part.

¶ 44 While I concur with the majority's analysis as to the denial of defendant's challenge to a juror for cause, denial of defendant's motion to suppress, and the trial court's failure to order another transfer hearing, I write separately on the issue of the jury instruction because I believe the evidence supported an instruction for the lesser-included offense of second-degree murder, and therefore, I dissent from that portion of the majority's opinion.

¶ 45 Defendant contends "[t]he trial court erred by failing to instruct the jury on second-degree murder because there was evidence that supported the instruction." Before the trial court, defendant requested a second-degree murder instruction.

> In *State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002), we comprehensively explained that when the [S]tate proceeds on a first-degree murder theory of felony murder only, the trial court must instruct on all lesser-included offenses if the evidence of the underlying felony supporting felony murder is in conflict and the evidence would support a lesser-included offense of first-degree murder. Conversely, when the [S]tate proceeds on a theory of felony murder only, the trial court should not instruct on lesser-included offenses *if the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder*.

State v. Gwynn, 362 N.C. 334, 336, 661 S.E.2d 706, 707 (2008) (emphasis added) (citations, quotation marks, and brackets omitted); *see State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) ("The next

question is whether there is here evidence to support a conviction for involuntary manslaughter. Under North Carolina and federal law a lesser-included offense instruction is required if the evidence would permit a jury rationally to find defendant guilty of the lesser offense and acquit him of the greater. The test is whether there is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense. Where the State's evidence is positive as to each element of the offense charged *and there is no contradictory evidence* relating to any element, no instruction on a lesser-included offense is required. 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 alternative verdicts. On the other hand, the trial court need not submit lesser-included 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*.") (first emphasis added) (second emphasis in original) (citations, quotation marks, and brackets omitted)); *see also State v. Juarez*, 369 N.C. 351, 357, 794 S.E.2d 293, 299 (2016) (noting second-degree murder as a lesser offense of first-degree murder). Here, the State proceeded only on a theory of first-degree murder, specifically felony murder, with the underlying felony being attempted robbery.

¶ 46 The State contends this issue was not preserved for appeal. But defendant requested an instruction on second-degree murder, and the trial court acknowledged it by stating to the State, "The Defendant has asked for second degree, voluntary, and involuntary. Do you want to say anything about those?" Thus, this issue is preserved and properly before us.

It is well-established that

> the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that the defendant committed the lesser included offense. However, when the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser included offense. The determining factor is the presence of evidence to support a conviction of the lesser included offense.

> Failure to so instruct the jury constitutes reversible error not cured by a verdict of guilty of the offense charged.

State v. Boozer, 210 N.C. App. 371, 377, 707 S.E.2d 756, 762 (2011) (citations, quotation marks, and brackets omitted).

¶ 47 Here, there was a conflict in the evidence regarding an element of felony murder. Viewed in the light most favorable to the State, the evidence of attempted robbery is substantial as defendant had Zachary come to a location of his choosing based on the lie that defendant was a father with his children on Father's Day; he arrived with a gun and another individual with a gun whom he knew had a plan to rob Zachary. *See State v. Van Trusell*, 170 N.C. App. 33, 37, 612 S.E.2d 195, 198 (2005) ("The essential elements of the crime of attempted robbery with a dangerous weapon are: (1) the unlawful attempted taking of personal property from another; (2) the possession, use or threatened use of a firearm or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim." (citation and quotation marks omitted)).

¶ 48 But the State played defendant's statement to the police for the jury, and in that statement, defendant denies multiple times that he planned to or attempted to rob Zachary. Defendant stated several times in answer to questions about the robbery that his plan was only to sell the phone and that he opposed Tink's plan to rob Zachary. Defendant said, "My plan was to sell the phone[,]"and, "[Tink] was like I want to rob him, I was like you ain't got to rob him just sell him the phone[.]" Defendant was asked, "But then yall talked then what? One person isn't gonna sell and one [] person gonna rob, does that make sense, when you guys go to do something together you['re] either gonna sell or you['re] gonna rob. Right? So, which one were you decided on when you met that man?" to which defendant responded, "Selling my phone." The State even acknowledged the conflicting evidence when it stated to the jury in closing, "This statement that you have all seen and now heard, this is a made-up fantasy story. There was never going to be and there never was any intent to sell a phone out there."

¶ 49 For purposes of review of defendant's request for an instruction on second-degree murder, this Court must consider whether "all" the evidence supports the underlying felony of felony murder. *Gwynn*, 362 N.C. at 336, 661 S.E.2d at 70. In other words, if *any* of the evidence supports that defendant did not attempt to rob Zachary, a lesser offense instruction should have been provided. *See generally id*. Here, defendant's repeated statements regarding a lack of intent to rob or actual robbery

support the request for the instruction on second-degree murder. A thorough reading of defendant's statement leaves factual questions about what exactly defendant thought would happen when he was armed and took another armed individual with him whom he knew had an intent to rob with him to meet Zachary; any reasonable adult considering the situation would likely know something more was going to occur than just selling the phone. Yet, defendant was not a reasonable adult; he was a 15-year-old who plainly, throughout his statement, seemed to believe Tink could talk a big game, but he would not actually shoot anyone, even though he was armed. According to defendant, Tink was always armed, but he apparently did not shoot people every day, and defendant -- who also had a gun -- intended only to sell the phone. This conflicting evidence presents a question of credibility and weight of the evidence which must be resolved by a jury. *See generally Thomas*, 325 N.C. at 594, 386 S.E.2d at 561. Because the State chose to proceed *only* on the theory of felony murder based upon the felony of attempted robbery, any conflicting evidence of the robbery also brings the murder into question. *See generally Gwynn*, 362 N.C. at 336, 661 S.E.2d at 707.

¶ 50 Thus, while viewed in the light most favorable to the State, the evidence demonstrates an attempted robbery, defendant's own statements that he had no plan to rob Zachary and that he took no steps to rob Zachary *is* conflicting evidence as to the underlying felony of attempted robbery. *See Gwynn*, 362 N.C. at 336, 661 S.E.2d at 707. But of course, this Court does not view the evidence in the light most favorable to the State for issues regarding jury instructions on lesser-included offenses; instead, we view the evidence in the light most favorable to defendant. *See State v. Brichikov*, 2022-NCCOA-33, ¶ 1, 869 S.E.2d 339, 341 ("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."). But the majority is viewing the evidence in the light most favorable to the State and resolving issues of credibility and weight against the defendant. On appeal, this Court cannot make its own determinations of credibility or weigh the evidence, but rather must consider whether there was any evidence that is "in conflict" "as to the underlying felony[.]" *See Gwynn*, 362 N.C. at 336, 661 S.E.2d at 707. Indeed, some evidence was "in conflict[,]" and I cannot say that "*all*" of the evidence supports the underlying felony of attempted robbery. *Id.* The issue is not, as the majority frames it, if we believe defendant's story, but rather if the jury might have believed it. It is important to note the jury *acquitted* defendant on the count of conspiracy to commit robbery with a firearm, so it appears the jury believed at least some of defendant's account of events or was not fully

convinced by the State's evidence regarding a plan to commit robbery. If given the option to convict on second-degree murder, I cannot say for certain what the jury would have determined.

¶ 51 The State contends that because the jury convicted defendant of attempted robbery it cannot be prejudicial that defendant did not receive a second-degree murder instruction. In other words, upon finding defendant guilty of attempted robbery, the felony murder conviction naturally followed and was the required verdict. But as explained in *Thomas*, "That the State elected to prosecute defendant solely on a felony murder theory does not abrogate defendant's entitlement to have the jury consider all lesser-included offenses supported by the indictment and raised by the evidence." *Thomas*, 325 N.C. at 591, 386 S.E.2d at 559–60. This is because, "in a case in which one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *Id.* at 599, 386 S.E.2d at 564.

> The United States Supreme Court has expounded on the importance of permitting the jury to find a defendant guilty of a lesser included offense supported by the evidence by noting that the doctrine aids both the prosecution and the defense. *Beck v. Alabama*, 447 U.S. 625, 65 L.Ed.2d 392. It aids the prosecution when its proof may not be persuasive on some element of the greater offense, and it is beneficial to the defendant because *it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal.* The Supreme Court has also expressed concern that in a case in which one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, *the jury is likely to resolve its doubts in favor of conviction despite the existing doubt, because the jury was presented with only two options: convicting the defendant or acquitting him outright. Keeble v. United States*, 412 U.S. 205, 212–213, 36 L.Ed.2d 844, 850 (1973) (emphasis in original).
>
> We share this concern in this case. While some reasonable doubt could have existed regarding whether defendant acted in concert with Brewer when he fired at the Calhoun residence, given the conflicting

> evidence on this aspect of the case, almost all the evidence points to some criminal culpability on defendant's part. *It was important, therefore, that the jury be permitted to consider whether defendant was guilty of the lesser included offense of involuntary manslaughter and not be forced to choose between guilty as charged or not guilty.*

Id. (emphasis added) (citations, quotation marks, and ellipses omitted).

¶ 52 Here too, where "one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction despite the existing doubt, because the jury was presented with only two options: convicting the defendant or acquitting him outright." *Id.* Furthermore, in this case, the jury found defendant not guilty of conspiracy to commit robbery with a firearm but guilty of attempted robbery with a firearm, indicating they believed defendant did not conspire with Tink to rob Zachary, as defendant repeatedly stated during the questioning by officers. Thus, without an instruction on second-degree murder, the jury's only options were to "convict[ ] the defendant or acquit[ ] him outright." *Id.* Thus, in accord with *Thomas*, I would hold defendant must receive a new trial. *See Thomas*, 325 N.C. 583, 386 S.E.2d 555.

¶ 53 Therefore, I concur in part and dissent in part.

BOTTOMS TOWING & RECOVERY, LLC v. CIRCLE OF SEVEN, LLC

[283 N.C. App. 446, 2022-NCCOA-342]

BOTTOMS TOWING & RECOVERY, LLC, PETITIONER
v.
CIRCLE OF SEVEN, LLC, RESPONDENT

No. COA21-513

Filed 17 May 2022

1. Liens—motor vehicle—towing company—express contract—with legal possessor—communication of towing and storage costs

In a dispute between a limited liability corporation (respondent) and a towing company (petitioner) over one of respondent's trucks, the trial court's order upholding petitioner's lien on the truck under N.C.G.S. § 44A-2(d) and authorizing the sale of the truck was affirmed, where competent evidence showed that petitioner repaired, serviced, towed, or stored motor vehicles in the ordinary course of its business and entered into an express contract with the owner of the real property where respondent stored the truck, who also became the truck's legal possessor by operation of law. Where section 44A-4(a) permits enforcement of a motor vehicle lien for towing and storage if the related charges remain unpaid for ten days after they are due, petitioner's failure to notify respondent of those charges did not invalidate its lien where the person respondent sent to recover the truck was not its legally authorized agent, and therefore petitioner was not obligated to notify that person of the charges.

2. Liens—motor vehicle—towing company—amount of lien—not in excess of legal limit

In a dispute between a limited liability corporation (respondent) and a towing company (petitioner) over one of respondent's trucks, the trial court's order upholding petitioner's lien on the truck under N.C.G.S. § 44A-2(d) and authorizing the sale of the truck was affirmed, where the amount of the lien did not exceed legal limits. Competent evidence supported the trial court's finding concerning the number of days petitioner stored the truck, as well as the court's reduction of the lien amount based on petitioner's unnecessary use and alterations of the truck.

Judge TYSON concurring in the result in part and dissenting in part.

Appeal by respondent from order and judgment entered 26 February 2021 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 23 March 2022.

Fields & Cooper, PLLC, by John S. Williford, Jr., and Ryan S. King, for petitioner-appellee.

Q. Byrd Law, by Quintin D. Byrd, for respondent-appellant.

ARROWOOD, Judge.

¶ 1 Circle of Seven, LLC ("respondent") appeals from the trial court's order and judgment regarding Bottoms Towing & Recovery, LLC's ("petitioner") Petition for Authorization to Sell Motor Vehicle Under a Lien. Respondent contends the trial court erred in affirming the lien and authorizing the sale of a truck, and that the claimed lien amount exceeded legal limits. For the following reasons, we affirm the trial court.

I. Background

¶ 2 On 17 November 2020, petitioner filed a Petition for Authorization to Sell Motor Vehicle Under a Lien in Nash County Superior Court. The vehicle at issue was a 2018 Dodge Ram truck ("Truck"), owned by and registered to respondent. The Clerk of Court entered an order the same day authorizing petitioner to sell the Truck, with a sale scheduled for 14 December 2020.

¶ 3 On 9 December 2020, respondent filed a Notice of Contested Sale and Lien with the Clerk seeking an order staying the sale and transferring the proceedings to the Superior Court Division for a hearing. The Clerk of Court entered an order the same day granting respondent's request.

¶ 4 The matter was heard in Nash County Superior Court on 1-2 February 2021, Judge Sumner presiding. The evidence and testimony presented at the special proceeding tended to show as follows.

¶ 5 In 2014, Sainte Deon Robinson, Sr. ("Robinson"), designated himself as sole managing member for two limited liability companies: respondent, and One BlueSky Investments, LLC ("BlueSky"). In 2016, BlueSky purchased property at the address 973 Wesleyan Boulevard, Rocky Mount, North Carolina ("Wesleyan property") in a seller-financed transaction from Anne D. Cliett ("Cliett").

¶ 6 On 2 May 2018, Robinson was indicted on federal charges for failure to collect and pay over trust fund taxes. On 4 October 2018, Robinson reached a plea agreement, with a memorandum of the agreement filed 5 October 2018. On 22 March 2019, the United States District Court for the Eastern District of North Carolina entered judgment against Robinson based on his guilty plea, and sentenced Robinson to thirty months imprisonment.

¶ 7 Shortly after Robinson was indicted, Cliett and her company, Cliett, Inc., initiated judicial foreclosure proceedings in Nash County Superior Court against BlueSky on the Wesleyan property. On 11 February 2019, the trial court entered a judgment and order of sale, appointing a commissioner to sell the Wesleyan property at a judicial sale. The sale was noticed and held on 20 March 2019, with Cliett and Cliett, Inc. as the highest bidders at the sale. BlueSky filed for Chapter 11 bankruptcy on 1 April 2019, which stayed the sale.

¶ 8 Respondent operated out of the Wesleyan property and Robinson stored the Truck and other personal property there, including a second truck which is not at issue in this case. Robinson testified that in anticipation of his imprisonment, he replaced the tires on the Truck on 24 January 2019. Robinson also testified that Eulanda Elliott ("Elliott") was "[a]bsolutely" authorized to conduct business on behalf of respondent. Elliott was not listed as a registered agent or manager for respondent on respondent's Secretary of State documents.

¶ 9 Robinson testified that the mileage on the Truck on 24 January 2019 was 81,004 miles. Robinson also testified that he had additional maintenance work done on the Truck; a copy of the invoice for the work was admitted into evidence, which indicated a mileage of 81,007. Robinson then stored the Truck at the Wesleyan property, left a key in the ignition, placed another key in a secure location, and locked the Wesleyan property. Robinson testified that he went to prison on 10 September 2019.

¶ 10 On 19 November 2019, Cliett filed a notice of default and subsequently notified the trial court of the bankruptcy court's order and default, seeking to confirm the prior sale. On 5 December 2019, the trial court entered an order confirming the foreclosure sale and directing the sale distributions; a general warranty deed was filed reflecting Cliett's interest in the Wesleyan property.

¶ 11 Elliott testified that at some point after the foreclosure sale was confirmed, she contacted Dan Howell ("Howell"), who managed Cliett's affairs, to make arrangements to retrieve respondent's personal property, including the Truck, from the Wesleyan property. Howell directed Elliott to contact his attorney, John S. Williford ("Williford"), who also represents petitioner in this case. Elliott called Williford four times: once each on 27 and 30 January 2020, and twice on 31 January 2020. Elliott testified that she made arrangements to retrieve respondent's property on 28 February 2020, including the rental of a U-Haul truck.

¶ 12 When Elliott arrived at the Wesleyan property on 28 February, she spoke with Howell and another individual who identified himself

as a representative of petitioner and gave Elliott a business card for petitioner. Elliott testified that she was told that petitioner would be "[r]emoving the property" from the Wesleyan property; petitioner's representative did not specifically tell Elliott that petitioner would be towing the trucks. Elliott further testified that she did not pick up the trucks on 28 February because she did not have the keys and did not know where they were located.

¶ 13 Elliott contacted Howell again "a couple of weeks" after first attempting to retrieve the trucks.[1] Howell informed Elliott that petitioner had towed the trucks. Elliott subsequently called petitioner at the number on the business card and spoke to Glenn Bottoms ("Bottoms") in order to "find out what [she] needed to do to come pick up the [Truck]."

¶ 14 Elliott testified that she spoke to Bottoms several times and was given several different reasons as to why the Truck could not be retrieved. Bottoms first directed Elliott to speak with Howell again, and later "stated that he needed to hear back from the DMV before he could release the [Truck]." Elliott stated that she produced a letter from the North Carolina Department of Transportation notifying respondent that the Truck was in petitioner's possession, but Bottoms responded that he "ha[d] to wait to hear back from the bank" before releasing the Truck.[2] When Elliott called Bottoms again on 17 April 2020 to confirm that respondent "was the registered owner of the [Truck,]" Bottoms stated that the bank instructed him not to release the Truck because the bank was coming to pick up both trucks. Elliott testified that Bottoms did not tell her during these conversations how much the tow and storage would cost.

¶ 15 On cross-examination, Elliott acknowledged that she was "not legally" the manager of respondent and did not provide Bottoms with any documentation that she was an authorized agent or representative for respondent. Elliott also acknowledged that approximately three months had elapsed between the foreclosure sale and when the Truck was towed. Elliott stated that she "inadvertently forgot to get the keys" to remove the Truck on 28 February but that she did remove other personal property, only leaving the two trucks, a commercial-style lawnmower, and "trash items[.]"

¶ 16 Bottoms testified that on 5 March 2020, he had a conversation with Cliett and subsequently went to the Wesleyan property and "loaded

1. A cell phone bill admitted into evidence indicated that Elliott contacted Howell on 27 March 2020.

2. Elliott stated that this conversation was by telephone on 9 April 2020.

two trucks up and carried them to [petitioner's] lot." Bottoms provided Cliett with a bill for towing and storing the Truck, charging $150.00 for the tow and $40.00 daily for storage. Bottoms "let them sit there for about ten days, and then" filed a Report of Unclaimed Motor Vehicles on 13 March 2020. On 6 April 2020, the Department of Transportation sent letters providing notice of the report to petitioner, respondent, and Cliett. On 24 April 2020, petitioner filed a "Notice of Intent to Sell a Vehicle to Satisfy Storage and/or Mechanic's Lien" for the Truck, listing Cliett as the person authorizing towing and storage.

¶ 17 Bottoms stated that when he towed the Truck, he searched for keys "in the glove box, over the top of the sunvisor, and in the ashtray[,]" but failed to find any keys. On 15 October 2020, Bottoms had a locksmith make a new set of keys for the Truck. Bottoms testified that between 5 March 2020 and 15 October 2020, it was not possible to drive the Truck.

¶ 18 Regarding expenses, Bottoms testified that he had two batteries, two fuel filters, an oil filter, a right front tire, and chrome wheel covers installed for the Truck. An invoice admitted into evidence reflected a total cost of $1,351.41 for parts and $12,040.00 for storage; the total claimed balance due amounted to $14,048.65. Bottoms testified that after getting the Truck serviced and re-keyed, he "drove it home five or six times, . . . just to make sure everything was running good [sic]." Bottoms estimated that he put "between two and two hundred fifty miles" on the Truck. When asked about respondent's claim that the Truck was driven an additional ten thousand miles, Bottoms responded, "Impossible." Bottoms later stated that he had "no idea" what the mileage on the Truck was when he towed it, but that it had "about 90,000 miles on it" at the time of the hearing.

¶ 19 On 10 September 2020, the Department of Transportation sent a letter to respondent indicating that petitioner claimed a lien in the amount of $2,230.00 on the Truck and that respondent had the right to a judicial hearing regarding the claimed lien. On 10 October 2020, the Department of Transportation sent a letter to petitioner stating it had been unable to secure delivery of certified mail to respondent, and that if petitioner wished to sell the vehicle to satisfy the claimed lien, "[petitioner] may have a judicial hearing before a court of competent jurisdiction to determine its validity" or file a petition with the Clerk of Court.

¶ 20 Robinson was released from prison on 13 October 2020. Robinson testified that on 6 November 2020, he called Bottoms to ask why the Truck was in petitioner's possession, and Bottoms replied, "Well, if you want your truck, you can get it, but you've got to bring some proof from

the bank." On 10 November 2020, Robinson drove to petitioner's address and saw the Truck, which he did not initially recognize because the rims were replaced, some decals were removed, and the Truck was repainted white. Robinson also observed damage to the Truck's bumper and passenger side rear fender. Bottoms later confirmed that it was the Truck. Robinson testified that Bottoms also told him that he owed petitioner "ten-thousand-something dollars . . . ."

¶ 21 After the presentation of evidence concluded, petitioner argued that there was no obligation to communicate with Elliott because no one from respondent "produce[d] any documents that obligated Bottoms to deal with [Elliott.]" Petitioner additionally argued that it had a valid claim because Cliett was the legal possessor of the Truck at the time it was towed. Respondent, on the other hand, contended that there was insufficient evidence that petitioner had followed proper procedures as set out in several statutes in towing the Truck. Respondent further contended that the communications between Elliott and Bottoms did not comport with petitioner's agency argument, and concluded by arguing that any lien should be limited to the period of 6 March 2020, when petitioner began storing the Truck, to 27 March 2020, when Elliott claimed she began attempting to recover the Truck from petitioner.

¶ 22 At the conclusion of the hearing, the trial court found that there was a valid lien by petitioner and an express contract between petitioner and Cliett for the towing and storage of the Truck. The trial court reduced the lien amount due to unnecessary maintenance and alterations. The trial court found that respondent owed petitioner a total of $13,620.00, further reduced by $62.50 due to Bottoms's admission that he drove the Truck "250 miles during the time that he had the vehicle stored." On 26 February 2021, the trial court entered an order and judgment affirming the lien and authorizing the sale of the Truck, and requiring respondent to post a cash bond of $13,557.50 as a condition of any stay pending an appeal.

¶ 23 On 17 March 2021, respondent filed and served notice of appeal.

II. Discussion

¶ 24 Respondent contends the trial court erred in affirming the lien and authorizing the sale of the truck and that the claimed lien amount exceeded legal limits. We disagree.

A. Standard of Review

¶ 25 "The standard of appellate review for a decision rendered in 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." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (citation omitted), *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001). "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). "The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*." *Curran v. Barefoot*, 183 N.C. App. 331, 335, 645 S.E.2d 187, 190 (2007) (citing *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980)).

B. Affirming Lien and Authorizing Sale

¶ 26 **[1]** Respondent's argument centers on the contention that petitioner did not have an express or implied contract with the legal possessor of the Truck because Cliett was not the legal possessor. We disagree.

¶ 27 Under Chapter 44A, "legal possessor" is defined as meaning "[a]ny person entrusted with possession of personal property by an owner thereof, or . . . [a]ny person in possession of personal property and entitled thereto by operation of law." N.C. Gen. Stat. § 44A-1(1) (2021). N.C. Gen. Stat. § 44A-2(d) governs liens for motor vehicles:

> Any person who repairs, services, tows, or stores motor vehicles in the ordinary course of the person's business pursuant to an express or implied contract with an owner or legal possessor of the motor vehicle, except for a motor vehicle seized pursuant to G.S. 20-28.3, has a lien upon the motor vehicle for reasonable charges for such repairs, servicing, towing, storing, or for the rental of one or more substitute vehicles provided during the repair, servicing, or storage. This lien shall have priority over perfected and unperfected security interests. Payment for towing and storing a motor vehicle seized pursuant to G.S. 20-28.3 shall be as provided for in G.S. 20-28.2 through G.S. 20-28.5.

N.C. Gen. Stat. § 44A-2(d).

¶ 28 In *Green Tree Financial Servicing Corp. v. Young*, this Court reviewed several cases involving a motor vehicle lien under N.C. Gen. Stat. § 44A-2(d), in which our appellate courts had "held that a storage or towing company may obtain a lien over a motor vehicle . . . when the company is directed by a sheriff to tow or store that vehicle." *Green Tree*

Fin. Servicing Corp. v. Young, 133 N.C. App. 339, 342, 515 S.E.2d 223, 225 (1999) (citations omitted). "These holdings . . . involve an implied contract with a legal possessor, i.e., the sheriff, to tow and store a vehicle in a situation whereby the legal possessor has no intention of paying the requisite towing and storage costs." *Id.* The motor vehicle at issue in *Green Tree* was an abandoned mobile home that was towed at the request of the legal possessor after a Judgment of Summary Ejectment and writ of possession; the Court noted that the towing company "did not expect . . . the legal possessor[ ] to pay for the mobile home's towing and storing, but rather expected that the mobile home's owner would pay those fees." *Id.* The Court affirmed the towing and storage lien. *Id.*

¶ 29 In the order *sub judice*, the trial court found that petitioner "repairs, services, tows, or stores motor vehicles in the ordinary course of its business[,]" and that petitioner "entered into an express contract on March 5, 2020 with [Cliett] for [p]etitioner to tow the Truck . . . for $150.00 and to store the Truck at the rate of $40.00 per day." The trial court further found "[Cliett] was then the owner of this real property where the Truck had been left, and she was legal possessor of the Truck." Based on these findings, the trial court concluded that petitioner "entered into an express contract on March 5, 2020 with [Cliett], the legal possessor of the Truck, for [p]etitioner to tow the Truck from [the Wesleyan property], where the Truck had been left unattended," for the aforementioned towing and storage rates.

¶ 30 The trial court's findings were supported by competent evidence and in turn support its conclusions of law. Respondent does not dispute that petitioner tows and stores motor vehicles in the ordinary course of its business, that the Wesleyan property was purchased by Cliett at a foreclosure sale, or that the Truck was left there. These facts were established by ample testamentary and documentary evidence. At the time petitioner entered a contract with Cliett to tow and store the Truck, Cliett was the legal possessor of the Wesleyan property, and by operation of law was the legal possessor of the Truck.

¶ 31 We note that the foreclosure proceedings were initiated in February 2019, and although the sale was stayed by BlueSky's bankruptcy in April 2019, Robinson did not go to prison until September 2019 and had the opportunity to move the Truck to a different location but failed to do so. Additionally, although Robinson, the only authorized agent of respondent, was unable to take direct action to reclaim the Truck during his imprisonment, he had some ability, both prior to and during his imprisonment, to legally authorize another individual, such as Elliott, to act on respondent's behalf. Robinson, however, failed to do so.

¶ 32 Although respondent argues that the trial court was required to specifically find or conclude "that Bottoms entrusted [Cliett] with possession or that she was entitled to possession by operation of law[,]" respondent has failed to identify any precedent to support this argument. Despite respondent's arguments to the contrary, we find this case to be analogous to *Green Tree* and the cases cited therein. The foreclosure sale was similar to the writ of possession in *Green Tree*, and although petitioner may not have expected Cliett to pay for the towing and storage fees, our caselaw is clear that this expectation is irrelevant to a lien claim. As this Court held in *Green Tree*, "[w]e see no reason to depart from the reasoning of these cases." *Id.* The trial court's finding that Cliett was the owner of the Wesleyan property, where the Truck had been left, was sufficient to establish that she was the legal possessor for statutory purposes.

¶ 33 Alternatively, respondent argues that petitioner did not have a contract with the owner or legal possessor of the Truck, reiterating the argument that Cliett was not the legal possessor. Respondent notes that the invoice and receipts establishing the contract identified "Bottoms Tire" or "Bottoms Tire & Auto," but not petitioner. While the invoice description does state that the Truck was "towed to Bottoms Tire for storage[,]" the invoice heading identifies "Bottoms Towing & Recovery Inc."[3] The trial court received competent evidence to support its finding that a contract existed between petitioner and Cliett for the towing and storage of the Truck, and respondent's arguments to the contrary are without merit.

¶ 34 Respondent next contends that petitioner had no enforceable possessory lien on the Truck because there was insufficient evidence that petitioner satisfied N.C. Gen. Stat. § 44A-4(a), which provides that a lien may be enforced for towing and storage charges on a motor vehicle if the charges "remain unpaid or unsatisfied for . . . 10 days following the maturity of the obligation to pay any such charges[.]" N.C. Gen. Stat. § 44A-4(a) (2021). Respondent argues that petitioner "never communicated or attempted to communicate the amount of the alleged obligation until November 2020, after amassing months of storage fees and *after* it had already claimed a lien[,]" which "prevents a determination that the lien remained unpaid." Petitioner, however, argues that respondent never disclosed that Elliott was an agent with authority to act on respondent's behalf.

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3. Petitioner's legal name on its Articles of Organization, and as stated on the Petition, is "Bottoms Towing & Recovery, LLC."

¶ 35 Although Elliott testified that she made numerous attempts to retrieve the Truck from petitioner, she also acknowledged on cross-examination that she did not have any actual legal authority to act on respondent's behalf. Additionally, while Elliott testified that Bottoms gave several different reasons why she could not take the Truck without questioning her authority as an agent, Bottoms testified that he had only spoken to Elliott at his garage, and that "[s]he never presented any paperwork at all." This constitutes competent evidence that respondent did not present an authorized agent until November 2020, when Robinson first contacted petitioner. Bottoms was not obligated to communicate the amount of the obligation to Elliott, and his failure to do so has no bearing on the trial court's conclusion of law regarding N.C. Gen. Stat. § 44A-4(a).

C. Lien Legal Limits

¶ 36 **[2]** Respondent further argues the amount of the lien should be limited "to only include days prior to [Elliott]'s first attempt to retrieve the Truck," and should be substantially reduced by Bottoms's personal use of the Truck. In support of this argument, respondent again notes that Bottoms instructed Elliott "to provide bank and repossession paperwork as if she were authorized to retrieve the Truck."

¶ 37 With respect to storage expenses, the trial court found that the Truck was stored by petitioner from 5 March 2020 to 1 February 2021 when the special proceeding was heard. This finding was supported by Bottoms's testimony regarding the towing and storage of the Truck. As previously discussed, Elliott did not have legal authority to act on behalf of respondent, and despite her testimony regarding her attempts to communicate with Bottoms, respondent did not take any action that serves to limit or negate the duration of petitioner's storage of the Truck. The contract established a storage rate of $40.00 per day, and the trial court's finding that petitioner stored the Truck for 333 days was supported by competent evidence. Accordingly, the trial court's findings with respect to the duration and amount of the lien were supported by competent evidence, and in turn support the conclusions of law.

¶ 38 Finally, respondent argues the lien should be limited by Bottoms's personal use of the Truck, noting that Bottoms drove the Truck, kept personal items inside, made alterations, and that the Truck's mileage increased by approximately ten thousand miles during the storage period. Petitioner, however, notes Bottoms's testimony that he did not have a key to the Truck until 15 October 2020 and that he drove around 250 miles after obtaining the key.

¶ 39 The trial court found that Bottoms drove the Truck 250 miles and reduced the lien at a rate of $0.25 per mile, additionally reducing the claimed lien amount for the alterations and maintenance it deemed unnecessary. Because these findings are supported by Bottoms's testimony and documentary evidence that was judicially noticed by the trial court, they are binding on appeal and support the related conclusions of law, even though there was evidence to the contrary. Neither the claimed lien amount nor the trial court's order exceeded legal limits.

III. Conclusion

¶ 40 For the foregoing reasons, we affirm the trial court's order and judgment.

AFFIRMED.

Judge CARPENTER concurs.

Judge TYSON concurs in the result in part and dissents in part by separate opinion.

TYSON, Judge, concurring in the result in part and dissenting in part.

¶ 41 The majority's opinion properly affirms the trial court's conclusion that petitioner possesses a valid statutory lien. The trial court erred in its calculation of the offset to reduce the lien amount due to Bottoms' unlawful conversion and personal use of the stored Truck. The order and judgment authorizing the sale of the Truck should be reversed and remanded for re-calculation of offset and credits based upon this error. I concur in the result in part and respectfully dissent in part.

I. Conclusion of Law

A. Standard of Review

¶ 42 The trial court found, solely on Bottoms' self-serving and unsubstantiated testimony, that he had driven the Truck 250 miles for personal use and reduced the lien for that mileage at an unexplained rate of $0.25 per mile. This calculation of the offset due against the lien is more properly designated and reviewed as a conclusion of law.

¶ 43 "As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a

finding of fact." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations and quotation marks omitted).

¶ 44 The calculation and award of the amount offset due to the owner against the lien is a conclusion of law. This conclusion is subject to *de novo* review on appeal.

B. Valuation

1. Conversion

¶ 45 The Truck at issue was secured in a locked facility in 2019, prior to Robinson reporting to prison. After the Truck was removed from where Robinson had secured it, the prior documented mileage at that time increased by approximately 10,000 miles. Bottoms' testified and admitted he took possession of the vehicle and drove the truck about "250 miles during the time that he had the vehicle stored." Bottoms' self-serving admission of using the truck for about 250 miles is not supported by any other competent evidence and is directly contradicted by documented objective evidence.

¶ 46 Bottoms' taking possession under the statutory lien does not allow for any personal use of Robinson's Truck. Bottoms did not come into possession of the vehicle through any express or implied agreement with the vehicle's registered owner.

¶ 47 Robinson had sent someone to pay the towing and storage fees, which could be used to offset any amount accrued, and which Bottoms refused to accept payment. This fact should be considered of his intent, along with his admitted act of conversion and personal use during the statutory possession of the vehicle. Our General Statutes should provide a statutory remedy and offset for Robinson for Bottoms' admitted conversion of his Truck. Petitioner charged Robinson storage fees during the time he admitted he was driving the Truck for personal use, and not keeping the Truck in the condition when taken while in storage. The decision on the validity of Bottoms' lien does not foreclose Robinson's ability to receive credit for Bottoms' unlawful conversion and use.

2. Valuation of Offset

¶ 48 The trial court reduced the lien amount by only $0.25 for each mile Bottoms claimed he had used the vehicle for personal use. The trial court assessed a wholly unsupported and arbitrary cost-per-mile calculation to compute this offset value against the lien.

¶ 49 North Carolina courts have applied diminished market value as a measure of damages for conversion and physical harm to property. *See*

Phillips v. Chesson, 231 N.C. 566, 571, 58 S.E.2d 343, 347 (1950) ("[T]he measure of damages recoverable for injury to property is the difference between the market value immediately before the injury and the market value immediately afterwards.").

II. Conclusion

¶ 50 The trial court should have assessed an offset of the loss in value to equal Bottoms' conversion and the added miles to reduce the Truck's book value. This method should also include any other damages to the Truck after Bottoms took possession and during the period of conversion and unauthorized use.

¶ 51 I concur with the majority's result holding the petitioner acquired and possesses a valid statutory lien. The trial court erred in its calculation and conclusion of the amount to offset and the credit due against the lien on account of petitioner's unlawful conversion and personal use of the stored Truck. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
TODD EMERSON COLLINS, JR., DEFENDANT

No. COA21-404

Filed 17 May 2022

1. Criminal Law—motion to dismiss—ruling reserved—State allowed to reopen case—trial court's discretion

The trial court did not abuse its discretion in a trial for felony eluding arrest with a motor vehicle and felonious possession of stolen goods by allowing the State, pursuant to N.C.G.S. § 15A-1226(b), to reopen its case and introduce new evidence even though defendant had moved to dismiss for insufficiency of the evidence. The court did not violate N.C.G.S. § 15A-1227(c) by reserving its ruling on the motion to dismiss until after the State rested but before closing arguments and jury deliberations.

2. Possession of Stolen Property—felonious—value of stolen truck—sufficiency of evidence

The State presented substantial evidence that the value of the truck stolen by defendant from an automobile dealership was more than $1,000 (necessary to prove felonious possession of stolen

property) based on testimony from the dealership's manager regarding the truck's value before it was stolen and damaged during a car chase ($6,625) and also when it sold at auction ($1,325).

3. Criminal Law—prosecutor's closing argument—that defendant could have caused more harm—reasonableness of inference

The trial court did not abuse its discretion in a trial for felony eluding arrest with a motor vehicle and felonious possession of stolen goods by overruling defendant's objection to the State's closing argument that defendant's reckless driving when he led police on a high-speed car chase could have led to someone being killed, which was a reasonable inference from the evidence.

4. Criminal Law—judicial bias—judge's discretionary rulings and comments to jury—no prejudicial error

In a trial for felony eluding arrest with a motor vehicle and felonious possession of stolen goods, defendant failed to establish prejudicial error in his argument that the trial court exhibited judicial bias in its rulings and comments to the jury, where the court did not abuse its discretion in allowing the State to reopen its case to introduce more evidence or in overruling defendant's objection to a portion of the State's closing argument stating that defendant's reckless driving during a high-speed car chase could have led to someone being killed.

Appeal by Defendant from judgment entered 15 February 2021 by Judge Angela B. Puckett in Surry County Superior Court. Heard in the Court of Appeals 25 January 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.

Irons & Irons, P.A., by Ben G. Irons, II, for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant-Appellant Todd Emerson Collins, Jr., ("Defendant") was convicted by jury verdict of felony eluding arrest with a motor vehicle and felonious possession of stolen goods after he stole a pickup truck and led police on a high-speed chase. On appeal, Defendant argues: (1) the trial court abused its discretion by allowing the State to reopen its case before the trial court ruled on Defendant's motion to dismiss for insufficiency of the evidence; (2) the trial court erred in denying

Defendant's motion to dismiss the charge of felonious possession of stolen goods because the State failed to prove an essential element of the crime, namely the value of the vehicle; and (3) the trial court abused its discretion and demonstrated judicial bias against Defendant by permitting the State to reopen its case and allowing certain statements in the State's closing argument. After careful review of the record and our precedent, we hold Defendant's trial was free from error.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The record below discloses the following:

¶ 3 Around 1:00 a.m. on 10 May 2020, Defendant drove a 2004 Nissan Titan pickup truck from Carroll County, Virginia into Mount Airy, North Carolina, leading Virginia police officers in a high-speed chase. A Surry County Sherriff's Deputy joined the pursuit of the vehicle, which Defendant drove without lights and at speeds of at least 90 mph on a stretch of highway where the speed limit was between 45 and 50 mph. Defendant twice drove the truck over stop sticks deployed by law enforcement. He did not attempt to stop the vehicle after the first set of stop sticks; the vehicle slowed to a stop on the median after the second stop sticks destroyed the truck's tires. Once the truck came to a stop, Defendant exited the vehicle and attempted to flee on foot. Police quickly apprehended and arrested him.

¶ 4 After detaining Defendant, law enforcement contacted the General Manager of Foothills Ford in Pilot Mountain, Robert Sutphin ("Mr. Sutphin"), and confirmed that earlier that same day, the 2004 Nissan Titan pickup truck driven by Defendant had been removed from the automotive dealership. No one at the dealership had given Defendant permission to take the vehicle.

¶ 5 Ten days later, on 20 May 2020, Defendant was convicted of driving while license revoked. He appealed to the Superior Court.

¶ 6 One month later, on 20 July 2020, while his appeal was pending in Superior Court, Defendant was indicted on charges of felony eluding arrest with a motor vehicle and felonious possession of stolen goods. Defendant's appeal and the felony charges came on for a jury trial on 15 February 2021.

¶ 7 At the close of the State's evidence, defense counsel moved to dismiss all charges against Defendant. In particular, counsel argued the State failed to present evidence of the value of the allegedly stolen vehicle pursuant to N.C. Gen. Stat § 14-71.1 (2021) ("Possessing stolen

goods") on the felonious possession of stolen goods charge. The trial court responded:

> Then, [defense counsel], your motion—I see the argument that it would not be a felony. It would be a misdemeanor, it would not be a felony, as alleged, unless the item could be proved to—if it had been stolen, it would be more than $1,000.

The trial court asked for the prosecutor's retort and the prosecutor stated he "would . . . simply move to reopen the evidence to put on that testimony, just in case it becomes an issue later down the road."[1] Defense counsel challenged the State's attempt to recall the witness, reasoning the purpose of the motion to dismiss was not to "signal a mulligan for the State." The trial court replied:

> I do not take that as that. However, in this case, I think that in the Court's discretion, that there is no prejudice to the Defendant, and the Court will allow that motion. But we will note that.

The trial court allowed the State to reopen its case after a lunch break for the jury and delayed ruling on defense counsel's motion to dismiss until then.

¶ 8 The State recalled Mr. Sutphin for a second time. He testified the value of the stolen truck was $6,625 before it was damaged and that the truck had been sold at auction for $1,325 after the chase. The State again rested. Defense counsel renewed the motion to dismiss, and the trial court denied it before closing arguments and before the case was submitted to the jury.

¶ 9 At closing argument, the prosecutor began:

> Truth be told, in a lot of ways, we're kind of lucky. Because this case could have turned out very differently. A car fleeing law enforcement across state lines, and pushing 100 miles an hour, is about the quickest way to get somebody killed on this road.

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1. This was not the first time during the trial the State had recalled its witness, the General Manager of the Foothills Ford in Pilot Mountain, Mr. Sutphin. Earlier in the trial, the prosecutor told the trial court that direct examination of Mr. Sutphin was complete, only to ask the trial court moments later to recall him to ask an additional question to confirm the name of the automotive dealership. The trial court allowed the State to recall Mr. Sutphin without objection from defense counsel.

Defense counsel objected to this portion of the closing, but the trial court overruled it. The State proceeded to illustrate for the jury the potential dangers that Defendant could have inflicted upon anyone on the roads that night:

> All it would have taken is a power line being down and a road crew out there, and all of a sudden, you've got more people in harm's way out there trying to put a power line back up. What if you've got someone who's trying to get back home, and they've got a flat tire on the side of the road. Now they're in harm's way. What if you have people getting off of work at Lowe's Home Improvement, right there on 52. What if you've got people over there getting off work, Pizza Hut right there on 52. The Food Lion, the Roses, any of these stores or businesses that could have been closing, and these folks could be getting off work at that time of day or night. All it would have taken is one mistimed or unlucky swerve after his tires popped, and this could have been a much more tragic situation than it is now. And so, to a degree, we're lucky that we're just here with what we're at.

Defense counsel did not further object to the State's closing. However, in her own closing argument, defense counsel contended the State's arguments contained many "[w]hat[-]ifs."

¶ 10 The jury found Defendant guilty of felonious eluding arrest in a motor vehicle and felonious possession of stolen goods. Following the verdict, Defendant was tried for, and the jury found him guilty of, attaining habitual felon status. The trial court sentenced Defendant to two consecutive prison terms of 105 to 108 months. Defendant gave oral notice of appeal.

II. ANALYSIS

A. Defendant's Motion to Dismiss

1. The Trial Court Did Not Abuse Its Discretion by Reserving Ruling on the Motion to Dismiss to Allow the State to Reopen Its Case to Introduce New Evidence.

¶ 11 **[1]** Defendant contends the trial court abused its discretion by delaying its ruling on Defendant's motion to dismiss for insufficiency of the evidence and allowing the State to introduce new evidence. We disagree.

¶ 12 We will reverse a trial court's decision to permit a party to introduce additional evidence at any time prior to the verdict only upon a showing of an abuse of discretion. *State v. Wise*, 178 N.C. App. 154, 163, 630 S.E.2d 732, 737 (2006) (citing *State v. Riggins*, 321 N.C. 107, 109, 361 S.E.2d 558, 559 (1987)).

¶ 13 Our General Statutes provide: "The judge in his [or her] discretion may permit any party to introduce additional evidence *at any time prior to verdict*." N.C. Gen. Stat. § 15A-1226(b) (2021) (emphasis added). Subsection 15A-1227(c) further provides: "The judge must rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed." N.C. Gen. Stat. § 15A-1227(c) (2021). Defendant interprets Subsection 15A-1227(c) to preclude the trial court from postponing ruling on Defendant's motion for insufficiency of evidence to allow the State to reopen the case and introduce new evidence. Though these sections deal with different procedural mechanisms at trial, assuming *arguendo* they conflict in some way, they "must be construed in pari materia, and harmonized, if possible, to give effect to each." *Hoffman v. Edwards*, 48 N.C. App. 559, 564, 269 S.E.2d 311, 313 (1980) (citation omitted).

¶ 14 In general, "[i]t is the trial judge's duty to supervise and control the trial, including the manner and presentation of evidence, matters which are largely left to his [or her] discretion." *State v. Lowery*, 318 N.C. 54, 70, 347 S.E.2d 729, 740 (1986). Our appellate courts have repeatedly held Subsection 15A-1226(b) allows a trial court to exercise its discretion to permit a party to reopen its case and present evidence—even after the parties have rested—before the case is submitted to the jury. *See*, *e.g.*, *Riggins*, 321 N.C. at 109, 361 S.E.2d at 559 ("Pursuant to N.C. [Gen. Stat.] § 15A-1226(b), the trial judge is authorized in his [or her] discretion to permit any party to introduce additional evidence at any time prior to verdict."); *Wise*, 178 N.C. App. at 163, 630 S.E.2d at 737 (holding the trial court did not err by allowing the State to reopen its case and present additional evidence of the defendant's release date after the parties had rested but before the case was presented to the jury). "This Court has long recognized that the trial court has the discretion to allow either party to recall witnesses to offer additional evidence, even after jury arguments." *State v. Goldman*, 311 N.C. 338, 350, 317 S.E.2d 361, 368 (1984) (citation omitted); *see also State v. Revelle*, 301 N.C. 153, 161, 270 S.E.2d 476, 481 (1980) ("[N.C. Gen. Stat. §] 15A-1226(b) specifically provides the trial judge may exercise his [or her] discretion to permit any party to introduce additional evidence at any time prior to the verdict. This is so even after arguments to the jury have begun and even if the additional evidence is testimony from a surprise witness." (citations

omitted)), *disapproved on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988).

¶ 15 Harmonizing the statutes and giving each full effect, *Hoffman*, 48 N.C. App. at 564, 269 S.E.2d at 313, Subsection 15A-1227(c) of our General Statutes, which mandates the trial court shall rule on a motion to dismiss for insufficiency of the evidence "before the trial may proceed," does not alter or minimize the trial court's discretion to allow for recall of a witness or further presentation of evidence *before the jury returns a verdict* pursuant to Subsection 15A-1226(b). The Criminal Code Commission Commentary to Subsection 15A-1227(c) explains: "the practice of reserving decision on a motion is little followed at present in North Carolina—and ought not to be encouraged. [The Commission] therefore amended a draft provision based on the procedure of another jurisdiction, authorizing reservation of decision on the motion to dismiss, to bar such a procedure." Criminal Code Comm'n Commentary, § 15A-1227(c) Editors' Notes. Our precedent supports this reading. This Court has held trial courts violate Subsection 15A-1227(c) when the trial court reserves ruling on a motion to dismiss until *after the jury returned a verdict*. *See State v. Kiselev*, 241 N.C. App 144, 151, 772 S.E.2d 465, 470 (2015) ("The trial court violated N.C. Gen. Stat. § 15A-1227(c) by reserving judgment on the defendant's motion to dismiss for insufficiency of the evidence until after the jury returned a verdict."); *State v. Hernandez*, 188 N.C. App. 193, 204, 655 S.E.2d 426, 433 (2008) (considering whether the trial court's reservation of ruling on motions to dismiss at the close of all evidence until after the jury returned its verdict amounted to prejudicial error).

¶ 16 Here, after the State rested for the first time, defense counsel moved to dismiss the charge of felonious possession of stolen goods because the State had not presented evidence that the allegedly stolen truck was valued in excess of $1,000. *See* N.C. Gen. Stat. §§ 14-71.1, 72(a) (2021) (providing the offense is not a felony unless the value of the stolen property is more than $1,000). The State moved to reopen its case, and the trial court, within its discretion, allowed Mr. Sutphin to testify to the value of the stolen truck. The State again rested and the trial court denied Defendant's motion to dismiss. In doing so, the trial court reserved ruling on Defendant's motion to dismiss until the State again rested but before closing arguments and before the jury began its deliberation. *Cf. Kiselev*, 241 N.C. App at 151, 772 S.E.2d at 470. We hold the trial court did not abuse its discretion in delaying its ruling on Defendant's motion to dismiss and allowing the State to reopen its case.

2. The Trial Court Did Not Err in Denying Defendant's Motion to Dismiss for Insufficiency of the Evidence.

¶ 17 **[2]** We now consider whether the trial court erred in ultimately denying Defendant's motion to dismiss the charge of felonious possession of stolen goods. We hold it did not.

¶ 18 We review a trial court's denial of a motion to dismiss *de novo*, *State v. Cox*, 367 N.C. 147, 151, 749 S.E.2d 271, 275 (2013) (citation omitted), to determine whether there was "substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense," *State v. Key*, 182 N.C. App. 624, 628-29, 643 S.E.2d 444, 448 (2007). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 629, 643 S.E.2d at 448. "When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

¶ 19 Defendant challenges the State's failure to prove one element of the felonious possession of stolen goods charge, that the value of the vehicle was more than $1,000. *See* § 14-71.1; *State v. Phillips*, 172 N.C. App. 143, 145, 615 S.E.2d 880, 882 (2005). Viewing the evidence, including Mr. Sutphin's testimony that the value of the truck was $6,625 before it was damaged and $1,325 after the chase when it sold at auction, in the light most favorable to the State, *Miller*, 363 N.C. at 98, 678 S.E.2d at 594, the State presented substantial evidence of the value of the vehicle. *See State v. Williams*, 65 N.C. App. 373, 375, 309 S.E.2d 266, 267 (1983) ("[W]here a merchant has determined a retail price of merchandise which [she/]he is willing to accept as the worth of the item offered for sale, such a price constitutes evidence of fair market value sufficient to survive a motion to dismiss.") We hold the trial court did not err in denying Defendant's motion to dismiss this charge.

B. Judicial Bias and Abuse of Discretion

¶ 20 Defendant asserts that the trial court abused its discretion and demonstrated judicial bias against Defendant because it: (1) permitted the State to recall a witness twice, once after defense counsel moved to dismiss the charges; and (2) allowed the State to argue in closing "that the careless and reckless driving if attributed to [Defendant] could have resulted in the death of people." Defendant's arguments are without merit.

1. The Trial Court Did Not Abuse its Discretion in Overruling Defendant's Objection to the State's Closing Argument.

¶ 21 **[3]** We review the trial court's decision to overrule defendant's timely objection to a closing argument for abuse of discretion. *State v. Murrell*, 362 N.C. 375, 392, 665 S.E.2d. 61, 73 (2008). A trial court abuses its discretion "if the ruling could not have been the result of a reasoned decision." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (quotation marks and citations omitted). "We first determine if the remarks were improper and then determine if the remarks were of such a magnitude that their inclusion prejudiced defendant." *State v. Copley*, 374 N.C. 224, 228, 839 S.E.2d 726, 729 (2020) (quotation marks and citations omitted). Where there is no objection, on the other hand, we consider whether the remarks were "so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998). The trial court must intervene during closing arguments if "the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *State v. Atkins*, 349 N.C. 62, 84, 505 S.E.2d 97, 111 (1998). A prosecutor may argue "all the facts in evidence as well as any reasonable inferences that may be drawn from those facts." *State v. Riley*, 137 N.C. App. 403, 413, 528 S.E.2d 590, 597 (2000) (citing *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975)); *see also State v. Phillips*, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011). Pursuant to our General Statutes, during closing argument an attorney:

> . . . may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2021).

¶ 22 Here, defense counsel only objected to the first few sentences of the State's closing argument:

> Truth be told, in a lot of ways, we're kind of lucky. Because this case could have turned out very differently. A car fleeing law enforcement across state lines,

> and pushing 100 miles an hour, is about the quickest way to get somebody killed on this road.

The trial court immediately overruled the objection.

¶ 23 In *State v. Williams*, 201 N.C. App. 103, 685 S.E.2d 534 (2009), this Court held the following prosecutorial statements were proper:

> I want you to remember one thing; and that is, he ought to thank his lucky stars every day that he's not sitting over here looking at the death penalty jury, because had that gun discharged and hit one of those victims or gone through that wall and hit that child, this would be a completely different situation. No matter what happens to him today is his lucky day.

Williams, 201 N.C. App. at 106, 685 S.E.2d at 537. Here, as in *Williams*, it was reasonable for the prosecutor to infer and then argue that Defendant's flight from police, driving at extremely high speeds without headlights, could have killed someone. We hold the trial court did not abuse its discretion by overruling Defendant's objection to this portion of the State's closing argument. *See Jones*, 355 N.C. at 131, 558 S.E.2d at 106. As to the remainder of the prosecutor's argument, Defendant has failed to show the trial court's failure to intervene *ex mero motu* interfered with Defendant's right to a fair trial. *See Atkins*, 349 N.C. at 84, 505 S.E.2d at 111.

2. No Judicial Partiality

¶ 24 **[4]** Without pointing us to caselaw or specific misconduct, Defendant alleges the trial court "guided the State to convictions in this case," abused its discretion, and violated Defendant's constitutional rights. We detect no partiality below.

¶ 25 "The law imposes on the trial judge the duty of absolute impartiality." *Nowell v. Neal*, 249 N.C. 516, 520, 107 S.E.2d 107, 110 (1959). The trial court also has the duty to supervise and control a trial, including testimony of witnesses, to ensure justice for all parties. *State v. Agnew*, 294 N.C. 382, 395, 241 S.E.2d 684, 692 (1978). "The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury," and, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. §§ 15A-1222, 1232 (2021).

¶ 26 We review claims of judicial bias by considering the totality of the circumstances. *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732 (1999). Considering the totality of the circumstances of the trial court's actions which form the basis of Defendant's assignment of error, Defendant has failed to establish prejudicial error.

¶ 27 First, we have already held the trial court did not abuse its discretion in reserving ruling on Defendant's motion to dismiss and allowing the State to reopen its case and recall a witness on two separate occasions. Second, as we have also held, the trial court did not abuse its discretion in overruling defense counsel's objection to a portion of the prosecutor's closing argument nor did it err in failing to intervene by its own volition in the remainder of the closing. Further, the trial court did not make any improper comments in front of the jury. *See* §§ 15A-1222, 1232.

¶ 28 We hold Defendant has failed to demonstrate prejudicial error and we reject his claim of partiality. *See Fleming*, 350 N.C. at 125-30, 512 S.E.2d at 732-35 (holding no prejudicial error or partiality where the defendant alleged 39 instances in which the trial court intervened and interjected during jury selection, witness testimony, prosecutorial questioning, and objections during trial).

III. CONCLUSION

¶ 29 For the foregoing reasons, we hold Defendant has failed to demonstrate error or that he is entitled to a new trial.

NO ERROR.

Judges DIETZ and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 MAY 2022)

STATE v. HAHN 2022-NCCOA-77 No. 21-190	Buncombe (19CRS85718-20)	No Error
RACINE v. CITY OF RALEIGH 2022-NCCOA-324 No. 21-406	Wake (20CVS10329)	Affirmed
ABEDI v. ABEDI 2022-NCCOA-341 No. 21-126	Gaston (20CVS2140)	Dismissed
BRASWELL v. W. N.C. CONF. OF THE UNITED METHODIST CHURCH 2022-NCCOA-343 No. 21-416	Mecklenburg (20CVS12650)	Vacated and Remanded.
BRIGGS v. MARKIEWICZ 2022-NCCOA-344 No. 21-443	Transylvania (19CVS387)	Affirmed.
DILLARD v. W. N.C. CONF. OF THE UNITED METHODIST CHURCH 2022-NCCOA-345 No. 21-324	Mecklenburg (20CVS10092)	Vacated and Remanded.
DOE GS v. W. N.C. CONF. OF THE UNITED METHODIST CHURCH 2022-NCCOA-346 No. 21-417	Mecklenburg (20CVS14317)	Vacated and Remanded.
DONLEY v. CHIP GANASSI RACING 2022-NCCOA-347 No. 21-447	N.C. Industrial Commission (18-041204)	Affirmed
FIELDS v. FIELDS 2022-NCCOA-348 No. 20-855	Pasquotank (17CVD719)	Affirmed
FRANCIS v. BROWN 2022-NCCOA-349 No. 21-466	Wake (21CVD4617)	Affirmed
IN RE A.R. 2022-NCCOA-350 No. 21-678	Mecklenburg (20JA488) (20JA489) (20JA490)	Adjudication Order Reversed In Part; Disposition Order Vacated In Part.

IN RE ENTZMINGER 2022-NCCOA-351 No. 21-525	Pitt (17CRS1930)	Affirmed
IN RE J.A.W. 2022-NCCOA-352 No. 21-636	Burke (21JT61)	Vacated and Remanded
IN RE J.B.D. 2022-NCCOA-353 No. 21-549	Watauga (20JT18)	Affirmed
IN RE J.W.M. 2022-NCCOA-354 No. 21-617	Stokes (19JA79)	AFFIRMED IN PART, REMANDED.
IN RE M.M. 2022-NCCOA-355 No. 21-721	McDowell (17JT12) (17JT13)	Affirmed
IN RE S.C.S. 2022-NCCOA-356 No. 21-738	Cabarrus (20JT16)	Affirmed
IN RE S.G.A.R.B. 2022-NCCOA-357 No. 21-727	Gaston (17JT326) (17JT327) (19JT92)	Affirmed
MAAS v. WALGREENS 2022-NCCOA-358 No. 21-307	N.C. Industrial Commission (767919)	Reversed and Remanded
McLANE v. GOODWIN-McLANE 2022-NCCOA-359 No. 21-528	Iredell (20CVD2326)	Affirmed
MEDPORT, INC. v. HAZLEHURST 2022-NCCOA-360 No. 21-695	Mecklenburg (19CVS21720)	Dismissed
MILLER v. AURIA SOLS. LTD. 2022-NCCOA-361 No. 21-475	N.C. Industrial Commission (19-016250) (19-729851)	AFFIRMED; MOTION TO DISMISS CROSS-APPEAL ALLOWED.
MITCHELL v. ORANGE CNTY. 2022-NCCOA-362 No. 21-394	Orange (20CVS1359)	Affirmed

PITTMAN v. WILKINS 2022-NCCOA-363 No. 21-492	Nash (21CVS131)	Affirmed
SIMMONS v. WILES 2022-NCCOA-364 No. 21-320	Cabarrus (17CVS1131)	Affirmed
SINGLETON v. McNABB 2022-NCCOA-365 No. 21-746	Vance (19CVS1102)	Dismissed
SPENCER v. GOODYEAR TIRE & RUBBER CO. 2022-NCCOA-366 No. 21-354	N.C. Industrial Commission (18-017149)	Affirmed in part, Vacated in part and Remanded
STATE v. ASKEW 2022-NCCOA-367 No. 21-502	Wake (17CRS221790-91)	No Plain Error
STATE v. BARSTOW 2022-NCCOA-368 No. 21-389	Franklin (18CRS51837)	No Error in Part; Dismissed Without Prejudice in Part
STATE v. DOTSON 2022-NCCOA-370 No. 21-575	Randolph (15CRS54251)	Affirmed in Part; Remanded in Part
STATE v. GILES 2022-NCCOA-371 No. 21-645	Wake (19CR203027)	Affirmed
STATE v. MALDONADO 2022-NCCOA-372 No. 21-308	Union (19CRS54744)	Dismissed
STATE v. WILLIAMS 2022-NCCOA-373 No. 21-449	Halifax (96CRS11350) (96CRS11376-77) (96CRS11379) (97CRS380) (98CRS7849)	Affirmed
STATE v. WRIGHT 2022-NCCOA-374 No. 21-247	Mecklenburg (20CRS203878-81) (20CRS9804)	Vacated and Remanded

GUILFORD ARCHIE, III, PLAINTIFF
v.
DURHAM PUBLIC SCHOOLS BOARD OF EDUCATION, DEFENDANT

No. COA21-313

Filed 7 June 2022

1. Negligence—contributory negligence—student hit while walking on school service road—summary judgment

Summary judgment was properly granted for a school board in plaintiff's claims for negligence and negligent infliction of emotional distress where there was no genuine issue of material fact regarding whether plaintiff—a student who was hit by another student's car while walking on a school service road—was contributorily negligent. The evidence demonstrated that plaintiff had headphones on and was listening to music and not paying attention with his back to oncoming traffic as he walked along the service road, and that his conduct contributed to his injury when he was hit from behind by a car.

2. Appeal and Error—preservation of issues—gross negligence—wilful and wanton conduct—not argued before trial court

In an action for negligence and negligent infliction of emotional distress based on an incident where a student was hit by a driver while walking along a school service road, plaintiff failed to preserve for appellate review the issue of whether the school board committed wilful and wanton conduct to qualify as gross negligence where there was no record evidence that plaintiff raised the issue before the trial court. Assuming arguendo that the issue was properly preserved, plaintiff failed to present evidence of gross negligence to overcome his contributory negligence.

Appeal by Plaintiff from order entered 2 March 2021 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 15 December 2021.

M. Howard Law Office, by Marlon J. Howard, for Plaintiff-Appellant.

Cranfill Sumner LLP, by Steven A. Bader and Donna R. Rascoe, for Defendant-Appellee.

COLLINS, Judge.

¶ 1 Plaintiff Guilford Archie, III, appeals from an order granting summary judgment to Defendant Durham Public Schools Board of Education ("Durham BOE"). Plaintiff argues that there are genuine issues of material fact as to whether he was contributorily negligent and whether Durham BOE's negligence was willful and/or wanton and that Durham BOE was not entitled to judgment as a matter of law. We affirm.

I. Background

¶ 2 Durham BOE operates the Southern School of Energy and Sustainability ("Southern High School"), a public school located in Durham, North Carolina. Plaintiff Guilford Archie, III, was a high school student at Southern High School in 2016, during which time he played on the school's football team. On 3 October 2016, Plaintiff was hit by a car driven by another student while Plaintiff was walking on school property on a vehicular service road from the school's "football film room" to the school's field house to change for practice.

¶ 3 Plaintiff filed a complaint against Durham BOE on 1 October 2019 alleging negligence and negligent infliction of emotional distress. Durham BOE filed a motion for summary judgment on 15 January 2021 arguing that "[t]here is no evidence, or any forecast of evidence, to support a claim for negligence against Defendant; Plaintiff failed to establish the elements of his negligent infliction of emotional distress claim; and the evidence supports a finding that Plaintiff's claims are barred by contributory negligence." After a hearing, the trial court granted summary judgment on 2 March 2021 in favor of Durham BOE, finding and concluding that "there is no genuine issue as to any material fact with regard to the defense of contributory negligence" as "the evidence supports a finding that Plaintiff's negligence claim is barred by his own contributory negligence" and that "Defendant is entitled to judgment as a matter of law." Plaintiff timely appealed.

II. Discussion

¶ 4 Plaintiff argues summary judgment was improper because he was not contributorily negligent as a matter of law. Plaintiff further contends that, even assuming he was contributorily negligent, summary judgment was improper as the jury could have determined that Durham BOE acted willfully and wantonly. We address each argument in turn.

A. Standard of Review

¶ 5 We review a trial court's order granting summary judgment de novo. *Proffitt v. Gosnell*, 257 N.C. App. 148, 151, 809 S.E.2d 200, 203 (2017). Under de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower [court]." *Blackmon v. Tri-Arc Food Systems, Inc.*, 246 N.C. App. 38, 41, 782 S.E.2d 741, 743 (2016) (quotation marks and citations omitted).

¶ 6 Summary judgment is appropriately entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). The party moving for summary judgment

> bears the burden of showing that no triable issue of fact exists. This burden can be met by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that an affirmative defense would bar the [non-moving party's] claim. Once the moving party has met its burden, the non-moving party must forecast evidence demonstrating the existence of a *prima facie* case.

CIM Ins. Corp. v. Cascade Auto Glass, Inc., 190 N.C. App. 808, 811, 660 S.E.2d 907, 909 (2008) (citations omitted).

¶ 7 "[I]n ruling on a motion for summary judgment the court does not resolve issues of fact and must deny the motion if there is any issue of genuine material fact." *Singleton v. Stewart*, 280 N.C. 460, 464-65, 186 S.E.2d 400, 403 (1972) (citations omitted). Summary judgment on the ground of contributory negligence may only be granted "where the [plaintiff's] forecast of evidence fails to show negligence on [the] defendant's part, or establishes [the] plaintiff's contributory negligence as a matter of law." *Blackmon*, 246 N.C. App. at 42, 782 S.E.2d at 744 (quotation marks and citations omitted). We review all the evidence in the light most favorable to the nonmoving party and "determine if the evidence is sufficient to be submitted to the jury." *Hawley v. Cash*, 155 N.C. App. 580, 582, 574 S.E.2d 684, 686 (2002) (quotation marks and citations omitted).

1. Contributory Negligence

¶ 8 **[1]** "Contributory negligence is negligence on the part of the plaintiff which joins . . . with the negligence of the defendant alleged in

the complaint to produce the injury of which the plaintiff complains." *Proffitt*, 257 N.C. App. at 152, 809 S.E.2d at 204 (quotation marks and citation omitted). Contributory negligence is a bar to recovery if a plaintiff has contributed to their injury in any way. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 648, 423 S.E.2d 72, 73-74 (1992). "In order to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *Proffitt*, 257 N.C. App. at 152, 809 S.E.2d at 204 (quotation marks, brackets, and citations omitted). " 'However, a plaintiff may relieve the defendant of the burden of showing contributory negligence when it appears from the plaintiff's own evidence that he was contributorily negligent.' " *Id.* (quoting *Price v. Miller*, 271 N.C. 690, 694, 157 S.E.2d 347, 350 (1967)).

¶ 9 Every person who has the capacity to exercise ordinary care for their "own safety against injury is required by law to do so[.]" *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965) (citations omitted). If a person fails to exercise such ordinary care, and "such failure, concurring an[d] cooperating with the actionable negligence of defendant, contributes to the injury complained of, he is guilty of contributory negligence." *Id.* "Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Id.*

¶ 10 "Pedestrians have a duty to maintain a lookout when crossing an area where vehicles travel and a duty to exercise reasonable care for their own safety." *Patterson v. Worley*, 265 N.C. App. 626, 629, 828 S.E.2d 744, 747 (2019) (bracket and citation omitted). While failing to yield the right of way to a motor vehicle is not contributory negligence *per se*, summary judgment in a negligence action on the ground of contributory negligence is proper "when all the evidence so clearly establishes [the plaintiff's] failure to yield the right of way as one of the proximate causes of his injuries[.]" *Blake v. Mallard*, 262 N.C. 62, 65, 136 S.E.2d 214, 216 (1964) (citations omitted). *See Proffitt*, 257 N.C. App. at 167, 809 S.E.2d at 213 (affirming summary judgment for defendant and holding plaintiff was contributorily negligent when he played on a fallen tree in the road and was struck by a vehicle that he thought would stop).

¶ 11 Our review of the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, supports a conclusion that Plaintiff's claim is barred by contributory negligence.

¶ 12 Plaintiff testified in his deposition as follows: He was walking "on the pavement" of the vehicular service road, and not on the grass or beside the road, when he was hit. He was wearing his headphones and

listening to music. When Plaintiff had walked on the service road to the field house on prior occasions, he had seen vehicles driving on and using the service road, including cars and a "Gator" utility vehicle. As he walked on the right-hand side of the service road, he "was getting hyped, getting ready for practice, getting in the mood" and was "dancing – in my little hype moment, but not like breaking-out dancing." As he listened to his music and danced, his leg was hit from behind by the front bumper and tire of a car.

¶ 13 Darius Robinson was the Head Football Coach at Southern High School on the date of the accident. In his affidavit he averred, in pertinent part, as follows:

> 3. I recall the events of 3 October 2016 when two of my football players, Guilford Archie, III and Ezekiel Jennette, were involved in an accident on a road that runs through campus while going to football practice (hereinafter the "Accident");
>
> 4. I did not personally witness the Accident;
>
> 5. I am familiar with the Durham County Public School guidelines for motor vehicles and pedestrians using this road on which the Accident occurred;
>
> 6. There is no written policy regarding use of this road;
>
> 7. The other coaches and I have on a number of occasions asked that the student athletes driving their vehicles from the school buildings to the football field not use this road;
>
> 8. I do not recall giving nor hearing another coach give a verbal reminder of this request on the day of the Accident;
>
> 9. Student athletes did sometimes drive their vehicles on this road to travel between the buildings and the athletic fields;
>
> 10. Other public vehicles and the school's gator also use this road to travel between the buildings and the athletic fields;
>
> 11. Football players are aware that both pedestrians walking to the football field and vehicles use this road;

12. There is enough room on this road for a vehicle to safely pass a pedestrian;

13. On October 3, 2016, I was driving down the service road next to the baseball field when I saw the gator in the roadway and a lot of people tending to someone;

14 I approached the gator and saw Guilford Archie in the back of the gator in distress;

15. It was obvious that the Accident had occurred moments before my arrival;

16. I began trying to assist in making Guilford Archie comfortable.

17. As I was holding Guilford Archie, I heard him say the following:

a. "It's my fault."

b. "I shouldn't have had my headphones on."

c. "I shouldn't have been dancing."

d. "I've messed up my football career."

e. "I won't be able to play again."

f. "I'm sorry, Coach."

18. I continued to try to provide comfort to Guilford Archie until the emergency personnel arrived, and I contacted his parents.

¶ 14 Plaintiff's own evidence shows that he was contributorily negligent, relieving Durham BOE of its burden of showing contributory negligence. *Proffitt*, 257 N.C. App. at 152, 809 S.E.2d at 204. Plaintiff's testimony and Robinson's affidavit clearly show that Plaintiff failed in his pedestrian duty "to maintain a lookout" in "an area where vehicles travel," *Patterson*, 265 N.C. App. at 629, 828 S.E.2d at 747, when he walked with his back to oncoming traffic, while listening to music via headphones and dancing in the road, and that this conduct contributed to his injury. As Plaintiff failed to maintain a safe lookout, the trial court properly granted summary judgment "when all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries[.]" *Blake*, 262 N.C. at 65, 136 S.E.2d at 216.

2. Gross Negligence

¶ 15 **[2]** Plaintiff next argues that Durham BOE's "willful and wanton" conduct was gross negligence. Plaintiff has not preserved this issue for appellate review as the record before us does not indicate that Plaintiff raised this argument before the trial court.

¶ 16 In his complaint, Plaintiff' alleged (1) negligence and (2) negligent infliction of emotional distress. In his reply to Defendant's answer, he pled the last clear chance doctrine in response to Durham BOE's affirmative defense of contributory negligence. Plaintiff did not provide this Court with a transcript of the summary judgment hearing. *See* N.C. R. App. P. 7(b) ("A party may order a transcript of any proceeding that the party considers necessary for the appeal."); N.C. R. App. P. 9(a) ("The components of the record on appeal include: the printed record, transcripts, exhibits and any other items . . . filed pursuant to this Rule 9."); *Miller v. Miller*, 92 N.C. App. 351, 353, 374 S.E.2d 467, 468 (1988) ("It is the appellant's responsibility to make sure that the record on appeal is complete and in proper form.") (citation omitted). As our appellate courts have long held, "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount[.]" *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quotation marks and citations omitted). Plaintiff cannot argue gross negligence for the first time on appeal.

¶ 17 Nonetheless, even assuming arguendo that Plaintiff's argument is properly before us, it is meritless. Gross negligence, if established, overcomes the defense of contributory negligence. *Sloan v. Miller Bldg. Corp.*, 119 N.C. App. 162, 167, 458 S.E.2d 30, 33 (1995). Gross negligence requires evidence tending to show that conduct is willful, wanton, or done with reckless indifference. *Yancey v. Lea*, 139 N.C. App. 76, 79, 532 S.E.2d 560, 562 (2000). Willful conduct is done purposefully and in deliberate violation of the rights of others. *Id.* Wanton conduct is "done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Parish v. Hill*, 350 N.C. 231, 239, 513 S.E.2d 547, 551-52 (1999) (citations omitted).

¶ 18 A plaintiff must come forward with particular evidence of gross negligence to overcome summary judgment. *See Lashlee v. White Consol. Indus., Inc.*, 144 N.C. App. 684, 694, 548 S.E.2d 821, 827 (2001) (holding that plaintiffs "failed to present sufficient evidence to support a finding that defendants were willfully or wantonly negligent"); *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 51, 524 S.E.2d 53, 60 (1999) (holding that plaintiff's evidence, tending to show that a business took no

security measures to protect customers despite being located in a high crime area, was not sufficient evidence of gross negligence); *Sawyer v. Food Lion, Inc.*, 144 N.C. App. 398, 403, 549 S.E.2d 867, 870 (2001) (holding that plaintiff's evidence, showing that defendant-employer "allow[ed] holes in the floor to remain uncovered," did not establish willful or wanton conduct).

¶ 19 Plaintiff argues that a jury could have determined that Durham BOE's "failure to have a policy, or having a policy and not enforcing it, regarding the access road and safety of students rose to the level of willful and/or wanton conduct." We disagree. *Lashlee*, *Benton*, and *Sawyer* require that Plaintiff provide particular evidence of Durham BOE's alleged gross negligence, and Plaintiff has failed to do so here. As BOE was not grossly negligent, Plaintiff's contributory negligence bars his recovery. *Sorrells*, 332 N.C. at 648, 423 S.E.2d at 73-74.

III. Conclusion

¶ 20 As there was no genuine issue of material fact and Durham BOE was entitled to judgment as a matter of law, the trial court properly granted summary judgment for Durham BOE. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c). The trial court's order is affirmed.

AFFIRMED.

Judges DIETZ and JACKSON concur.

DEAN v. ROUSSEAU

[283 N.C. App. 480, 2022-NCCOA-376]

RICKY DEAN, ADMINISTRATOR OF THE ESTATE OF
OLIVIA DARLENE FLORES, PLAINTIFF
v.
RAVON WALSER ROUSSEAU, DEFENDANT

No. COA21-518

Filed 7 June 2022

Process and Service—wrongful death—uninsured motorist insurance—untimely service on carriers

The trial court did not err by dismissing plaintiff's wrongful death case, pursuant to Civil Procedure Rule 12(b)(6), where two unnamed defendant uninsured motorist carriers were served with the summons and complaint through the Commissioner of Insurance after the applicable statute of limitations period expired.

Appeal by plaintiff from Order entered 17 May 2021 by Judge John O. Craig in Forsyth County Superior Court and from Order entered 25 May 2021 by Judge Martin B. McGee in Forsyth County Superior Court. Heard in the Court of Appeals 22 February 2022.

Morrow Porter Vermitsky & Taylor, PLLC, by John N. Taylor, Jr., for plaintiff-appellant.

Sue & Anderson L.L.P., by Gary K. Sue, for unnamed defendant-appellee Southern General Insurance Company.

Bowden Gardner & Hill, P.C., by Spencer L. Hill, for unnamed defendant-appellee National General Insurance Company.

GORE, Judge.

¶ 1 Plaintiff Ricky Dean, administrator of the estate of Olivia Darlene Flores, appeals from two Orders granting Motions to Dismiss filed by unnamed defendants Southern General Insurance Company ("Southern General") and National General Insurance Company ("National General"). For the reasons stated herein, we affirm the Orders of the trial court.

I. Background

¶ 2 On 12 November 2020, plaintiff filed a complaint for wrongful death and survivorship damages against Ravon Walser Rousseau. Plaintiff alleged that on 14 November 2018, Ms. Flores was involved in a collision

with Mr. Rousseau while operating a taxi cab for Taxi Universal, Ms. Flores's employer. The complaint alleges that at the time of the collision with Ms. Flores, Mr. Rousseau was racing with a second vehicle and driving at excessive speeds. The driver of the second vehicle fled the scene and was never identified. Mr. Rousseau also fled the scene but was later apprehended and charged with second-degree murder and felonious hit and run; he pled guilty and was sentenced to fifteen years in prison. Ms. Flores was pronounced dead at the scene. Mr. Rousseau did not have car insurance, however, Ms. Flores's insurance policies with Southern General and National General included uninsured motorist coverage.

¶ 3 On 12 November 2020, a Civil Summons was issued against Southern General. Service of the Summons and Complaint as to Southern General and National General[1] were made through the Commissioner of Insurance on 1 December 2020 and 26 January 2021, respectively. Southern General filed an Answer and Motion to Dismiss on 29 December 2020 and National General filed an Answer and Motion to Dismiss on 15 February 2021. Both Southern General and National General claimed that plaintiff's claim should be dismissed for failure to state a claim upon which relief may be granted pursuant to North Carolina Rules of Civil Procedure Rule 12(b)(6) because plaintiff failed to serve the unnamed defendants within the applicable statute of limitations.

¶ 4 The trial court granted Southern General's motion to dismiss pursuant to Rule 12(b)(6) on 17 May 2021 and National General's motion to dismiss pursuant to Rule 12(b)(6) on 20 May 2021. The trial court entered an Amended Default Judgment against Mr. Rousseau on 8 June 2021. Plaintiff entered Notice of Appeal from the two Orders granting the Southern General and National General Motions to Dismiss on 1 July 2021.

II. Discussion

¶ 5 Plaintiff appeals from grants of a 12(b)(6) motion to dismiss. On appeal, plaintiff argues that decisions from this Court regarding similarly situated litigants are inconsistent. This line of cases includes *Thomas v. Washington*, 136 N.C. App. 750, 525 S.E.2d 839 (2000), *Davis v. Urquiza*, 233 N.C. App. 462, 757 S.E.2d 327 (2014), and *Powell v. Kent*,

1. The record does not include the Civil Summons issued to National General. Generally, failure to include the Civil Summons would frustrate review of the issue before this Court. However, we were able to piece together enough of the facts to resolve the issue presented.

257 N.C. App. 488, 810 S.E.2d 241, *disc. rev. denied*, 371 N.C. 338, 813 S.E.2d 857 (2018). These cases have been interpreted as standing for the proposition that service of the complaint and summons on an unnamed defendant uninsured motorist carrier must occur before the expiration of the applicable statute of limitations.

¶ 6 "The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint." *Simpson v. Sears*, 231 N.C. App. 412, 414, 752 S.E.2d 508, 509 (2013). "In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

¶ 7 In order for an uninsured motorist carrier to be bound by a judgment against an uninsured motorist, the insurer must be "served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law . . . ." N.C. Gen. Stat. § 20-279.21(b)(3)(a) (2021). "The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name." *Id.*

¶ 8 N.C. Gen. Stat. § 20-279.21(b)(3)(a) does not specify a time limitation for service of the uninsured motorist carrier. However, the North Carolina Rules of Civil Procedure provide that "[a] civil action is commenced by filing a complaint with the court." N.C. R. Civ. P. 3(a) (2021). The Rules go on to state that "[u]pon the filing of a complaint, summons shall be issued forthwith, and in any event within five days." N.C. R. Civ. P. 4(a). "Personal service or substituted personal service of summons as prescribed by Rule 4(j) and (j1) must be made within 60 days after the date of the issuance of summons." N.C. R. Civ. P. 4(c).

¶ 9 In *Thomas*, the plaintiff instituted an action to recover for personal injuries from a car accident before the statute of limitations applicable to automobile negligence expired and properly issued summons against both individual defendants, who were properly served. *Thomas*, 136 N.C. App. at 753, 525 S.E.2d at 841. A series of alias and pluries summonses were issued and directed to the named defendants, but the uninsured

motorist carrier was not served within the statutory time limit. *Id.* The plaintiff argued that because her action against the uninsured motorist carrier arose from a contract of insurance, the statute of limitations did not apply, and that her action was kept alive through alias and pluries summonses. *Id.* at 754, 525 S.E.2d at 842. This Court rejected the plaintiff's arguments in affirming the trial court's grant of summary judgment, holding that the applicable statute of limitations, "which begins running on the date of the accident, also applies to the uninsured motorist carrier[]" and that "the provisions relating to issuance of alias or pluries summonses did not apply, as both individual defendants were served personally with the original summons." *Id.* at 754-56, 525 S.E.2d at 842-43.

¶ 10 In *Davis*, the plaintiff filed a claim for personal injuries resulting from a vehicular collision against the defendant, an uninsured motorist, on 31 May 2012. *Davis*, 233 N.C. App. at 463, 757 S.E.2d at 329. On 5 June 2012, counsel for the plaintiff mailed a copy of the summons and complaint to a representative of the uninsured motorist carrier (who was not a proper person upon which service of process could be made). *Id.* The uninsured motorist carrier's representative received these documents on 7 June 2012 and the uninsured motorist carrier filed an answer to plaintiff's complaint on 6 July 2012, asserting the defenses of insufficiency of process as well as the statute of limitations. *Id.* The plaintiffs caused alias and pluries summonses to be issued on 20 July 2012, 25 September 2012, and 10 December 2012. *Id.* On 2 January 2013, the plaintiffs sent by certified mail a copy of the summons and complaint to the Commissioner of Insurance in order to be served upon the uninsured motorist carrier. This Court, in affirming the trial court's dismissal of the plaintiff's complaint, stated that mere notice to the uninsured motorist carrier is insufficient under N.C. Gen. Stat. § 20-279.21(b); "the carrier must be formally served with process." *Id.* at 464, 757 S.E.2d at 330. The Court went on to state that "[w]here a plaintiff seeks to bind an uninsured motorist carrier to the result in a case, the carrier must be served by the traditional means of service, within the limitations period." *Id.* at 467, 757 S.E.2d at 332.

¶ 11 In *Powell*, the plaintiff filed a complaint for personal injury and had summons issued against the individual defendants on 4 February 2009. *Powell*, 257 N.C. App. at 488, 810 S.E.2d at 242. Summons were issued to the uninsured motorist carrier on 24 February 2009 and service of the summons and complaint as to the uninsured motorist carrier was made through the Commissioner of Insurance on 31 March 2009. *Id.* The complaint was voluntarily dismissed on 13 December 2013 and refiled on

24 February 2014. *Id.* at 488-89, 810 S.E.2d at 242. The uninsured motorist carrier was served through the Commissioner of Insurance with the summons and refiled complaint on 20 March 2014. *Id.* at 489, 810 S.E.2d at 242. The complaint was again voluntarily dismissed on 2 November 2014. *Id.* Plaintiff refiled his complaint on 26 February 2016. *Id.* The uninsured motorist company moved for summary judgment because it was served with the summons and complaint after the statute of limitations had expired, which the trial court granted. *Id.* at 490, 810 S.E.2d at 243. This Court concluded that our holdings in *Thomas* and *Davis* required the Court to affirm the trial court's grant of summary judgment. *Id.* at 493, 810 S.E.2d at 245. However, this Court noted:

> The holdings in *Thomas* and *Davis* appear to be inconsistent with other applications of the statute of limitation which hold that cases are timely when filed within the statute of limitation, with service of process permitted within the time frames set forth in Rule 4 of the North Carolina Rules of Civil Procedure, even when service is accomplished after the statute of limitation has expired. While we are unable to discern any requirement in N.C. Gen. Stat. § 20-279.21(b)(3)(a) that specifically requires in an uninsured motorist action that service of process also be accomplished before the date the statute of limitation expires, we are bound by the prior determinations in *Thomas* and *Davis*. Given this inconsistent application of the statutes of limitations for similarly situated litigants, this situation appears ripe for determination or clarification by our Supreme Court or Legislature.

Id. at 492, 810 S.E.2d at 244-45.

¶ 12 In the case *sub judice*, the action for wrongful death was filed on 12 November 2020, before the applicable two-year statute of limitations expired on 14 November 2020. *See Brown v. Lumbermens Mut. Casualty Co.*, 285 N.C. 313, 319, 204 S.E.2d 829, 833 (1974) (applying the two-year statute of limitations for wrongful death actions to claims brought by a deceased's estate seeking to recover from an uninsured motorist provision). The civil summons was issued that same day. Southern General and National General were then served with the summons and complaint through the Commissioner of Insurance on 1 December 2020 and 26 January 2021, respectively. Neither our Supreme Court nor General Assembly has addressed this issue since this Court's holding in *Powell*. Thus, just as we were in *Powell*, we are bound by this Court's

prior decisions and must affirm the trial court's dismissal of plaintiff's actions because both Southern General and National General were served after the statute of limitations expired. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

¶ 13 However, just as in *Powell* we note that the rule established by this Court in *Thomas* and *Davis* seems inapposite and inconsistent with this State's Rules of Civil Procedure and how the statute of limitations is evaluated in other civil matters. Thus, we once again request clarification and further guidance from either our Supreme Court or General Assembly.

III. Conclusion

¶ 14 For the foregoing reasons the Orders of the trial court are affirmed.

AFFIRMED.

Judges INMAN and ZACHARY concur.

IN RE J.C.

[283 N.C. App. 486, 2022-NCCOA-377]

IN THE MATTER OF J.C., MINOR JUVENILE

No. COA21-666

Filed 7 June 2022

1. Child Visitation—minimum duration—sufficiency of specification—multiple orders read in conjunction

The trial court's order in a child neglect proceeding sufficiently specified the minimum duration of visitation between the parents and their daughter as required by N.C.G.S. § 7B-905.1(b) where, when read in conjunction with a prior order in the case that was incorporated by reference, it clearly provided that the parents were authorized one visit per week for one hour.

2. Child Visitation—limited to virtual visits—best interests of child

In a child neglect proceeding, the trial court's decision to grant the parents only virtual visitation with their daughter was supported by its findings and conclusions that virtual visitation was in the child's best interests, and necessarily encompassed a determination that in-person visits would not be appropriate or in the child's best interests, even though not explicitly stated.

3. Child Abuse, Dependency, and Neglect—neglect—findings—siblings adjudicated neglected—domestic violence in home

The trial court's unchallenged findings of fact supported its adjudication of the child as neglected where three older siblings had been adjudicated neglected and were in the custody of the department of social services (DSS), the child's parents were involved in a domestic violence incident while they were the child's sole caretakers, and the parents were not in compliance with their case plan because they refused to allow DSS access to the child and had not completed domestic violence classes.

4. Child Abuse, Dependency, and Neglect—judicial bias—comments directed at parents during hearing

In a child neglect matter, where the father failed to allege a specific legal error arising from the trial court's comments from the bench regarding the parents' lack of effort in the case, there was no merit to his contention that the comments, even if some of them may have been unnecessary and unadvisable, constituted an abuse of discretion.

5. Child Abuse, Dependency, and Neglect—case plan requirements—nexus to reason for removal—evidentiary support

In a child neglect proceeding, the trial court did not err by including in the disposition order case plan requirements for the father regarding drug screens, housing, and employment, where those requirements had a sufficient nexus with the conditions that led to the removal of the child from the home, including a domestic violence incident in the home that was based, in part, on the father's drinking, and the parents' refusal to allow the department of social services to have access to the child, which created a concern about the safety and stability of the home environment.

6. Child Visitation—right to file motion for review—no notice to parent—remand required

In an appeal from an initial disposition order in a child neglect proceeding, where the trial court failed to inform the father of his right to file a motion for review of the visitation plan as required by N.C.G.S. § 7B-905.1(d), the matter was remanded for the court to enter an order in compliance with the statute.

Appeal by Respondents from order entered 7 April 2021 by Judge Caitlyn Evans in Cumberland County District Court and from order entered 27 July 2021 by Judge Cheri Siler Mack in Cumberland County District Court. Heard in the Court of Appeals 27 April 2022.

Patrick A. Kuchyt for Petitioner-Appellee Cumberland County Department of Social Services.

Richard Croutharmel for Respondent-Appellant Mother.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky Brammer, for Respondent-Appellant Father.

K&L Gates LLP, by Leah D'Aurora Richardson, for guardian ad litem.

GRIFFIN, Judge.

¶ 1 Respondents appeal from orders adjudicating their minor child, Janet[1], a neglected juvenile and continuing custody of Janet with Cumberland County Department of Social Services. Respondents argue that the trial court's disposition order must be vacated because the order's visitation provisions did not provide the minimum duration of visits and allowed only virtual visits without making required findings. Respondent Father argues that the trial court erred by (1) adjudicating Janet a neglected juvenile; (2) making prejudicial statements from the bench; (3) ordering Father to complete irrelevant case plan requirements; and (4) failing to inform Father of his right to file a motion for review of the visitation plan.

¶ 2 We hold that the trial court erred by failing to inform Father of his right to file a motion for review of the visitation order. We therefore remand this matter to the trial court with instructions to inform Father of his right to file a motion for review. We otherwise affirm the trial court's orders.

I. Factual and Procedural Background

¶ 3 In October 2020, CCDSS filed a juvenile petition alleging that Janet was a neglected juvenile after Respondents had "engaged in a physical altercation with each other." "Father stated to law enforcement that Respondent Mother was upset because he had been drinking and [that they had] pushed each other." After observing "scratches" on Father, law enforcement placed Mother under arrest and "charged [her] with simple assault." Janet "was in Respondents' care at the time of the altercation but was not present."

¶ 4 "At the time of the filing of the petition [by CCDSS]," Mother had "three older children who [were] in the custody of CCDSS. . . . Father is the father of two of the older children." The older children were each "adjudicated neglected based on Respondents' lack of proper care . . . in that . . . Mother engaged in a physical altercation with the oldest juvenile, Respondents would not allow the CCDSS social worker to have access to the children, and Respondents failed to provide necessary remedial and medical care for one of the children."

¶ 5 On 10 March 2021, a hearing was held on the petition filed by CCDSS, after which the trial court entered an order adjudicating Janet a neglected juvenile and temporarily placing her in the custody of CCDSS. The order provided for in-person visitation between Respondents and

1. We use a pseudonym to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b).

Janet. Following a disposition hearing, a disposition order was entered continuing custody of Janet with CCDSS and providing that Janet "be placed with [her] paternal grandparents [in California.]" The order provided that "supervised virtual visitation with the juvenile . . . is in the juvenile's best interest" and established a virtual visitation plan.

¶ 6 Respondents timely filed notice of appeal from the trial court's adjudication and disposition orders.

II. Analysis

¶ 7 Respondents argue that the trial court's disposition order must be vacated because the order's visitation provisions did not provide the minimum duration of visits and limited visits to virtual visits only without making required findings. Father argues that the trial court erred by (1) adjudicating Janet a neglected juvenile; (2) making prejudicial statements from the bench; (3) ordering Father to complete irrelevant case plan requirements; and (4) failing to inform Father of his right to file a motion for review of the visitation plan.

A. Visitation Order

¶ 8 Respondents argue that the trial court erred by (1) failing to provide the minimum duration of visits in the disposition order and (2) limiting all visits to virtual visits only without making required findings. We disagree.

¶ 9 "We review disposition orders, including visitation determinations, for abuse of discretion. 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." *Matter of K.W.*, 272 N.C. App. 487, 495, 846 S.E.2d 584, 590 (2020) (citations omitted).

1. Minimum Duration of Visits

¶ 10 **[1]** With respect to the minimum duration of visits, N.C. Gen. Stat. § 7B-905.1(b) provides:

> If the juvenile is placed or continued in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved or ordered by the court. The plan shall indicate the minimum frequency and length of visits and whether the visits shall be supervised.

N.C. Gen. Stat. § 7B-905.1(b) (2021).

¶ 11 The trial court's disposition order contained the following visitation provisions:

> 10. Respondent Parents are hereby authorized virtual visits with the juvenile at 12 p.m. on Thursdays, with 24-hour notice. If no notice is given, there shall be no visits.
>
> 11. When the juvenile is placed in California [with her grandparents], Respondent Parents are authorized virtual/telephone visits up to (30) thirty minutes, two times per week.
>
> . . .
>
> 14. The Court's previous orders not inconsistent with this order shall remain in effect.

¶ 12 Respondents argue that, by not stating the specific duration of visits in paragraph No. 10 above, the trial court committed reversible error. However, Respondents overlook that paragraph No. 14 states that "previous orders not inconsistent with this order shall remain in effect." The disposition order further stated that "the [c]ourt incorporates all the previous findings made from the Adjudication Hearing heard on March 10, 2021, as if set forth fully herein." In the order entered pursuant to that hearing, the trial court ordered that "Respondent Parents *shall receive one (1) hour supervised visitation* with the juvenile once a week, supervised by [CCDSS]." (Emphasis added).

¶ 13 "Viewing the[] two orders in conjunction, it is clear that the visitation plan authorizes supervised[]" virtual visits, once per week, for one hour. *In re L.Z.A.*, 249 N.C. App. 628, 639, 792 S.E.2d 160, 169 (2016) (affirming a visitation plan in a disposition order where the order referred to a previous visitation plan which specified the minimum duration of visitation); *In re J.W.*, 241 N.C. App. 44, 51, 772 S.E.2d 249, 255 (2015) (affirming a visitation plan in a disposition order where the order provided that all previous orders remained in full effect, and where a prior order specified the minimum duration of visitation). As in *L.Z.A.* and *J.W.*, we conclude that the two orders, read together, satisfied N.C. Gen. Stat. § 7B-905.1(b).

2. Virtual Visitation

¶ 14 **[2]** With respect to visitation, "[a]n order that removes custody of a juvenile from a parent . . . or that continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of

the juvenile consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905.1(a) (2021). "Conversely, the court may prohibit visitation or contact by a parent when it is in the juvenile's best interest[.]" *Matter of J.L.*, 264 N.C. App. 408, 421, 826 S.E.2d 258, 268 (2019) (citing N.C. Gen. Stat. § 7B-905.1(a) (2017)).

> [I]n the absence of findings that the parent has forfeited [his or her] right to visitation or that it is in the child's best interest to deny visitation[,] the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place[,] and conditions under which such visitation rights may be exercised. As a result, even if the trial court determines that visitation would be inappropriate in a particular case or that a parent has forfeited his or her right to visitation, it must still address that issue in its dispositional order and either adopt a visitation plan or specifically determine that such a plan would be inappropriate in light of the specific facts under consideration.

Id. at 421–22, 826 S.E.2d at 268.

¶ 15 Regarding virtual visitation, N.C. Gen. Stat. § 50-13.2(e)(3) provides that "[e]lectronic communication may not be used as a replacement or substitution for custody or visitation." N.C. Gen. Stat. § 50.13.2(e)(3). Instead, electronic communication may only "be used to supplement visitation with the child." *Id.*; *see also In re T.R.T.*, 225 N.C. App. 567, 573–74, 737 S.E.2d 823, 828 (2013) ("Nothing in our juvenile code states that electronic communication may be substituted for in-person visitation.").

¶ 16 Here, the trial court made the following findings with respect to visitation in its disposition order:

> 37. The Respondent Parents have been authorized one (1) hour supervised visitation with the juvenile at [CCDSS] or in the community, once a week, supervised by the [CCDSS]. . . . If the Respondent Parents miss two (2) visits, the visits are to be moved back to bi-weekly. If the Respondents miss visits again, the Department was ordered to cease all visits.
>
> 38. Respondent Mother has not been consistently attending the visits. In fact, on February 24, 2021,

> Respondent Parents ended the visitation within twenty minutes because the juvenile was crying. Respondent Father set up virtual visits with the juvenile, but Respondent Mother has not been present. There have been no recent video visitations between the juvenile and Respondent Father.
>
> 39. On or about March 10, 2021, at the Adjudication and Temporary Disposition hearing, [CCDSS] made the following findings: "*That the Respondent Mother has only visited with the juvenile once. Respondent Mother continues to testify that it is too hard for her to visit with the juvenile inasmuch as the juvenile is sad and cries during the visitation. Respondent Mother stated the visitations are more for [CCDSS] than it is for her daughter and [she] was not going to put her daughter through that experience. At the last hearing Respondent Mother informed the Court that she desires to resume visitation.* That as of this hearing, Respondent Mother has not visited with the juvenile . . . .
>
> 40. Respondent Father continues to be the only Respondent Parent visiting with the juvenile.

¶ 17 Based on the foregoing findings, the trial court made the following conclusions of law and orders with respect to visitation:

> 4. That Respondent Parents are not fit and proper persons for the care, custody, and control of the juvenile. That Respondent Mother is a fit and proper person to have supervised virtual visitation with the juvenile and such visitation is in the juvenile's best interest. That Respondent Father is a fit and proper person to have supervised virtual visitation with the juvenile and such visitation is in the juvenile's best interest.
>
> 5. That the juvenile . . . should be placed with the paternal grandparents [in California]. That placement of the juvenile . . . with her paternal grandparents is in the juvenile's best interest.
>
> . . .
>
> 10. Respondent Parents are hereby authorized virtual visits with the juvenile at 12 p.m. on Thursdays,

> with 24-hour notice. If no notice is given, there shall be no visits.
>
> 11. When the juvenile is placed in California, Respondent Parents are authorized virtual/telephone visits up to thirty (30) minutes, two times per week.

¶ 18 Based on the foregoing findings and conclusions, it is clear that the trial court determined that virtual visitation would be in Janet's best interests and that in-person visitation "would be inappropriate in light of the specific facts under consideration." *Matter of J.L.*, 264 N.C. App. at 421–22, 826 S.E.2d at 268. The trial court's findings indicate that Mother failed to exercise her visitation rights on multiple occasions, and under the original visitation plan, visits were to be terminated if Father or Mother missed more than two visitation appointments. The findings also indicate that Father had already "set up virtual visits with the juvenile" but that "[t]here have been no recent video visitations between the juvenile and Respondent Father." Additionally, in-person visitation would doubtlessly have been impracticable once Janet moved to California with her paternal grandparents. By establishing a video visitation plan, the trial court provided for visitation that Respondents would reasonably be able to comply with under the circumstances.

¶ 19 Lastly, by providing that "supervised virtual visitation with the juvenile" was "in the juvenile's best interest[,]" the trial court necessarily concluded that in-person visitation would *not* be in Janet's best interest. Although the trial court did not expressly find that in-person visitation would not be in Janet's best interest, "express findings on the children's best interests are not necessary when[,]" as here, "it is clear from the record that the court considered the children's best interests in making its visitation determination." *Matter of E.R.*, 278 N.C. App. 373, 2021-NCCOA-322 ¶ 38 (July 6, 2021) (unpublished) (citing *Matter of T.W.*, 250 N.C. App. 68, 77–78, 796 S.E.2d 792, 798 (2016)). Indeed, the relevant statute contains no provision stating that the trial court must expressly find that in-person visitation is inappropriate. Rather, the statute provides only that the order "shall provide for visitation that is in the best interests of the juvenile . . . , *including no visitation*." N.C. Gen. Stat. § 7B-905.1(a) (emphasis added). Respondents' argument is therefore without merit.

B. Neglect

¶ 20 **[3]** Father argues that the trial court erred by adjudicating Janet a neglected juvenile because the trial court "did not find a substantial risk of harm, and all of the evidence does not support one." We disagree.

¶ 21 "The role of this Court in reviewing a trial court's adjudication of neglect and abuse is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact[.]" *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citations and internal quotation marks omitted). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.*

¶ 22 Father does not challenge any of the trial court's findings of fact in the adjudication order. The findings of fact in the order are therefore binding on appeal. *Id.* "[W]e review a trial court's conclusions of law *de novo*[.]" *In re M.H.*, 272 N.C. App. 283, 286, 845 S.E.2d 908, 911 (2020) (citation omitted).

¶ 23 N.C. Gen. Stat. § 7B-101(15) defines a "[n]eglected juvenile" in pertinent part as:

> Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker does any of the following:
>
> a. Does not provide proper care, supervision, or discipline.
>
> b. Has abandoned the juvenile.
>
> c. Has not provided or arranged for the provision of necessary medical or remedial care.
>
> . . .
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.

N.C. Gen. Stat. § 7B-101(15) (2021).

¶ 24 "In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives . . . in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." *Id.* "The fact of prior abuse, standing alone, however, is not sufficient to support an adjudication of neglect. Instead, this Court has generally required the presence of other factors to suggest that the neglect or abuse will be repeated." *Matter of K.L.*, 272 N.C. App. 30, 51, 845 S.E.2d 182, 197 (2020) (citations and internal quotations marks omitted). These factors "include the presence of domestic violence in the home and current and ongoing substance abuse issues, unwillingness

to engage in recommended services or work with or communicate with DSS regarding prior abuse and neglect, and failing to accept responsibility for prior adjudications[.]" *Id.* at 51–52, 845 S.E.2d at 197–98 (citations omitted).

¶ 25 In this case, the trial court's adjudication order contained the following findings of fact:

> 13. [CCDSS] received a Child Protective Services (CPS) referral on 8/28/2020 concerning the safety of [Janet]
>
> . . .
>
> 15. At the time of the filing of the petition, Respondent Mother ha[d] three older children who [were] in the custody of CCDSS. Respondent Father is the father of two of the older children. On 8/2/2019, the children were adjudicated neglected based on Respondent's lack of proper care and supervision in that Respondent Mother engaged in a physical altercation with the oldest juvenile, Respondents would not allow the CCDSS social worker to have access to the children, and Respondents failed to provide necessary remedial and medical care for one of the children. . . .
>
> 16. As of the date of the filing of this petition, Respondents [were] still engaged in the plan to alleviate the conditions for which the older children were removed from the care of [Respondents]. . . .
>
> 17. On 8/1/2020, [Respondents] engaged in a physical altercation with each other. Respondent Father stated to law enforcement that Respondent Mother was upset because he had been drinking and [that they had] pushed each other. A Fayetteville Police officer observed scratches on Respondent Father. As a result, Respondent Mother was arrested and charged with simple assault. The child was in Respondents' care at the time of the altercation but was not present.
>
> 18. A safety assessment was completed on August 30, 2020 with a 45 day plan for the child. The child was not removed at the time. Respondent Mother and Respondent Father allowed [the] CCDSS social

> worker access to the child on 9/2/2020 and 9/17/2020. Since 9/17/2020, Respondents have not allowed the social worker access to the child as required by the plan.
>
> 19. The Respondent Parents were ordered by the Court in the sibling matter . . . to complete Domestic Violence classes and neither parent has completed those classes as of the date of the filing of this Petition. Respondent Mother has started the classes.
>
> 20. The Court finds that the evidence presented rises to the level of neglect pursuant to N.C. Gen. Stat. § 7B-101(15). . . . The Court finds neglect based on the very young age of the juvenile and that the Respondent Parents were the sole caretakers of the juvenile. The Respondent Parents failed to complete domestic violence services in the sibling matters, along with other services, and domestic violence continued in the home thusly creating an environment injurious to a very young juvenile.

¶ 26 The trial court's findings of fact support the adjudication of Janet as neglected. At the time the juvenile petition was filed, three of Respondents' older children had been adjudicated neglected and were in the custody of CCDSS, a domestic violence incident between Respondents occurred while Respondents were the sole caretakers of Janet, Respondents refused to allow CCDSS social workers access to Janet as required by the case plan, and neither parent had completed the domestic violence classes they were ordered to complete as part of a prior adjudication of neglect. Each of these factors support the trial court's adjudication of Janet as neglected. *See Matter of K.L.*, 272 N.C. App. at 51–52, 845 S.E.2d at 197–98 (citations omitted) ("[F]actors that suggest that the neglect or abuse will be repeated include the presence of domestic violence in the home . . . , unwillingness to engage in recommended services or work with or communicate with DSS regarding prior abuse and neglect, and failing to accept responsibility for prior adjudications[.]" (citations omitted)).

C. Prejudicial Statements

¶ 27 **[4]** Father next argues that the trial court abused its discretion by making prejudicial statements from the bench. We disagree.

¶ 28 Father argues that the following remarks by the trial judge show "a concerning bias against" Respondents and constitute an abuse of discretion:

I'm going to tell you guys how this is going to have, what's going to happen. I'm going to tell you how this is going to go. I send her out to California. At the first permanency planning hearing, the next 90 days, right, they're going to have done absolutely nothing, because they're going to throw their hands up – I'm just being real. They're going to throw their hands up and say, You know what, the child is out there, we're not getting her back, she's been in my business, she got on my nerves, I can't stand it anyway, so guess what, I'm not doing a thing. But they're not doing it because, guess what, the child is already gone, so you all are going to keep saying that I'm going to reunify, but you've sent my child to California, and I now don't see her even though I get to see her for a week now, and I'm not doing it. For the week, the hour, guess what, I'm not doing it now at all.

They're not going to do one thing. Then we're going to come back here and I'm going to set a second permanency planning and I'm going to be at the end of, what's that, where are we, May, June, July, August, August, September, October, November, right before the end of the year I'm going to set the second one, and I'm going to say they continue to act inconsistent with their constitutional right, they still have not done one thing, they're not doing one thing, I'm going to close the file, the child's going to be gone. But if you're saying that reunification is an option? This is -- just hear me out. What I'm trying to tell them is, they're either going to get on board right now or I am going to be sending, because I'm going to make all of these findings, after the first permanency plan I'm going to tell them that the permanency plan needs to be guardianship with other suitable persons or custody with other suitable persons, and reunification to be, reunification and custody could be with someone else, because they're not going to do it, because – they're asking now, Give me one more chance, give me one more chance. I have given a million chances on less things, or more things.

So the issue is, I hate that I might lose this, but then again, if that's what's going to happen, I don't want

> them ping-ponging because, see, I don't want us to do, send, let them start working with us because they know she's going to go and then they fall off and they're not going to do it.

¶ 29 Father also provides in his brief that "the court appeared confused about the facts of the case[] while ordering disposition[,]" "refused to accept [Father's] employment[,]" "stated because [Father] was working for cash, [Father] was not paying his taxes[,]" and "refused to accept [Mother's] prescriptions that she provided DSS unless she physically provided the [pill] bottle itself."

¶ 30 Although we find some of the trial judge's remarks unnecessary and unadvisable, Father fails to allege any particular legal error resulting from the remarks made by the trial judge and cites no law on point to support his argument. Father's argument is therefore without merit.

D. Case Plan Requirements

¶ 31 **[5]** Father argues that the trial court erroneously "ordered [Father] to complete irrelevant case plan requirements that had no nexus to Janet's removal conditions." Specifically, Father argues that "there is no evidence as to why [he] should have to provide random [drug] screens or meet DSS' approval regarding housing and employment[,]" contending that "[t]he requirements are unsupported and should be struck." We disagree.

¶ 32 Section 7B-904(d1) of our General Statutes provides in pertinent part:

> At the dispositional hearing or subsequent hearing, the court may order the parent, guardian, custodian, or caretaker served with a copy of the summons pursuant to G.S. 7B-407 to do any of the following:
>
> . . .
>
> (3) Take appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker.

N.C. Gen. Stat. § 7B-904(d1)(3) (2021).

¶ 33 "For a court to properly exercise the authority permitted by this provision, there must be a nexus between the step ordered by the court

and a condition that is found or alleged to have led to or contributed to the adjudication." *In re T.N.G.*, 244 N.C. App. 398, 408, 781 S.E.2d 93, 101 (2015) (citation omitted). "However, the trial court is not limited to ordering services which directly address the reasons for the children's removal from a parent's custody. It may also order services which could aid in both understanding and resolving the possible underlying causes of the actions that contributed to the trial court's removal decision." *Matter of S.G.*, 268 N.C. App. 360, 368, 835 S.E.2d 479, 486 (2019) (citation and internal quotation marks omitted).

¶ 34 In this case, there was sufficient evidence for the trial court to require Father to "[c]omplete a substance abuse assessment" and "[p]articipate in random drug screens." The adjudication order included the following finding of fact, which was incorporated by reference in the disposition order requiring a substance abuse assessment and drug screenings:

> 17. On 8/1/2020, [Respondents] engaged in a physical altercation with each other. *Respondent Father stated to law enforcement that Respondent Mother was upset because he had been drinking and [that they had] pushed each other.* A Fayetteville Police officer observed scratches on Respondent Father. As a result, Respondent Mother was arrested and charged with simple assault. The child was in Respondents' care at the time of the altercation but was not present.

(Emphasis added). Accordingly, there was sufficient evidence for the trial court to conclude that a substance abuse assessment and drug screenings "could aid in both understanding and resolving the possible underlying causes of" domestic violence in the home. *Id.*

¶ 35 Father argues that the trial court's finding that "substance abuse [is] still an issue with Respondent[s]" is unsupported by the evidence. However, the trial court also found that Father "has submitted to random drug screens, but they are sporadic. . . . Father was a 'No Show' on January 22, 2020; February 17, 2020, and March 3, 2021. . . . The Court considers no shows as positive drug screens." Given Father's inconsistent compliance with drug screenings and the possibility that his drinking could have led to domestic violence in the home, we hold that there was sufficient evidence to require Father to complete a substance abuse assessment and participate in drug screenings.

¶ 36 With respect to Father's employment, a social worker testified at the disposition hearing that CCDSS had requested proof of income from

employment in May of 2021 but "did not receive an email back from him." She further testified that she had "only received one" pay stub from Father in 2020, which was "the last" and "only time that [she] received pay stubs." Although Father testified at the disposition hearing that he was working and was paid in cash, he did not provide any proof of employment other than the one pay stub he provided to CCDSS in 2020. The trial court thus did not err by requiring Father to provide proof of employment.

¶ 37 There was also sufficient evidence to require Father to maintain stable housing. The trial court's findings of fact, to which Respondents stipulated, included findings that domestic violence occurred in the home, that Respondents refused to allow CCDSS social workers access to Janet as required by the case plan, and that neither parent had completed the domestic violence classes they were ordered to complete as part of a prior adjudication of neglect. These factors indicate that Respondents may not be maintaining a safe and stable home environment for Janet. The trial court thus did not err by ordering Father to maintain stable housing.

E. Motion for Review

¶ 38 **[6]** Father argues that the trial court erred by "fail[ing] to inform [Father] of his right to file a motion for review" of the visitation plan, contending that "[t]he order must be vacated and remanded." We agree that the trial court erred by failing to inform Father of his right to file a motion for review. We therefore remand this matter to the trial court to so inform Father of his right, but we do not vacate the order.

¶ 39 Pursuant to N.C. Gen. Stat. § 7B-905.1(d), "[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) (2021). "This Court has held that a trial court's failure to inform a party of this right in a permanency planning order can constitute reversible error." *Matter of K.W.*, 272 N.C. App. 487, 497, 846 S.E.2d 584, 591 (2020) (citation omitted). Unlike a permanency planning order, however, "this appeal arises from an initial disposition order, which the trial court is required to review 'within 90 days from the date of the initial disposition hearing.' " *Id.* at 498, 846 S.E.2d at 591 (quoting N.C. Gen. Stat. § 7B-905(b) (2019)). This Court held in *K.W.* that, on appeal "from an initial disposition order," we are only required to remand the matter to the trial court to "enter an order compliant with N.C. Gen. Stat. § [7B-]905.1(d)." *Id.* at 498, 846 S.E.2d 591–92. As in *K.W.*, we remand

this matter to the trial court to enter an order in accordance with section 7B-905.1(d) but do not vacate the order.

III. Conclusion

¶ 40 For the foregoing reasons, we remand this matter to the trial court with instructions to inform Father of his right to file a motion for review of the visitation plan. We otherwise affirm the trial court's orders.

AFFIRMED IN PART; REMANDED.

Judges DIETZ and JACKSON concur.

IN RE S.O.C., A MINOR JUVENILE

No. COA21-681

Filed 7 June 2022

Termination of Parental Rights—findings of fact supporting termination—circumstances existing at time of hearing—required

An order terminating a mother's parental rights in her son under N.C.G.S. § 7B-1111(a)(1), (2), and (6) was vacated and remanded where the trial court based all of its findings of fact on circumstances as they existed about thirty-one months before the termination hearing rather than on circumstances as they existed at the time of the hearing.

Appeal by Respondent-Mother from Order entered 22 July 2021 by Judge Robert Gilmore in Duplin County District Court. Heard in the Court of Appeals 6 April 2022.

Elizabeth Myrick Boone for petitioner Duplin County Department of Social Services.

Benjamin J. Kull for Respondent-Mother.

Brian C. Bernhardt, Attorney for Guardian ad Litem.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Respondent-Mother appeals from the trial court's Judgment Terminating Parental Rights entered 22 July 2021, which adjudicated grounds to terminate Respondent-Mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6) and further determining it was in the best interests of the juvenile to terminate Respondent-Mother's parental rights.[1] The Record tends to reflect the following:

¶ 2 Respondent-Mother is the mother of Samuel.[2] On 30 January 2018, the Duplin County Department of Social Services (DSS) filed a Juvenile Petition (Petition) alleging Samuel was neglected as defined by N.C. Gen. Stat. § 7B-101.

¶ 3 The Petition alleged that on 29 January 2018, DSS launched an investigation after Samuel reported that his older brother choked him with a belt causing Samuel to develop red marks on his neck and also placed a hand over Samuel's mouth causing him to almost pass out. Samuel reported that when he screamed for help, Respondent-Mother came into his bedroom. However, after Respondent-Mother evaluated the situation, she felt the juveniles "were fine" so she left the juveniles alone and did not seek medical treatment. Respondent-Father was home but also did not address the incident. The DSS report noted that a prior 21 November 2012 trial court order required Respondent-Mother to be supervised with the juveniles at all times.

¶ 4 On 2 February 2018 the trial court entered a Non-Secure Custody Order granting non-secure custody to DSS. On 4 April 2018, the trial court entered an Order adjudicating Samuel neglected as defined by N.C. Gen. Stat. § 7B-101. In its Disposition Order, the trial court ordered Respondent-Mother to obtain a psychiatric evaluation, an independent parenting evaluation, and to continue receiving intensive in-home services.

¶ 5 Respondent-Mother submitted to an individual Psychological Assessment at the Waynesboro Family Clinic with Dr. James T. Smith on 8 November 2018 (the Smith Evaluation). During the Smith Evaluation, Respondent-Mother completed an Adaptive Behavior Assessment System (ABAS) and Slosson Intelligence Test (SIT) to "determine her IQ and level of adaptive behavior so that her capacity to regain custody and appropriately parent her children could be determined."

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1. Respondent-Father did not appeal the TPR.

2. The juvenile is referred to by the parties' stipulated pseudonym.

¶ 6 Respondent-Mother and her children also submitted to a Child/Family Evaluation with Dr. Kristy Matala at Matala Psychological Services (the Matala Evaluation). The Matala Evaluation consisted of interviews with Respondent-Mother and her children which occurred over multiple sessions from 2 October 2018 to 12 November 2018. The Matala Evaluation indicated Respondent-Mother had "a need for . . . a competent supervisor who can act as a guardian by providing care to the children."

¶ 7 On 16 September 2020, approximately two years after the Matala and Smith Evaluations, the trial court entered a Six Month and Permanency Planning Review Order pursuant to N.C. Gen. Stat. § 7B-906.1. As part of the Order, the trial court reviewed the 2018 Smith Evaluation, which stated:

> a. That Respondent-Mother's adaptive behavior functioning is in the low to below average range;
>
> b. That Respondent-Mother has a Mild Intellectual disability, and is unlikely to progress beyond the 6th grade level in academic subjects; and
>
> c. That Respondent-Mother should be supervised while caring for her children.

¶ 8 The trial court also found that, due to the COVID-19 pandemic, Respondent-Mother's visitations were telephonically held and that "Respondent-Father is now required to initiate all phone calls [as] calls from Respondent-Mother have resulted in upsetting the juveniles." The trial court found the conditions which led to removal still existed and that it was in the best interest of the Juveniles to remain in DSS custody. The trial court Ordered Samuel's primary permanent plan as custody to a relative or other suitable person and for his secondary permanent plan to be reunification.

¶ 9 The trial court entered an Order of Continuance on 11 January 2021, and on 14 January 2021, the trial court entered an additional Six Month and Permanency Planning Review Order. The trial court found Respondent-Mother remained unemployed and continued to initiate phone calls with the juveniles against their previous Order. The trial court also found that a potential placement Respondent-Mother supplied to the trial court for evaluation "informed the Department she was adopting a six-week-old baby and would not be a possible placement for the Juveniles." The trial court found that "the best plan of care to achieve a safe, permanent home for Samuel within a reasonable

period of time is a primary plan of adoption . . . and a secondary plan of reunification." The trial court ordered Samuel's primary permanency plan changed to adoption and maintained his secondary permanency plan as reunification.

¶ 10 On 23 February 2021, approaching three years after the trial court adjudicated Samuel as neglected, DSS filed a Petition for the Termination of Parental Rights. In this Petition, DSS alleged grounds existed to terminate Respondent-Mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6) as follows:

> 12. That clear and convincing facts sufficient to terminate Respondent-Mother's parental rights exist and are specifically as follows:
>
> a. That the juvenile has been adjudicated to be a neglected juvenile as defined by N.C. Gen. Stat. §7B-101[15], having been so adjudicated in an Order entered April 4, 2018;
>
> b. That the juvenile is neglected as defined by N.C. Gen. Stat. §7B-101, and there is a high probability of continued neglect . . . .
>
> d. That the Respondent-Mother has willfully left the juvenile in foster care or placement outside of the home for more than twelve (12) months without reasonable progress under the circumstances being made in correcting those conditions which led to the removal of the juvenile. . .
>
> f. That the Respondent-Mother is incapable of providing for the proposed care and supervision of the juvenile, such that the juvenile is a neglected juvenile within the meaning of N.C. Gen. Stat. § 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future.

¶ 11 The trial court conducted a hearing on the Petition to Terminate Parental Rights on 9 June 2021. On 22 July 2021, now more than three years after the trial court adjudicated Samuel as neglected, the trial court entered its Judgment Terminating Parental Rights. In its Judgment, the trial court made Findings of Fact related to the family's history with DSS between 2008 and 2018. As it relates to Respondent-Mother, these findings included:

10. That the Juvenile has been under the legal custody of the Duplin County Department of Social Services since January 29, 2018.

11. That the Respondent Parents have an extensive history with the Duplin County Department of Social Services Chat pre-dates the Juvenile's birth which includes:

> a. That on November 15, 2008 the Department received a neglect report. The report was substantiated for injurious environment (domestic violence).
>
> b. That on December 04, 2009 the Department received a report for improper medical care which was substantiated. On January 7, 2010 the children were removed from the home and placed into foster care due to concerns of lack of heat in the home, roach infestation, significant medical needs of the children, and failure to thrive diagnosis for two of the three minor children. . . . On February 2, 2011, the court ordered that physical and legal custody be given back to the parents and the case was closed,
>
> c. That on September 1, 2010, the Department received a neglect report regarding the family. The family was found to be in need of services and case was transferred to case management,
>
> d. That on May 23, 2011, the Department received an abuse and neglect report regarding the family. . . . The case was substantiated for abuse and neglect (physical) . The children were placed into foster care and it was adjudicated on September 28, 2011. On November 21, 2012, the court ordered that the legal and physical custody be given back to [Respondent-Parents]; that [Respondent-Mother] have supervised visitation with the juveniles and that [Respondent-Mother] had to be supervised at all times . . .
>
> e. That on May 1, 2012, the Department received a neglect/abuse report stating that [Samuel] reported

> that his father . . . had spanked him on the butt. . . . . The Social Worker did observe a bruise on his butt that appeared to be a few days old. The case was substantiated and closed,
>
> f. That on June 4, 2013, the Department received a report of abuse and neglect. The case was substantiated and sent to case management. Over the course of the case the parents completed parenting [sic] and . . . mental health evaluations through New Dimensions. The case management case was closed,
>
> g. That on August 15, 2013 the Department received a neglect report. . . . The report was substantiated and sent to case management on September 12, 2013. The case was later closed on January 21, 2014.
>
> h. That on November 20, 2017, the Department received a neglect report regarding the family. . . .
>
> i. That on January 29, 2018, the Duplin County Department of Social Services received a neglect report . . .

¶ 12 The trial court also set out the findings from the 2018 Smith Evaluation:

> a. That Respondent-Mother's IQ as measured with the S[I]T, is 50, based on a comparison of her chronological age and her mental age, estimated to be 8 years and 3 months;
>
> b. That the score, coupled with the adaptive behavior scores places Ms. Capitano in the [range] of Mild Intellectual Disability;
>
> c. That persons with such Mild Intellectual Disability can benefit from training in social and occupational skills but are unlikely to progress beyond the sixth-grade level in academic subjects;
>
> d. That Ms. Capitano is seeking to regain custody of her four children. It is recommended that this is a reasonable request which should be supported at a level that considers her level of disability; and

> e. That the Respondent-Mother Should be supervised while caring [for] her children, given her impaired level of cognitive functioning.

¶ 13 The trial court also found the 2018 Matala Evaluation reported:

> 13. That the Respondent Parents submitted to a child forensic evaluation on October 2, 2018. The findings expressed doubts that the parents had the ability to provide a safe, stable environment [for] the children and meet all of their special needs without a competent supervisor, who can act as a guardian by providing care to the children.

¶ 14 Lastly, the trial court found "the prior adjudication of neglect was admitted into evidence and was considered."

¶ 15 Based on these findings, the trial court concluded statutory grounds existed for the termination of Respondent-Mother's parental rights as alleged in the Petition in that:

> a. That the juvenile has been adjudicated to be neglected as defined by N.C. Gen. Stat. §7B-101 and there is a high probability of a repetition of neglect;
>
> b. That the Respondent-Mother has willfully left the juvenile in foster care or placement outside of the home for more than twelve (12) months without reasonable progress under the circumstances being made in correcting those conditions which led to the removal of the Juvenile; and
>
> c. That the Respondent-Mother is incapable of providing for the proper care and supervision of the Juvenile, such that the Juvenile is a dependent Juvenile within the meaning of N.C. Gen. Stat. §7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future.

¶ 16 The trial court further concluded it was in the best interests of Samuel to terminate Respondent-Mother's parental rights and, ultimately, ordered Respondent-Mother's parental rights terminated as to Samuel. On 23 August 2021, Respondent-Mother timely filed Notice of Appeal.

Issue

¶ 17 The dispositive issue on appeal is whether the trial court erred in adjudicating grounds to terminate Respondent-Mothers' parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6) where the trial court did not base its Findings of Fact on conditions related to Respondent-Mother at the time of the termination hearing.

Analysis

¶ 18 Jurisdiction for this appeal is granted by N.C. Gen. Stat. §§ 7A-27(b)(2) and 7B-1001(a)(7) (2021). The standard of appellate review of an order adjudicating grounds upon which to terminate parental rights is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support the conclusions of law. *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984).

> This Court reviews de novo the issue of whether a trial court's adjudicatory findings of fact are supported by its conclusion of law that grounds existed to terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a). Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court.

In re T.M.L., 377 N.C. 369, 2021-NCSC-55, ¶ 15 (internal citations and quotations omitted).

¶ 19 In this case, the trial court concluded statutory grounds existed under N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6) to terminate Respondent-Mother's parental rights. Under N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6), the trial court may terminate parental rights upon finding one or more of the following:

> (1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.
>
> (2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under

> the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.
>
> . . .
>
> (6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111(a) (2021).

¶ 20 Respondent-Mother contends the trial erred in terminating Respondent-Mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6) as none of the trial court's adjudicatory Findings of Fact address the circumstances at the time of the hearing. Specifically, Respondent-Mother contends the trial court's findings only address circumstances which existed—at the latest—almost thirty-one-months prior to the termination of parental rights hearing.

¶ 21 The North Carolina Supreme Court recently addressed a similar argument in *In re Z.G.J.*, 378 N.C. 500, 2021-NCSC-102. There, the respondent argued *inter alia* a trial court's findings based on evidence of the circumstances more than 13 months prior to the termination hearing did not support the trial court's conclusion that grounds existed to terminate Respondent-Mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6). The Supreme Court agreed and reversed the adjudication of grounds to terminate parental rights. *Id.* at ¶ 34.

¶ 22 With respect to the adjudication of neglect as a ground to terminate parental rights under Section 7B-1111(a)(1), the Court observed: "It is well established that when deciding whether future neglect is likely,

'[t]he determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination proceeding.' " *Id.* at ¶ 26 (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227 (1984)). The Court determined that as the only evidence presented incorporated only the allegations of the Petition filed more than 13 months prior to the hearing, and that those allegations "do not shed any light on respondent's fitness to care for [the juvenile] at the time of the termination hearing, and the trial court erred by relying on the stale information in the petition as its only support for this ground." *Id.* at ¶ 27.

¶ 23 Similarly, with respect to Section § 7B-1111(a)(2), the Supreme Court noted:

> Termination under this ground requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

Id. at ¶ 30 (quoting *In re Z.A.M.*, 374 N.C. 88, 95, 839 S.E.2d 792 (2020)). "A parent's reasonable progress 'is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights.' " *Id.* at ¶ 30 (quoting *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66 (2020)). Thus, the trial court's adjudication of grounds to terminate parental rights based solely on evidence of circumstances more than 13 months prior was also in error.

¶ 24 Additionally, as it relates to an adjudication of dependency as a ground to terminate parental rights, the Supreme Court likewise recognized Section 7B-1111(a)(6) requires a showing:

> (1) "the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and ... there is a reasonable probability that such incapability will continue for the foreseeable future[,]" and (2) "the parent lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-1111(a)(6) (2019).

Id. at ¶ 31. Moreover, "Like the adjudication of grounds pursuant to subsections (a)(1) and (2), an adjudication of dependency as a ground for termination under subsection (a)(6) must be based on an examination of the parent's ability to care for and supervise their child at the time of the adjudication hearing." *Id.* Therefore, as with the other grounds, the trial court's findings related to circumstances more than 13 months prior did not support the trial court's adjudication of dependency. *Id.*

¶ 25 Ultimately, the Supreme Court summarized its holding on these points:

> by relying solely on the evidence from a termination petition that was filed thirteen months prior to the hearing, the trial court erred by concluding grounds for termination existed under subsections (a)(1), (2), and (6), since each of those grounds requires evaluating the evidence as of the time of the termination hearing.

In re Z.G.J., 378 N.C. 500, 2021-NCSC-102, ¶ 34.

¶ 26 In the case before us, the trial court based its July 2021 determination that grounds existed to terminate Respondent-Mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6) based on Findings of Facts from almost 31 months prior to the termination hearing. Indeed, most of the trial court's relevant findings consist of reciting case history from 2008 to 2018 and the findings from the 2018 Smith and Matala reports. The trial court made no findings that would support a determination that at the time of the June 2021 hearing there was a likelihood of repetition of neglect. The trial court also made no findings evaluating Respondent-Mother's progress, if any, to correct the conditions resulting in the removal of Samuel from her custody in the time period leading up to the hearing. Finally, the trial court also made no findings which reflect any examination of the Respondent-Mother's ability to care for and supervise Samuel at the time of the adjudication hearing.

¶ 27 Thus, under *In re Z.G.J.*, the trial court's findings—in this case based on circumstances pre-dating the termination of parental rights hearing by almost 31 months or more—failed to evaluate the evidence at the time of the termination of parental rights hearing. Thus, in turn, those findings cannot support the trial court's conclusion grounds existed to terminate Respondent-Mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6). Consequently, the trial court erred in adjudicating grounds existed to terminate Respondent-Mother's parental rights. *See id.* at ¶ 34. As such, we vacate the trial court's Judgment

Terminating Parental Rights and remand this matter to the trial court to determine (1) whether the existing record contains evidence from which it may make Findings of Fact as to the circumstances at the time of the termination hearing and, if so, (2) to make a new determination as to whether grounds exist to terminate parental rights and, in turn, (3) enter the disposition it deems in the best interest of Samuel.[3] If the trial court determines the evidence does not support grounds for terminating Respondent-Mother's parental rights, the trial court should dismiss the Petition.

Conclusion

¶ 28 Accordingly, for the foregoing reasons, we vacate the trial court's 22 July 2021 Judgment Terminating Parental Rights and remand this matter to the trial court to conduct further proceedings as set forth herein.

VACATED AND REMANDED.

Judges DILLON and DIETZ concur.

3. In remanding this matter to the trial court, we also note that in adjudicating dependency as a ground to terminate parental rights, the trial court also failed to make any finding the "the parent lacks an appropriate alternative child care arrangement" as required under N.C. Gen. Stat. § 7B-1111(a)(6) (2019).

JABARI v. JABARI

[283 N.C. App. 513, 2022-NCCOA-379]

ALICIA JABARI, Plaintiff
v.
ISLAM JABARI, Defendant

No. COA21-265

Filed 7 June 2022

Domestic Violence—protective order—consent—renewal—Rule 60 motion

The trial court did not abuse its discretion by denying defendant-husband's Civil Procedure Rule 60(b) motion to set aside a consent order renewing a domestic violence protective order (DVPO) for plaintiff-wife where the renewal order was not void. As permitted by statute, the original DVPO was entered by the parties' consent without findings or conclusions, and the renewal order incorporated the original order; the renewal order found that plaintiff remained in fear of defendant and that the parties consented to the entry of the renewal (both of which were supported by the record); defendant was aware that the renewal order would not need findings or conclusions; the renewal order contained sufficient information supporting the existence of good cause, even if the trial court failed to check the Conclusion of Law box on the form order; and the renewal motion was filed before the original DVPO expired.

Appeal by defendant from order entered 9 December 2020 by Judge Lori G. Christian in District Court, Wake County. Heard in the Court of Appeals 30 November 2021.

Sandlin Family Law Group, by Deborah Sandlin, for plaintiff-appellee.

Allen & Spence PLLC, by Scott E. Allen, and Law Offices of Anton Lebedev, by Anton M. Lebedev, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant-Husband appeals from a trial court order denying his Rule of Civil Procedure 60 motion to set aside an order renewing a domestic violence protection order ("DVPO") for Plaintiff-Wife. Because we conclude the renewal order was not void, we affirm.

I. Background

¶ 2 On 10 October 2019, Plaintiff-Wife filed a "Complaint and Motion for Domestic Violence Protective Order" against Defendant-Husband alleging he hit and kicked their oldest child, physically intimidated her, and threatened to take their children from her. (Capitalization altered.) After an initial ex parte DVPO on the same day, the trial court entered a consent DVPO on 17 October 2019, which included a temporary child custody addendum. As part of the consent DVPO, the parties agreed "no findings of fact and conclusions of law will be included in this consent protective order." The consent DVPO also stated the parties "specifically agree, consent, and stipulate that Plaintiff is entitled to relief requested and ordered herein" and that the trial court "has jurisdiction to enter this order and that the order is fully valid and binding as a matter of law pursuant to Chapter 50B of the North Carolina General Statutes." (Capitalization altered.) The consent DVPO was set to expire on 17 April 2020.

¶ 3 On 7 April 2020, Plaintiff filed a motion to renew the DVPO on the grounds Defendant had violated the consent DVPO on multiple occasions leading to criminal charges including felony stalking and felony intimidating a witness.

¶ 4 On 17 April 2020, the trial court held a hearing on Plaintiff's motion to renew the DVPO. After Defendant's attorney said Defendant would "stipulate to an extension of the protective order," the parties agreed they wanted the hearing to focus on child custody instead. Specifically, both parties asked the trial court to issue a temporary custody order because the courts were generally closed due to the start of the COVID-19 pandemic. At the hearing, three witnesses testified: Defendant, Plaintiff, and Plaintiff's boyfriend, who was living with Plaintiff and the children at the time of the hearing.

¶ 5 Because the hearing focused on child custody, most of the testimony is not relevant to this appeal. But some testimony was relevant to the DVPO. First, during his testimony, Defendant confirmed he would consent to renewing the DVPO.

¶ 6 Second, Plaintiff testified she continued to fear Defendant. She said Defendant had been charged with multiple violations of the original DVPO, and those criminal charges included felony stalking and felony witness intimidation. As a result of the stalking, Plaintiff did not feel safe living in her house. Plaintiff also recounted an incident where she did not feel safe leaving their child's birthday party, which Defendant

attended, because she was "afraid [Defendant] was going to hit" her. Finally, Plaintiff testified about her concerns Defendant was a terrorist.

¶ 7 At the end of the hearing, the trial court announced it was going to enter the DVPO without "a lot of findings of fact about things that have to do with domestic violence. You enter that without entering findings of fact." Neither party objected to that plan.

¶ 8 On the same day as the hearing, the trial court entered an "Order Renewing Domestic Violence Protective Order" (the "renewal order"). (Capitalization altered.) The renewal order was on a pre-printed form to which the trial court added information.[1] First, the renewal order "attached and incorporated by reference" the previous DVPO. Then, the court found the motion to renew was filed before the original DVPO expired. Under pre-printed text stating, "State facts regarding good cause to renew the order; a new incident of domestic violence is not required" the trial court also found "Plaintiff remains in fear of Defendant, [and] both parties consent to the entry of the renewal order." On the Conclusion of Law portion of the renewal order form related to good cause, the trial court did not mark any box. Finally, the trial court renewed the DVPO and noted a temporary child custody order was pending.

¶ 9 On 15 September 2020, Defendant filed a Rule 60(b) motion "to declare the domestic violence protective order null and void ab initio." In that motion, Defendant argued the renewal order was void because the parties did not state in writing they consented to an order without findings of fact or conclusions of law; the trial court had no evidence to support its Finding Plaintiff remained in fear of Defendant; and the trial court did not determine good cause existed to renew the DVPO.

¶ 10 On 9 December 2020, after a hearing, the trial court denied Defendant's Rule 60(b) motion in an order entitled "Order Setting Aside Domestic Violence Protective Order."[2] (Capitalization altered.) The

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1. The pre-printed form is AOC Form "AOC-CV-314," and the form used in this case is the version that first came into effect in February 2006. The pre-printed form can currently be viewed at: https://www.nccourts.gov/assets/documents/forms/cv314-en.pdf?tYgLXEFWC2Mo2u.yuxNtz.VA80Yrcyun. The form includes pre-printed Findings of Fact on: (1) whether the motion to renew was "filed before the previous order expired"; (2) "good cause to renew the order," which includes a blank spot to fill in such facts; and (3) any other matters the trial court wishes to address. The form also includes a section on Conclusions of Law for the trial court to check whether there "is" or "is not" good cause to renew the DVPO. Finally, the form includes a section where the trial court puts its order, signs, and indicates the new date of expiration.

2. The trial court used AOC Form "AOC-CV-314, Side Two" for this order, and the title of the order form is "Order Setting Aside Domestic Violence Protective Order."

order found Defendant's "arguments and evidence" were "not sufficient for this Court to set aside the renewal." Likewise, the trial court concluded: "There is no good reason justifying relief from the operation of the domestic violence protected [sic] order and there is no equitable reason that the order should not have future application."

¶ 11 Defendant filed a written notice of appeal. The notice of appeal stated Defendant was only appealing the "Order Setting Aside Domestic Violence Protective Order" that denied his Rule 60(b) motion. Defendant did not appeal the underlying renewal order.

II. Analysis

¶ 12 Defendant only appealed the order denying his Rule 60(b) motion. He did not appeal the renewal order, and by the time he filed his notice of appeal he no longer could have appealed that order because the time to file an appeal had expired.[3] *See* N.C. R. App. P. 3(c)(1) (requiring appeals in civil actions be filed within 30 days of entry of judgment); *see also Lovallo v. Sabato*, 216 N.C. App. 281, 283, 715 S.E.2d 909, 911 (2011) (noting "motions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal" (alterations, quotations, and citation omitted)).

¶ 13 Rule 60 provides more limited grounds to challenge orders than an appeal. *See* N.C. Gen. Stat. § 1A-1, Rule 60(b) (2021) (listing five reasons for a motion followed by a catch-all provision for "[a]ny other reason *justifying relief from the operation of the judgment*" (emphasis added)); *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) ("Motions pursuant to Rule 60(b) may not be used as a substitute for appeal."). As a result, Defendant's argument—both to the trial court and on appeal—is constrained. While he uses different language across multiple headings, Defendant's argument on appeal can be summarized as a contention the renewal order was void because the trial court lacked jurisdiction or failed to make certain required Findings of Fact or Conclusions of Law and therefore the trial court erred in denying his Rule 60 motion. *See*

(Capitalization altered.) But the trial court actually denied Defendant's motion and did not set aside the DVPO, so we are addressing the actual substance of the order, despite the title of the order.

3. Defendant requests we "treat[] his opening brief as a *certiorari* petition" to the extent he has no right to directly appeal the renewal order. Defendant argues we should grant the petition for writ of certiorari ("PWC") because "this appeal raises jurisdictional issues." Because Defendant's argument for the appeal of the order denying his Rule 60 motion already addresses alleged jurisdictional defects in the renewal order, we decline to treat his opening brief as a PWC.

N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (listing "judgment is void" as one of the reasons for which a Rule 60 motion can be granted).

¶ 14 "As is recognized in many cases, a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975); *see also In re E.H.*, 227 N.C. App. 525, 530, 742 S.E.2d 844, 849 (2013) ("Appellate review of an order ruling on a Rule 60(b) motion is limited to whether the trial court abused its discretion." (quotations and citation omitted)). "An abuse of discretion occurs only upon a showing that the judge's ruling was so arbitrary that it could not have been the result of a reasoned decision." *In re E.H.*, 227 N.C. App. at 530, 742 S.E.2d at 849 (quotations and citation omitted).

¶ 15 Defendant argues the renewal order was void on jurisdictional grounds because it was missing or lacked support for certain Findings of Fact and Conclusions of Law. Specifically, Defendant contends the parties "never agreed in writing that no Findings of Fact and Conclusions of Law will be included in the renewal order." (Capitalization altered.) He also argues the trial court's Finding of Fact as to remaining fear "is wholly unsupported." Defendant finally asserts the renewal order is void because it does not include a Conclusion of Law there is good cause for renewal and "[t]his Court cannot make" that determination now.

¶ 16 As an initial matter, we note the briefs do not address the part of the renewal order that is pre-printed text in the form even though the pre-printed text is just as much part of the order as the words added by the judge. *See Price v. Price*, 133 N.C. App. 440, 441 n.2, 514 S.E.2d 553, 554 n.2 (1999) ("Because of the large number of domestic violence cases filed each year in North Carolina, we appreciate the usefulness of form orders."). Here, the renewal order includes pre-printed text specifically incorporating the prior DVPO: "The previous Domestic Violence Protective Order is attached and incorporated by reference." As a result, all the information from the original DVPO is part of the renewal order.

¶ 17 Turning to Defendant's arguments, the initial DVPO, which was signed by both parties, included a provision stating each of them "agrees that no findings of fact and conclusions of law will be included." As a result, the original DVPO did not include any Findings related to an act of domestic violence—it only included Findings on possession of the parties' house and vehicle—and did not include any Conclusions of Law. Further, the initial DVPO included the following language about its binding nature:

> THE PARTIES SPECIFICALLY AGREE, CONSENT, AND STIPULATE THAT PLAINTIFF IS ENTITLED TO RELIEF REQUESTED AND ORDERED HEREIN. THE PARTIES FURTHER STIPULATE AND AGREE THAT THIS COURT HAS JURISDICTION TO ENTER THIS ORDER AND THAT THE ORDER IS FULLY VALID AND BINDING AS A MATTER OF LAW PURSUANT TO CHAPTER 50B OF THE NORTH CAROLINA GENERAL STATUTES. DEFENDANT, BY HIS SIGNATURE HEREIN, ACKNOWLEDGES THAT ANY VIOLATION OF THIS ORDER MAY BE PUNISHABLE BY CONTEMPT POWERS OF THIS COURT, BY PROSECUTING FOR A CLASS A1 MISDEMEANOR OR SUCH OTHER MEASURE AS PROVIDED BY LAW.

(Capitalization in original.)

¶ 18 These provisions in the original DVPO are based upon a provision in the domestic violence statutes permitting the trial court to enter a consent DVPO without Findings or Conclusions:

> A consent protective order may be entered pursuant to this Chapter without findings of fact and conclusions of law if the parties agree in writing that no findings of fact and conclusions of law will be included in the consent protective order. The consent protective order shall be valid and enforceable and shall have the same force and effect as a protective order entered with findings of fact and conclusions of law.

N.C. Gen. Stat. § 50B-3(b1) (2019).

¶ 19 The parties' agreement the original DVPO need not include Findings of Fact or Conclusions of Law is relevant here because the renewal order subject to Defendant's Rule 60 motion followed the same procedure. First, as mentioned above, the renewal order incorporated the original DVPO, including the relevant consent language on not including Findings or Conclusions. Notably, Defendant does not seek to disavow that original DVPO even though it also lacks Findings or Conclusions.

¶ 20 Second, Defendant was aware the original consent DVPO did not include Findings or Conclusions, but he stipulated in open court to the consent renewal multiple times. At the start of the hearing, his attorney said, "Your Honor, my client would stipulate to an extension of the

protective order, as it relates to the claim." Then, during Defendant's testimony, he was asked if he "consent[ed] to the domestic violence protective order being renewed, as it relates to your wife?" and he responded, "As related to her only, yes." These stipulations bound Defendant to the consent renewal. *Plomaritis v. Plomaritis*, 222 N.C. App. 94, 101, 730 S.E.2d 784, 789 (2012) ("Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position." (quotations and citations omitted)). Nothing in the record indicates he ever withdrew these stipulations. *See id.*, 222 N.C. App. at 106, 730 S.E.2d at 792 (detailing how a party can set aside stipulations). Defendant is bound by the stipulations to the consent renewal order, and he knew, based on the original consent DVPO, that a consent order need not include written Findings and Conclusions pursuant to § 50B-3(b1). As a result, he cannot now complain the renewal order lacked such Findings and Conclusions.

¶ 21 Further, the trial court explained multiple times at the hearing it would enter a consent renewal order. At the beginning of the hearing, the trial court summarized without objection that the parties consented to the renewal of the DVPO. The trial court explained the consent DVPO allowed the hearing to focus on the temporary custody order both parties wanted entered because the courts were generally closed due to the start of the COVID-19 pandemic. The trial court also announced at the end of the hearing it was going to enter the DVPO renewal without making "a lot of findings of fact about things that have to do with domestic violence. You enter that without entering findings of fact." Again, neither party objected to that course of action. The trial court explained it understood "people enter into domestic violence protective orders by consent without findings of fact for any number of reasons, none of which are lost on the Court . . . ."

¶ 22 The reasons are not lost on this Court either. As the trial court alluded to, Defendant had practical reasons for not wanting testimony or Findings on the domestic violence issue. At the time of the renewal hearing, Defendant had been charged with multiple violations of the original DVPO, including felonies. Plaintiff even cited these violations in her motion to renew the DVPO. As a result, Defendant would not want to testify about the domestic violence issue. It was to his benefit to again enter into a consent DVPO. Especially in light of that benefit, Defendant cannot now claim the renewal order was void because it failed to include Findings of Fact and Conclusions of Law. Defendant consented to the renewal order and to its lack of Findings and Conclusions just as he did with the original DVPO. He cannot use the lack of Findings and Conclusions as both a shield and a sword.

¶ 23 Defendant cites numerous cases for the proposition the trial court only has authority to approve a consent DVPO "upon finding that an act of domestic violence occurred and that the order furthers the purpose of ceasing acts of domestic violence." Defendant did not challenge the original DVPO that lacked any Finding of an act of domestic violence, and he could not because of the consent provisions in § 50B-3(b1). Even if he had, the cases on which Defendant relies all predate the 2013 addition of sub-section (b1) to § 50B-3. *See* An Act to Provide that a Consent Protective Order Entered Under Chapter 50B of the General Statutes May Be Entered Without Findings of Fact and Conclusions of Law Upon the Written Agreement of the Parties, 2013 North Carolina Laws S.L. 2013-237 (adding (b1)'s allowance of a consent protective order without findings of fact or conclusions of law to § 50B-3). Also, as Defendant concedes, renewal orders are different than initial orders and only require a showing of good cause, not finding "an additional act of domestic violence after the entry of the original DVPO." *Rudder v. Rudder*, 234 N.C. App. 173, 184, 759 S.E.2d 321, 329 (2014). Therefore, the trial court did not abuse its discretion by denying Defendant's Rule 60 motion because the renewal order was not void despite lacking Findings of Fact and Conclusions of Law.

¶ 24 Defendant next argues the trial court's Finding of Fact on remaining fear "is wholly unsupported." Defendant first contends "no evidentiary hearing was held on the renewal of the DVPO." Defendant then asserts, relying on *Ponder v. Ponder*, 247 N.C. App. 301, 786 S.E.2d 44 (2016), that the renewal order was void because it lacked any supported Findings of Fact.

¶ 25 The trial court did not have an evidentiary hearing specifically to renew the DVPO because at the start of the hearing on Plaintiff's motion to renew the DVPO—and in Defendant's testimony during that hearing—Defendant consented to the renewal order. The parties instead agreed they wanted the hearing to focus on the issue of child custody. Regardless of the precise purpose of the hearing, the trial court heard testimony Plaintiff continued to fear Defendant. For example, Plaintiff testified Defendant was present for their child's birthday and she wanted to leave the house over Defendant's objections but did not because she "was afraid he was going to hit" her. Plaintiff also described how she did not feel safe living in her house because Defendant "had been stalking us [her and the children]." That testimony expanded upon Plaintiff's earlier statement Defendant was charged with felony stalking after the original DVPO went into effect. Plaintiff further testified she was concerned Defendant was a terrorist. Finally, Plaintiff told the trial court Defendant

had been charged with felony witness intimidation because he "just was threatening" her. This testimony at the hearing provides ample support for the trial court's Finding Plaintiff "remains in fear of Defendant."

¶ 26 In addition to the evidentiary support for the trial court's Finding regarding Plaintiff's fear, Defendant cannot rely on *Ponder* to support his position. Defendant cites *Ponder* for its conclusion that a DVPO renewal order "was void *ab initio* due to the lack of any findings of fact." 247 N.C. App. at 309, 786 S.E.2d at 50 (italics in original). Looking at the facts of that case, the trial court concluded "good cause existed to renew the DVPO" but "failed to make or list any findings of fact. The space on the AOC form in which the court was to make findings of fact is *left blank*." *Id.*, 247 N.C. App. at 303, 786 S.E.2d at 46 (emphasis added). Here, by contrast, the renewal order included two Findings in the space on the AOC form: "Plaintiff remains in fear of Defendant, [and] both parties consent to the entry of the renewal."

¶ 27 Beyond that decisive difference, we also distinguish *Ponde*r from the case at hand because of certain procedural differences. First, *Ponder* was not a consent renewal. The defendant in *Ponder* contested the renewal, and the trial court held a hearing. *Id.* That difference matters because only consent DVPOs, not contested ones like in *Ponder*, can be entered without findings of fact or conclusions of law under § 50B-3(b1). Further, in *Ponder*, the defendant appealed from the renewal order itself, 247 N.C. App. at 303, 786 S.E.2d at 46, rather than from a Rule 60(b) motion as Defendant did here. As explained above, Rule 60 motions are different from appeals. *Davis*, 360 N.C. at 523, 631 S.E.2d at 118 ("Motions pursuant to Rule 60(b) may not be used as a substitute for appeal."). Given Defendant cannot rely on *Ponder*, we again conclude the trial court did not abuse its discretion in determining the renewal order is not void due to insufficient Findings of Fact.

¶ 28 Defendant finally argues the renewal order is void because it does not include a Conclusion of Law that there is good cause for renewal and "this Court cannot make" that determination now. First, as already discussed, the parties stipulated the renewal order would be a consent order, like the original DVPO, which was incorporated by reference, and therefore it would not need Conclusions of Law.

¶ 29 Second, the renewal order form already had sufficient information to determine the trial court's conclusion as to good cause. The pre-printed text on the renewal order form says, "State facts *regarding good cause to renew the order*; a new incident of domestic violence is not required." (Emphasis added.) In that section, the trial court wrote,

"Plaintiff remains in fear of Defendant, [and] both parties consent to the entry of the renewal." We have already reviewed how those Findings are supported by the evidence the trial court had before it and the parties' stipulation. While the Conclusion of Law box was not checked on the form, it simply repeats the same thing from the Findings of Facts about good cause to renew the DVPO. There is no real difference between the order as it exists without the box checked and if the box had been checked. Either way, the answer on the legally determinative issue of whether the Findings of Fact supported the Conclusion of Law related to good cause stays the same. *See Ponder*, 247 N.C. App. at 307, 786 S.E.2d at 49 ("Our review of the trial court's order is limited to . . . whether the findings of fact in turn support the conclusion of law that there was 'good cause' to renew the DVPO." (citing, *inter alia*, N.C. Gen. Stat. § 50B-3(b))).

¶ 30 Even if the lack of that one checkmark in the Conclusions of Law section of the renewal order were error—which we cannot fully address since Defendant did not appeal that order and which probably is not even error for the reasons explained above—it was at most a clerical error, contrary to Defendant's argument. "A clerical error is defined as '[a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination.' " *Zurosky v. Shaffer*, 236 N.C. App. 219, 235, 763 S.E.2d 755, 765 (2014) (alterations in original) (quoting *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000)). "Generally, clerical errors include mistakes such as inadvertent checking of boxes on forms . . . or minor discrepancies between oral rulings and written orders . . . ." *In re D.D.J.*, 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006). For example, in *Rudder*, this Court found the trial court's failure to check a box on a pre-printed DVPO form was a clerical error because other information on the form showed the trial court had "intended to mark the box." 234 N.C. App. at 180, 759 S.E.2d at 327. Here, the trial court had already made Findings of Fact on good cause, and that shows the lack of checkmark was not due to judicial reasoning or determination. Rather, the trial court clearly intended to mark that box just as in *Rudder*. *Id.*

¶ 31 The clerical nature of any error defeats Defendant's challenge because, due to the fact he only appealed the denial of his Rule 60(b) motion rather than the underlying renewal order, he must show any error is so egregious it renders the renewal order void. *See* N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (listing "judgment is void" as one of the reasons for which a Rule 60 motion can be granted); *see also Davis*, 360 N.C. at 523,

631 S.E.2d at 118 ("Motions pursuant to Rule 60(b) may not be used as a substitute for appeal."). As this Court has previously explained:

> Our Supreme Court has described a void judgment as "one which has a mere semblance but is lacking in some of the essential elements which would authorize the court to proceed to judgment." *Monroe v. Niven*, 221 N.C. 362, 364, 20 S.E.2d 311, 312 (1942). "When a court has no authority to act its acts are void." *Id.*
>
> > "If a judgment is void, it must be from one or more of the following causes: 1. Want of jurisdiction over the subject matter; 2. Want of jurisdiction over the parties to the action, or some of them; or 3. Want of power to grant the relief contained in the judgment. In pronouncing judgments of the first and second classes, the court acts without jurisdiction, while in those of the third class, it acts in excess of jurisdiction." Freeman on Judgments (4 ed.), p. 176.
>
> *Ellis v. Ellis*, 190 N.C. 418, 421, 130 S.E. 7, 9 (1925). On the other hand, the Supreme Court has said that a judgment is not void where the court which renders it "has authority to hear and determine the questions in dispute and control over the parties to the controversy. ..." *Travis v. Johnston*, 244 N.C. 713, 719–20, 95 S.E.2d 94, 99 (1956). In such case, the judgment is not void even though it may be contrary to law; it is voidable, but is binding on the parties until vacated or corrected in the proper manner. *Worthington v. Wooten*, 242 N.C. 88, 86 S.E.2d 767 (1955).

Allred v. Tucci, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294 (1987).

¶ 32 Here, the trial court had subject matter jurisdiction to issue the renewal order, so the renewal order is not void. "[T]he *only* jurisdictional requirement contained within N.C. Gen. Stat. § 50B–3(b) is that a party seeking the renewal of a DVPO file such a motion before the expiration of the existing order." *Comstock v. Comstock*, 244 N.C. App. 20, 24–25, 780 S.E.2d 183, 186 (2015) (emphasis in original) (citing *Rudder*, 234 N.C. App. at 184, 759 S.E.2d at 329). The renewal order itself found, and no party disputes, the motion to renew was filed before the original DVPO expired. As a result, the trial court had jurisdiction to enter the renewal order, so it was not void.

III. Conclusion

¶ 33 Having reviewed all of Defendant's arguments, the trial court did not abuse its discretion in denying his Rule 60 motion because the renewal order is not void.

AFFIRMED.

Judges HAMPSON and GORE concur.

STATE OF NORTH CAROLINA
v.
JONATHAN DANIEL ORE

No. COA21-693

Filed 7 June 2022

1. Appeal and Error—modification of probation—no statutory right of appeal—petition for certiorari

A criminal defendant's appeal from an order modifying and extending his probation was dismissed where defendant had no statutory right of appeal under N.C.G.S. § 15A-1347(a), which only confers a right to appeal from a decision activating a sentence or imposing special probation, and where defendant's petition for a writ of certiorari was denied because—regardless of whether the Court of Appeals had the statutory authority to review the petition—it lacked merit.

2. Appeal and Error—defective notice of appeal—petition for certiorari—criminal contempt citation

A criminal defendant's petition for a writ of certiorari to review his criminal contempt citation was allowed pursuant to Appellate Rule 21, where defendant's in-court notice of appeal was inadequate (the trial court indicated that he could appeal his contempt citation, to which defendant replied "thank you") but where defendant's intent to appeal could be fairly inferred and the State could not show any prejudice resulting from the defective notice.

3. Contempt—criminal—willfulness—interruption of court proceedings—cursing and speaking over judge

In a probation violation hearing, the trial court did not err by finding defendant in criminal contempt under N.C.G.S. § 5A-11(a)

where the hearing transcript showed that defendant willfully interrupted the court's proceedings by speaking over the judge and using profane language at the time of sentencing.

Judge DILLON concurring by separate opinion.

Judge DIETZ concurring by separate opinion.

Appeal by defendant from judgments entered 22 June 2021 by Judge V. Bradford Long in Davidson County Superior Court. Heard in the Court of Appeals 11 May 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Shelby N.S. Boykin, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for defendant-appellant.

TYSON, Judge.

¶ 1 Jonathan Daniel Ore ("Defendant") seeks appellate review of orders modifying his probation and holding him in contempt. Defendant has no statutory right to appeal the waiver of counsel or the modification of his probation. Defendant recognizes this fact and has filed a petition for writ of certiorari ("PWC"). We dismiss Defendant's PWC seeking review of the waiver of counsel and the modification of his probation. We allow Defendant's other PWC to review the trial court's order holding him in contempt and affirm.

I. Background

¶ 2 Defendant pleaded guilty to possession of methamphetamine on 3 November 2020. He was sentenced to serve a term of 8 to 19 months imprisonment, which was suspended, and he was placed on supervised probation for twelve months. Defendant's suspension of sentence and probation judgment included among other conditions that he: (1) obtain a substance abuse assessment; (2) complete any recommended treatment; (3) if unemployed, complete the Treatment Accountability for Safer Communities ("TASC") program; (4) submit to drug testing; and, (5) not engage in further criminal activity.

¶ 3 On 27 May 2021, Kierra Mobley ("Officer Mobley"), filed a probation violation report alleging Defendant had willfully violated the conditions

of his probation by: (1) testing positive three times for controlled substances on 18 March 2021, 19 April 2021, and 27 May 2021; (2) failing to report to his probation officer on 25 May 2021 and 26 May 2021; (3) being charged with criminal trespass on 22 May 2021; and, (4) being discharged from TASC for failing to obtain a drug and alcohol assessment within 30 days of his referral.

¶ 4 A probation violation hearing was noticed for and held on 22 June 2021. At the hearing on his violation report, Defendant indicated to the trial court he desired to represent himself. The State requested the trial court to conduct a colloquy into Defendant's knowing and voluntary waiver of counsel prior to accepting Defendant's request. The trial court inquired into Defendant's request, informed him of potential adverse consequences of proceeding unrepresented, and accepted his waiver of counsel. Defendant signed a written waiver of all assistance of counsel in open court.

¶ 5 Officer Mobley was called and testified about Defendant's multiple violations asserted in the 27 May 2021 probation violation report. Defendant did not cross-examine Officer Mobley nor did he testify or offer any evidence. The State recommended Defendant's probation be modified and extended for 6 months to allow him to undergo substance abuse treatment with the Drug and Alcohol Recovery Treatment Center ("DART Center").

¶ 6 The trial court agreed with the State's recommendation and ordered Defendant to be held in custody until he could enter the DART Center. Defendant did not testify, offer evidence, or argue his case, but stated he did not believe he was going to jail.

¶ 7 The trial court began to enter its findings when Defendant blurted out: "just activate my damn sentence. That's what you done." The trial court explained it was only holding Defendant in custody until he could receive DART therapy. Defendant responded, "[t]hat's crazy. I mean, y'all just tricked me all the way. Dang. Be honest. Why don't you f--king be honest with me some Godd--n time. I mean, y'all–y'all are con artist (sic). Y'all con people." The trial court informed Defendant if he said "one more word" the court would "give [him] 30 days for direct criminal contempt."

¶ 8 The trial court found evidence supported the violations as alleged in the 27 May 2021 probation violation report and concluded Defendant was in knowing and willful violation of supervised probation without justifiable excuse. The trial court extended Defendant's probation term for 6 months and ordered him to complete the "DART drug/alcohol

treatment program maintained by the North Carolina Department of Corrections." The trial court also ordered Defendant to remain in custody until he could attend DART.

¶ 9 The trial court clarified it would only allow Defendant to remain in custody for a maximum of two weeks while waiting for an opening for DART. If no opening became available within two weeks, the trial court would revisit treatment options. As Defendant was exiting the courtroom, he stated: "Come on, ma'am. You tricked me, Mobley. Why'd you do me like this? Y'all start all this sh-- all over again."

¶ 10 The trial court instructed the bailiffs to bring Defendant back before the court and began contempt proceedings. The trial court found Defendant to be in direct criminal contempt and ordered him to serve an active sentence of 30 days. The trial court made appellate entries for the contempt charge.

II. Jurisdiction

A. Modification and Extension of Probation

¶ 11 **[1]** Defendant has no constitutional or common law right to appeal. "Similar to federal procedure, a North Carolina criminal defendant's right to appeal a conviction is provided entirely by statute." *State v. Berryman*, 360 N.C. 209, 214, 624 S.E.2d 350, 354 (2006) (citations omitted). Defendant entered no purported notice of appeal.

¶ 12 N.C. Gen. Stat. § 15A-1347(a) provides: "When a superior court judge as a result of a finding of a violation of probation, *activates a sentence or imposes special probation*, either in the first instance or upon a de novo hearing after appeal from a district court, the defendant *may* appeal under G.S. 7A-27." N.C. Gen. Stat. § 15A-1347(a) (2021) (emphasis supplied).

¶ 13 Defendant's initial term of probation was modified and extended after competent evidence of and findings and conclusions he had committed multiple willful violations. His sentence was not activated nor did the court impose a special condition of probation. *Id.* "[A] defendant does not have the right to appeal from an order that merely modifies the terms of probation where the [d]efendant's sentence was neither activated nor was it modified to 'special probation.' " *State v. Romero*, 228 N.C. App. 348, 350, 745 S.E.2d 364, 366 (2013) (Dillon, J.) (citation and first quotation marks omitted). Defendant has no right to appeal the modification and extension of his probation unless one of the two statutory conditions above is met. *Id.*

¶ 14 Recognizing he has no right to appeal, Defendant petitioned for a writ of certiorari to purport to invoke this Court's appellate jurisdiction, while showing no merit or prejudice. *State v. Ricks*, 378 N.C. 737, 738, 862 S.E.2d 835, 837, 2021-NCSC-116, ¶ 1 (2021) ("[A]n appellate court may only consider certiorari when the petition shows merit, meaning that the trial court probably committed error at the hearing.") This Court is "without [statutory] authority to review, either by right or by certiorari, the trial court's modification of defendant's probation." *State v. Edgerson*, 164 N.C. App. 712, 714, 596 S.E.2d 351, 353 (2004); *see* N.C. Gen. Stat. § 15A-1347.

¶ 15 "*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Rouson*, 226 N.C. App. 562, 564, 741 S.E.2d 470, 471 (2013) (citing *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)) "A petition for the writ [of certiorari] must show merit or that [prejudicial and reversible] error was probably committed below." *Id*.

¶ 16 Other than recognizing this Court's *power of* jurisdiction to exercise our discretion of appellate review over petitions for writ of certiorari, nothing in the holdings of either *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015) or *State v. Ledbetter*, 371 N.C. 192, 814 S.E.2d 39 (2018) bears any significance to the issues before us in this appeal. Neither *Edgerson*, nor N.C. Gen. Stat. § 15A-1347 is cited in either opinion.

¶ 17 In *Stubbs*, our Supreme Court held:

> given that our *state constitution authorizes the General Assembly to define the jurisdiction of the Court of Appeals*, and given that the General Assembly has given that court broad powers to supervise and control the proceedings of any of the trial courts of the General Court of Justice, and given that *the General Assembly* has *placed no limiting language* in subsection 15A-1422(c) *regarding which party may appeal a ruling on an MAR*, we hold that the Court of Appeals has *jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court.*

Stubbs, 368 N.C. at 43, 770 S.E.2d at 76 (internal citations omitted) (emphasis supplied). *Stubbs* merely interprets N.C. Gen. Stat. § 15A-1422 to allow an appellate court to review the State's PWC to review a trial court's decision on the denial of the State's motion for appropriate relief ("MAR") in a superior court. *Id*.

¶ 18 In *Ledbetter*, our Supreme Court extended the same statutory analysis from MARs to PWCs seeking appellate review of guilty pleas, and held our Court has jurisdiction and consequently discretionary authority to allow appellate review of a PWC under N.C. Gen. Stat. § 15A-1444(e) (2017). *Ledbetter*, 371 N.C. 196, 814 S.E.2d at 42; N.C. Gen. Stat. § 15A-1444(e) ("Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appropriate review *as a matter of right* when he has entered a plea of guilty or no contest to a criminal charge in the superior court, *but he may petition the appellate division for review by writ of certiorari*.") (emphasis supplied).

¶ 19 *Ledbetter* and *Stubbs* stand for the proposition that where a "valid statute gives the Court of Appeals jurisdiction to issue a writ of certiorari, Rule [of Appellate Procedure] 21 cannot take it away." *Ledbetter*, 371 N.C. 196, 814 S.E.2d at 42 (citations omitted). Here, Defendant's purported PWC seeks appellate review of a statutory non-reviewable extension of his probation made pursuant to N.C. Gen. Stat. § 15A-1347. Nowhere has the General Assembly granted this Court authority to hear cases or consider a PWC to review an extension of probation except for two specified instances in N.C. Gen. Stat. § 15A-1347(a).

¶ 20 "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). The Supreme Court of North Carolina has not overruled *Edgerson*.

¶ 21 Neither *Stubbs* or *Ledbetter* cited bear on any issue in this case. "We are *without authority* to overturn the ruling of a prior panel of this Court on the same issue." *Poindexter v. Everhart*, 270 N.C. App. 45, 51, 840 S.E.2d 844, 849 (2020) (citation omitted) (emphasis supplied) (Dietz, Tyson, and Inman, JJ.). *Edgerson* remains binding precedent upon this Court. *Edgerson*, 164 N.C. App. at 714, 596 S.E.2d at 353. Despite my concurring colleagues' notion otherwise and stretching exercises, *Edgerson* has not been and cannot be overruled by implication, particularly where *Edgerson* nor the statute it relies upon are not cited in any opinion they purport to rely upon. *Poindexter*, 270 N.C. App. at 51, 840 S.E.2d at 849.

¶ 22 "When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control."

Seders v. Powell, 298 N.C. 453, 459, 259 S.E.2d 544, 549 (1979). N.C. Gen. Stat. § 15A-1347(a) specifically applies to this Court's power to hear appeals from probation violation hearings.

¶ 23 Given this Court may possess *jurisdictional power* to review petitions for writ of certiorari or for other prerogative writs, that residual power does not compel this Court to review such a wholly frivolous petition, where Defendant failed to show any merit or potential prejudicial reversible error in the clear and uncontested facts before us. *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9.

¶ 24 This issue should have presented to this Court, if at all under an *Anders* brief. *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967). Certiorari is a rare writ, based upon petitioner's burden of showing of both merit and prejudice. The petition is not a vehicle to ignore preservation, lack of objections, proffers or evidence, failure to appeal, or to provide a backdoor review for wholly unmeritorious claims, even in a death penalty case. *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9.

¶ 25 Defendant's PWC shows no merit or prejudice to support his requested discretionary writ. *See Ricks*, 378 N.C. at 738, 862 S.E.2d at 837, 2021-NCSC-116, ¶ 1 ("[A]n appellate court may only consider certiorari when the petition shows merit, meaning that the trial court probably committed error at the hearing."). To any extent Defendant has a cognizable right for PWC, in the exercise of our discretion we deny Defendant's PWC.

¶ 26 In compliance with the statute, Defendant's wholly frivolous PWC seeking this Court to review the trial court's order on the modification and extension of his probation violations is dismissed. Defendant's purported petition to review the trial court's order on his extension of supervision for unchallenged and not appealed probation violations is dismissed.

B. Criminal Contempt

¶ 27 **[2]** After finding Defendant to be in contempt and sentencing him, the trial court stated: "Enter notice of appeal for his contempt citation." Defendant responded "Thank you."

¶ 28 The transcript does not reflect Defendant entered either oral or written notice of appeal. Defendant again acknowledges the inadequacy of his notice of appeal and also petitions this Court to issue a writ of certiorari authorizing appellate review of the judgment finding him in contempt.

¶ 29 "[A] writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1).

¶ 30 A defective notice of appeal "should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (citation and quotation marks omitted) (emphasis supplied).

¶ 31 Here, the State has not advanced any allegations tending to show it has been delayed, misled, or prejudiced by Defendant's defective notice of appeal. Defendant's intent to appeal can be "fairly inferred" from his colloquy with the trial court. *Id.* Given the trial court's immediate action of appellate entries, the State cannot show prejudice by the defective notice.

¶ 32 Defendant has lost his appeal of the judgment finding him in contempt through "failure to take timely action[.]" N.C. R. App. P. 21(a)(1). We allow Defendant's PWC, in the exercise of our discretion, and address the merits of the criminal contempt order.

III. Issue

¶ 33 Defendant argues the trial court erred in finding him in direct criminal contempt.

IV. Contempt Order

A. Standard of Review

¶ 34 The standard of review in direct criminal contempt is "whether . . . competent evidence . . . support[s] the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (2007) (citation and quotation marks omitted). "The trial judge's findings of fact are conclusive [on appeal] when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency." *State v. Coleman*, 188 N.C. App. 144, 148, 655 S.E.2d 450, 453 (2008) (citation, quotation marks, and ellipses omitted).

B. Analysis

¶ 35 **[3]** Defendant argues the trial court erred by finding him in direct criminal contempt. N.C. Gen. Stat. § 5A-11 (2021). Defendant asserts his

words and actions in open court failed to establish he was in willful violation of the statute sanctioning direct criminal contempt, Defendant argues the trial court's findings of fact did not support the conclusion he was in willful criminal contempt of court.

¶ 36 "Criminal contempt is imposed in order to preserve the court's authority and to punish disobedience of its orders. Criminal contempt is a crime, and constitutional safeguards are triggered accordingly." *Watson v. Watson*, 187 N.C. App. 55, 61, 652 S.E.2d 310, 315 (2007) (internal citation omitted). "If a trial court's finding is supported by competent evidence in the record, it is binding upon an appellate court, regardless of whether there is evidence in the record to the contrary." *State v. Key*, 182 N.C. App. 624, 627, 643 S.E.2d 444, 447 (2007).

¶ 37 N.C. Gen. Stat. § 5A-11(a) articulates acts which constitute criminal contempt, including:

> (1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
>
> (2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.
>
> (3) Willful 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) (2021).

¶ 38 "Willfulness" under N.C. Gen. Stat. § 5A-11(a) is defined as "an act done deliberately and purposefully in violation of law, and without authority, justification, or excuse." *State v. Phair*, 193 N.C. App. 591, 594, 668 S.E.2d 110, 112 (2008) (citation and quotation marks omitted).

¶ 39 The trial court found Defendant's behavior in both words and actions in open court, despite warnings of his prior words, actions, and conduct, was improper. Defendant was found to have "exhibit[ed] disruptive behavior during the proceeding; by speaking over the judge and using profane language at the time of sentencing, by verbally shouting f--k and [by] using the Lord's name in vain." The trial court concluded, and the transcript shows, Defendant's conduct "interrupted the proceedings of the court and impaired the respect due its authority."

¶ 40 This finding of fact supports the trial court's conclusion of law that in the presence of the court, Defendant's words and actions willfully interrupted the proceedings and impaired the respect due the Court's

authority beyond a reasonable doubt. The trial court did not err in holding Defendant in direct criminal contempt. N.C. Gen. Stat. § 5A-11. Defendant's argument is overruled.

V. Conclusion

¶ 41 Defendant does not possess the statutory right to appeal the modification and extension of his probation or his informed and admitted waiver of counsel, nor does the statute provide this Court the statutory authority to review his PWC on modification of his probation. N.C. Gen. Stat. § 15A-1347; *Edgerson*, 164 N.C. App. at 714, 596 S.E.2d at 353. To any extent his petition may be cognizable, in the exercise of our discretion, Defendant's PWC to review the trial court's order modifying and extending his probation violation is wholly without merit or prejudice and his purported appeal therefrom is dismissed.

¶ 42 In the exercise of our discretion, we allow Defendant's other PWC and hold the trial court did not err in finding Defendant's willful conduct violated the direct criminal contempt in the statute. N.C. Gen. Stat. § 5A-11. The order of the trial court is affirmed. *It is so ordered.*

DISMISSED IN PART; AFFIRMED IN PART.

Judge DILLON concurs by separate opinion.

Judge DIETZ concurs by separate opinion.

DILLON, Judge, concurring.

¶ 43 I concur. I write separately to address the jurisdictional issue raised in the lead opinion, specifically our Court's authority to issue a writ of *certiorari* in order to review a trial court's modification of a defendant's probation. I agree with the statement in the lead opinion that we have "jurisdiction power" to entertain such writs and that our "residual power does not compel this Court to [grant] a wholly frivolous petition[.]" I do not agree, though, with any statement to the extent that such statement could be construed to suggest that we lack jurisdictional authority — statutory or otherwise — to issue such writ in this case, if we were so inclined. Rather, though *defendant* clearly has no statutory right to an appeal, *this Court* has been granted the power/authority by our General Assembly to issue a writ of *certiorari*.

¶ 44 I first explained in my concurring opinion in *State v. Stubbs* that it is our General Assembly, and not our Supreme Court, which has the

constitutional authority to confer upon our Court jurisdiction to issue writs of *certiorari*:

> The North Carolina Constitution states that this Court has appellate jurisdiction "as the General Assembly may prescribe." N.C. Const. Article IV, Section 12(2).
>
> Our General Assembly has prescribed that this Court has jurisdiction "to issue . . . prerogative writs, including . . . certiorari . . . to supervise and control the proceedings of any of the trial courts [.]" N.C. Gen. Stat. § 7A-32(c) (2011).
>
> The General Assembly further has prescribed that the "practice and procedure" by which this Court exercises its jurisdiction to issue writs of certiorari is provided, in part, by "rule of the Supreme Court." *Id.*
>
> The Supreme Court has enacted the Rules of Appellate Procedure, which includes Rule 21, providing that writs of certiorari may be issued by either this Court or the Supreme Court in [certain] circumstances, none of which applies to the State's appeal in this case.
>
> * * *
>
> I believe that . . . our subject matter jurisdiction to issue writs of certiorari is not limited to the circumstances contained in Rule 21 [.]
>
> Additionally, in Rule 1 of the Rules of Appellate Procedure, our Supreme Court stated that the appellate rules "shall not be construed to extend or limit the jurisdiction of the courts of the appellate division[.]" *Id.*

232 N.C. App. 274, 287-88, 754 S.E.2d 174, 183 (2014) (Dillon, J., concurring).

¶ 45 Our Supreme Court essentially adopted my analysis, stating that "while Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals [to issue writs of *certiorari*], the Rules [of Appellate Procedure] cannot take away jurisdiction given to that court by the General Assembly in accordance with the North Carolina Constitution." *State v. Stubbs*, 368 N.C. 40, 44, 770 S.E.2d 74, 76 (2015).

¶ 46 Our General Assembly — in the exercise of its constitutional authority — has granted our Court broad authority to issue writs of *certiorari* generally, and there is no statute that suggests that we do not have the authority to issue the writ to review the trial court's order in this case. Indeed, the General Assembly has provided that our Court has "jurisdiction to review upon appeal decisions of [any trial court] upon matters of law or legal inference, in accordance with the system provided in this Article." N.C. Gen. Stat. § 7A-26 (2021). And later in the Article, our General Assembly has conferred upon our Court jurisdiction to issue writs of *certiorari* "in aid of [our] jurisdiction, or to supervise and control the proceedings of any of the trial courts." N.C. Gen. Stat. § 7A-32(c).

¶ 47 Though our Supreme Court does not have the constitutional authority to define our *jurisdiction* in granting writs, that Court does have concurrent authority with our General Assembly to provide "[t]he practice and procedure" that our Court must follow when considering petitions for writs. *Id.* And in those instances where we have jurisdiction to issue a writ, but also where neither our Supreme Court nor the General Assembly has established by rule or statute a procedure for exercising our jurisdiction, we may exercise said jurisdiction "according to the practice and procedure of the common law." *Id.*

¶ 48 I do recognize that our Supreme Court's decision in *State v. Ricks*, 378 N.C. 737, 738, 2021-NCSC-116, ¶ 1 contains language which suggests that our Court has no authority to issue a writ of *certiorari* "when the petition shows [no] merit." However, I believe this statement is *dicta* and, otherwise, not intended to be a limitation on our jurisdiction to issue a writ of *certiorari*. Indeed, it is not uncommon for our Court to issue a writ in order to review a defendant's appeal where there is a jurisdictional defect in his or her notice of appeal, where the State has not been prejudiced by the defect, *even where said defendant's appeal has little, if any merit*. Our Court does not always allow such writs, especially where the issues raised have little merit. But we might choose to do so, for instance, where considering and resolving the issues would promote judicial economy by eliminating the need for the trial court to have to consider a subsequent motion for appropriate relief or ineffective assistance of counsel.

¶ 49 I also recognize that language in *Ricks* could be read to suggest that our Supreme Court has the authority to limit the exercise of our jurisdiction conferred upon us by the General Assembly to issue such writs where that Court concludes that we have "abuse[d our] discretion." However, I do not read *Ricks* as holding that our Court lacks jurisdiction to issue a writ to review a legal issue that otherwise was not preserved

at the trial court (and therefore would require us to invoke Rule 2 to reach). Such a reading would suggest a limitation of our jurisdiction to issue such writs, which our Supreme Court does not have the constitutional authority to do. Rather, I construe our Supreme Court's holding in *Ricks* simply to mean that it was an abuse of discretion for our Court *to invoke Rule 2* once the case was before us on *certiorari*, because we had already shown grace by granting the writ to let the appellant in the door.

¶ 50 In sum, my understanding is that our General Assembly establishes our jurisdiction to review issues of law arising in our trial courts and that our General Assembly has conferred upon our Court broad authority to issue writs of *certiorari* to reach those legal issues. Also, it is my understanding that our Supreme Court can establish rules, instituting practices and procedures by which we are to exercise our jurisdictional authority, but that such rules cannot otherwise limit our jurisdiction, as that Court recognized in *Stubbs*.

¶ 51 In any event, our Supreme Court in *Stubbs* recognized that our Court has been granted the authority by our General Assembly to issue a writ of *certiorari* to review an order in a situation where our General Assembly provided the party no *right* to appeal. *Id.* at 44, 770 S.E.2d at 76. Just like in *Stubbs*, the fact that the General Assembly has expressly stated that the defendant here has *no right* to appeal does not strip *our Court* of our authority to issue a writ of *certiorari*, which was granted to us by the General Assembly.

DIETZ, Judge, concurring.

¶ 52 I concur in the result of this case but I do not join the statement that this Court is "without [statutory] authority to review, either by right *or by certiorari*, the trial court's modification of defendant's probation." This is not a correct statement of the law. We have the authority to review this issue by certiorari. *See* N.C. Gen. Stat. § 7A-32; *State v. Stubbs*, 368 N.C. 40, 44, 770 S.E.2d 74, 76 (2015); *State v. Thomsen*, 369 N.C. 22, 25, 789 S.E.2d 639, 641–42 (2016).

¶ 53 This well-settled legal principle was cemented in an epic sequence of remands, reversals, and disavowals in *State v. Ledbetter*, 243 N.C. App. 746, 747, 779 S.E.2d 164, 165 (2015), *remanded for reconsideration in light of Stubbs*, 369 N.C. 79, 793 S.E.2d 216 (2016), *on remand*, 250 N.C. App. 692, 692, 794 S.E.2d 551, 552 (2016), *reversed and remanded again*, 371 N.C. 192, 814 S.E.2d 39 (2018), *on remand*, 261 N.C. App. 71,

819 S.E.2d 591 (2018), *discretionary review denied in special order that "disavows the language in the last paragraph of the Court of Appeals's decision*," 372 N.C. 692, 830 S.E.2d 820 (2019).

¶ 54 Yet here we are again, with a Court of Appeals opinion citing a case (this time, *State v. Edgerson*) that relies on Rule 21 for the proposition that we are without authority to review an issue by certiorari because the applicable statute provides no appeal by right. And, worse yet, that citation accompanies a categorical statement that is inconsistent with *Stubbs*, *Thomsen*, and *Ledbetter* and uses precisely the sort of language that our Supreme Court disavowed in *Ledbetter* and quite plainly instructed us not to use again.

¶ 55 As I previously have explained, "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." *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 2021-NCCOA-689, ¶ 38 (Dietz, J., concurring). The Supreme Court has spoken. We have the authority under N.C. Gen. Stat. § 7A-32 to issue a writ of certiorari in our discretion to review a trial court decision for which the General Statutes do not provide litigants with an appeal by right. And, in exercising that authority, we should not cite to case law, or make statements, suggesting that Rule 21 of the Rules of Appellate Procedure in any way diminishes that authority.

¶ 56 Given the overwhelming weight of Supreme Court precedent instructing this Court *not* to rely on these outdated cases or use this sort of language, it is frustrating to continue seeing it in our opinions. Had the lead opinion simply acknowledged that we have statutory authority to issue a writ of certiorari but that, in our discretion, we deny the petition in this case because the defendant has not presented a meritorious argument, this would be a unanimous, single-opinion decision. Instead, the lead opinion insists that *Edgerson*—because it is not cited in *Stubbs*, *Thomsen*, and *Ledbetter*—is still good law on this issue. That is not an accurate statement of the law and thus I concur only in the result of this case.

STATE v. WILLIAMS

[283 N.C. App. 538, 2022-NCCOA-381]

STATE OF NORTH CAROLINA
v.
DOMINIQUE ALEXANDER WILLIAMS

No. COA20-633

Filed 7 June 2022

1. Homicide—jury instructions—defense of others—felony disqualifier—causal nexus

Where defendant, a convicted felon, was carrying a firearm and fatally shot his cousin, the trial court erred by failing to fully instruct the jury on perfect defense of others in its instructions on first- and second-degree murder—including that the State was required to prove an immediate causal nexus between defendant's felonious possession of a firearm and his use of defensive force—because, when taken in the light most favorable to defendant, the evidence showed that the cousin, who was intoxicated and had a history of violence toward his girlfriend, told the girlfriend that he was going to kill her and was on top of her beating her. The error was prejudicial because there was a reasonable possibility that, if given the correct instruction, the jury would have found no causal nexus and that defendant acted in defense of the cousin's girlfriend.

2. Homicide—sufficiency of evidence—defense of others—shooting

In defendant's prosecution for first- and second-degree murder, the State presented sufficient evidence to survive defendant's motion to dismiss where, in the light most favorable to the State, a rational juror could conclude that defendant's fatal shooting of his cousin was not an act in defense of the cousin's girlfriend, where the girlfriend's injuries were not serious and not consistent with the degree of attack (by the cousin) described by the testimony, defendant did not act quickly to come to the girlfriend's aid, defendant was frustrated with his cousin, the cousin's girlfriend and defendant's girlfriend gave inconsistent accounts to the police, the cousin's girlfriend lied to the police by saying there had been a drive-by shooting, and defendant walked away from the car on the way to taking his cousin to the hospital.

Appeal by Defendant from judgment entered 25 February 2020 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 24 August 2021.

STATE v. WILLIAMS

[283 N.C. App. 538, 2022-NCCOA-381]

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

Kathryn L. VandenBerg for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Dominique Alexander Williams appeals a judgment entered upon a jury's verdicts of guilty of second-degree murder and of attaining violent habitual felon status, and Defendant's guilty plea of possession of a firearm by a felon. Defendant contends that the trial court erred by denying his motion to dismiss the murder charge for insufficient evidence and by failing to correctly instruct the jury on defense of others. The trial court did not err by denying Defendant's motion to dismiss the murder charge. However, following the North Carolina Supreme Court's decision in *State v. McLymore*, 380 N.C. 185, 2022-NCSC-12, we conclude that the trial court prejudicially erred by failing to fully instruct the jury on defense of others. Accordingly, we vacate the trial court's judgment and remand for a new trial.

I. Facts

¶ 2 The evidence at trial tended to show the following: On the night of 16 November 2018, Defendant Dominique Williams went out for drinks with his cousin, Michael Williams; Defendant's girlfriend, Tyler Reid; and Michael's girlfriend, Ciara Jackson.

¶ 3 Michael had a history of a violent temper, aggression, and physical abuse. Ciara testified to enduring repeated assaults by Michael, stating the assaults "got more violent every time." At one point in their relationship, Michael stood over Ciara and stomped on her head while she lay on the ground. Another time, Michael kicked Ciara so hard he broke his own leg. That same day, he attacked Ciara while she drove him home, causing her car to swerve into a guardrail. On more than one occasion, when Michael was attacking Ciara, Defendant intervened. Michael once pulled a gun on Defendant when Defendant was trying to protect Ciara; Defendant also had a gun on him at the time, but did not brandish it. At one point, Michael and Ciara broke up. Shortly thereafter, Ciara filed assault charges against Michael and sought a domestic protection order. The two soon got back together and Ciara did not pursue the charges.

¶ 4 On 16 November 2018, Defendant, Michael, Tyler, and Ciara met and drank tequila at Tyler's house before driving in Ciara's car to a Greensboro bar. At the bar, Michael got drunk. The group left in Ciara's car with Ciara driving.

¶ 5 While on the road, Michael and Ciara got into an argument about another woman Michael had been seeing. Michael said to Ciara, "Bitch, I'll kill you." Then Michael began hitting Ciara while she was driving; he hit her in the head with a beer bottle and punched her with his fists.

¶ 6 Tyler told Ciara to pull over. Once on the side of the road, Michael and Ciara got out of the car, and Michael aggressively approached Ciara. Defendant broke up the fight and Michael calmed down somewhat. The group got back in the car and back onto the road, whereupon Michael again attacked Ciara, who was still driving; he pulled her hair and hit her in the face. Defendant said to Michael, "You're always doing this." Tyler told Ciara to pull over to avoid having an accident. Ciara pulled over in front of a TRD Motorsports.[1] Ciara got out of the car and ran towards Michael, who had also stepped out of the car, and pushed him.

¶ 7 During this altercation, Ciara and Michael ended up in the front seat of the car with Michael on top of Ciara, beating her the whole time. Ciara feared Michael would kill her and she fought back. Tyler tried to pull Michael off Ciara. Michael got out of the car, pushed Tyler to the ground, and said to Defendant, "Come get your bitch." Michael then resumed attacking Ciara.

¶ 8 Defendant, who was standing on the opposite side of the car from Michael, came around the car and shot at least two bullets, hitting Michael in the chest. The group put Michael, who was still conscious, into the car and proceeded to the High Point Hospital.

¶ 9 While driving to High Point, Defendant was on the phone with an unidentified person. He told that person that Michael had been shot in a drive-by-shooting by a person in a gray Dodge Challenger. The group pulled off the highway at the High Point exit. While stopped at an intersection, Tyler got out of the car and started to walk home. Defendant also got out of the car and walked away.

¶ 10 Ciara realized Michael had stopped breathing and called 911.[2] She told the 911 operator that Michael had been shot by someone in a gray Dodge Challenger in a drive-by shooting. Police officers arrived and took Ciara in for questioning. At the police station, Ciara's version of events changed. She first told officers that Michael had been shot in a drive-by,

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1. These events were captured on a nearby security camera. The video tape of the events of the shooting was introduced and played for the jury at trial as State's Exhibit #6.

2. The transcript of the 911 call was introduced as State's Exhibit #41.

but eventually she told them that Defendant had shot Michael. Michael died from the gunshot wounds.

¶ 11 The following day, 17 November 2018, Defendant turned himself in at the police station. He stated that he had "shot his cousin." Defendant was taken into custody.

II. Procedural History

¶ 12 On 4 March 2019, the Guilford County Grand Jury indicted Defendant for first-degree murder, possession of a firearm by a felon ("PFF"), and attaining violent habitual felon status.

¶ 13 The case came on for trial on 17 February 2020. Defendant pled guilty to PFF and not guilty to the remaining charges. Defendant moved to prohibit the State from referencing Defendant's prior felony convictions, including his contemporaneous PFF guilty plea, if Defendant did not testify. The trial court granted the motion. No evidence was presented on Defendant's prior felonies or contemporaneous PFF guilty plea.

¶ 14 At the close of the State's evidence, Defendant moved to dismiss the murder charge on grounds of insufficient evidence. The trial court denied the motion.

¶ 15 During the charge conference, Defendant requested a jury instruction on defense of others. The trial court denied Defendant's request on the basis that, as a matter of law, Defendant was disqualified from claiming the defense under N.C. Gen. Stat. § 14-51.4 and this court's decision in *State v. Crump*, 259 N.C. App. 144, 151, 815 S.E.2d 415, 421 (2018), *rev'd on other grounds*, 376 N.C. 375, 851 S.E.2d 904 (2020).

¶ 16 The trial court gave a limited defense of others instruction on the charges of first-degree and second-degree murder, stating only that to find Defendant guilty of first-degree or second-degree murder, the State must prove in addition to the elements of first-degree or second-degree murder, "that the defendant did not act in lawful defense of another." The trial court also gave an instruction on imperfect defense of others in the voluntary manslaughter charge. The trial court did not reference defense of others in its final mandate to the jury on either the first or second-degree murder charges; but did include the imperfect self-defense instruction in its final mandate on the voluntary manslaughter charge.

¶ 17 On 25 February 2020, the jury found Defendant guilty of second-degree murder and of attaining violent habitual felon status. The trial court entered judgment and sentenced Defendant to life imprisonment without parole. Defendant appealed.

III. Discussion

¶ 18 Defendant contends the trial court erred by (1) failing to fully instruct the jury on defense of others, (2) denying Defendant's motion to dismiss the murder charge for insufficient evidence, and (3) instructing the jury on the aggressor doctrine.

A. Defense of Others Jury Instruction

¶ 19 **[1]** Defendant argues that the trial court erred by failing to instruct the jury on defense of others in its instructions on first-degree and second-degree murder.

¶ 20 A trial court's decisions regarding jury instructions are reviewed de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). A trial court must give the substance of a requested jury instruction if it is "correct in itself and supported by [the] evidence[.]" *State v. Locklear*, 363 N.C. 438, 464, 681 S.E.2d 293, 312 (2009) (citation omitted). If there is sufficient evidence, when taken in the light most favorable to the defendant, to support a defense of others instruction, "the instruction must be given even though the State's evidence is contradictory." *State v. Montague*, 298 N.C. 752, 755, 259 S.E.2d 899, 902 (1979). "[A]n error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citation omitted) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)). The burden to show prejudice is on the defendant. N.C. Gen. Stat. § 15A-1443(a) (2020).

¶ 21 N.C. Gen. Stat. § 14-51.3(a)(1) provides, in pertinent part, that "a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if . . . [h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." N.C. Gen. Stat. § 14-51.3(a)(1) (2020). However, "[t]he justification described in . . . [N.C. Gen. Stat. §] 14-51.3 is not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony." *Id.* § 14-51.4(1) (2020). This Court held in *Crump* that N.C. Gen. Stat. § 14-51.4(1) does not require a causal nexus between the disqualifying felony and the defendant's use of defensive force for that statutory provision to disqualify the defendant from pleading he was justified in his use of that force. 259 N.C. App. at 151, 815 S.E.2d at 420.

¶ 22 In *McLymore*, the Supreme Court overruled the above-noted portion of *Crump* and held that the felony disqualifier of N.C. Gen. Stat. § 14-51.4(1) requires an immediate causal nexus between the disqualifying felony and the "confrontation during which the defendant used force." *McLymore*, 2022-NCSC-12, ¶¶ 14, 30. The Court also held that N.C. Gen. Stat. § 14-51.3 supplants the common law on all aspects of self-defense addressed by its provisions. *Id.* at ¶ 12.

¶ 23 The defendant in *McLymore* claimed he acted in self-defense when he shot and killed the victim in the victim's car, dumped the body, and fled. *Id.* at ¶ 4. Over the defendant's objection, the trial court instructed the jury that a defendant was not entitled to self-defense if he was committing the offense of possession of a firearm by a felon, a crime for which the defendant had not been indicted. *Id.* at ¶¶ 6, 33. The defendant was convicted of first-degree murder, felony speeding to elude arrest, and armed robbery. *Id.* at ¶ 6. The Supreme Court held that the trial court erred by failing to instruct the jury on the causal-nexus requirement. *Id.* at ¶¶ 14, 30. The Supreme Court explained that

> although [the defendant] admitted that he had previously been convicted of a felony offense and was possessing a firearm at the time he used deadly force, the trial court's failure to properly instruct the jury denied him the opportunity to dispute the existence of a causal nexus between his violation of N.C. [Gen. Stat.] § 14-415.1 and his use of force and to assert any affirmative defenses.

Id. at ¶ 2.

¶ 24 In light of the Supreme Court's decision in *McLymore*, the trial court in this case erred by concluding that Defendant's conviction for possession of a firearm by a felon disqualified him per N.C. Gen. Stat. § 14-51.4(1) from receiving a perfect defense-of-another instruction, and by "failing to instruct the jury that the State was required to prove an immediate causal nexus between his commission of a felony offense and the circumstances giving rise to his perceived need to use defensive force." *Id.* at ¶ 13. We note that the Supreme Court's opinion in *McLymore* was issued while the present case was pending on appeal. Thus, the trial court did not have the benefit of that opinion when it conducted the trial.

¶ 25 Moreover, the trial court's errors were prejudicial. "[W]here competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential

feature of the case." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (citations and emphasis omitted). "In determining whether the instruction is supported by the evidence, the evidence must be viewed in the light most favorable to the defendant." *State v. Gomola*, 257 N.C. App. 816, 820, 810 S.E.2d 797, 801 (2018) (emphasis omitted).

¶ 26 At trial, the following evidence was presented that, when taken in a light most favorable to Defendant, would support a defense of others instruction and a causal nexus instruction: Ciara testified that Michael had a history of violent and aggressive behavior towards her. Defendant had, on previous occasions, come to Ciara's aid to protect her from Michael's aggression. On one occasion, when Michael was beating Ciara and Defendant had intervened to protect her, Michael pulled a gun on Defendant.

¶ 27 Leading up to the point when Defendant shot Michael, Michael repeatedly attacked Ciara while she was driving, despite her pleas to stop. When Michael climbed on top of her in the car she feared for her life. Michael told Ciara he would "kill her" and she believed him. Defendant was present during this time and witnessed the aggression toward Ciara.

¶ 28 Moreover, in light of this evidence, there is a reasonable possibility that, had the jury been instructed on defense of others and the causal nexus requirement, the jury would have determined both that there was no causal nexus between Defendant's felonious possession of a firearm and Defendant's use of defensive force such that defense of others was available to justify Defendant's force, and that Defendant acted in defense of Ciara when he used force against Michael. Accordingly, the trial court erred by failing to instruct the jury on perfect defense-of-another and failing to instruct the jury that the State was required to prove an immediate causal nexus between his commission of possession of a firearm by a felon and the circumstances giving rise to his perceived need to use defensive force.

B. Sufficient Evidence that Defendant did not act in Defense of Another

¶ 29 **[2]** Defendant also argues that the trial court erred by denying his motion to dismiss the murder charge because the State failed to offer sufficient evidence that Defendant did not act in defense of Ciara.

¶ 30 On a defendant's motion to dismiss a charge for insufficient evidence, "the question for the [trial court] is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the

perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quotation marks and citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In 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). On appeal, the trial court's denial of a motion to dismiss is reviewed de novo. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

¶ 31 "First-degree murder is the unlawful killing of a human being with malice and with a specific intent to kill, committed after premeditation and deliberation." *State v. Cozart*, 131 N.C. App. 199, 202, 505 S.E.2d 906, 909 (1998). "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 which supports a conviction of second-degree murder is either actual, express malice, or acting in a manner "which is inherently dangerous to human life . . . [in that it is] so reckless[ ] and wanton[ ] as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982). Additionally, where there is evidence that a defendant charged with murder acted in defense of another, the State has the burden to prove beyond a reasonable doubt that the defendant did not act in defense of another. *See, e.g.*, *State v. Potter*, 295 N.C. 126, 143, 244 S.E.2d 397, 408 (1978) (explaining the rule in the context of self-defense).

¶ 32 N.C. Gen. Stat. § 14-51.3, which closely tracks the common law definition of the right to self-defense, provides that "a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if . . . [h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." N.C. Gen. Stat. § 14-51.3(a); *see McLymore*, 2022-NCSC-12, ¶ 11.

¶ 33 Here, the State presented substantial evidence from which a rational juror could conclude that Defendant did not act in defense of another, including that: Defendant fired his gun three times at Michael and Michael was shot twice; Ciara's injuries were not serious and not consistent with the degree of attack described by the testimony; Defendant did

not act quickly to come to Ciara's aid, but rather took his time before advancing; Defendant was frustrated at Michael prior to shooting him saying, "You're always doing this"; Ciara and Tyler gave inconsistent accounts to the police of the events that transpired the night Michael was shot; Ciara lied to the police when telling them that Michael had been shot in a drive-by shooting; and Defendant walked away from the car on the way to taking Michael to the hospital.

¶ 34 Viewed in the light most favorable to the State, this was sufficient evidence from which a rational juror could conclude that Defendant did not act in defense of Ciara. Accordingly, the trial court did not err by denying Defendant's motion to dismiss the charges of first-degree and second-degree murder.

¶ 35 In light of the above conclusions, we do not address Defendant's remaining argument.

IV. Conclusion

¶ 36 We vacate the judgments entered upon Defendant's convictions for second-degree murder and attaining violent habitual felon status, and remand for a new trial.

VACATED AND REMANDED FOR NEW TRIAL.

Chief Judge STROUD and Judge DIETZ concur.

THOMPSON v. UNION CNTY.

[283 N.C. App. 547, 2022-NCCOA-382]

WILLIE THOMPSON AND EARLENE THOMPSON, PETITIONERS
v.
UNION COUNTY, RESPONDENT

No. COA21-220

Filed 7 June 2022

1. Courts—superior court—sitting as appellate court—review of board of adjustment decision—standards of review

In an appeal from a county board of adjustment's decision regarding alleged zoning violations, the superior court, sitting as an appellate court, applied the correct standards of review: de novo review and the whole record test. Further, Civil Procedure Rule 52(a)(1) had no application in the case because the superior court was sitting as an appellate court; therefore, the superior court was not required to make factual findings.

2. Zoning—unified development ordinance—encroaching into setback—government's burden—incomplete record

Where a county board of adjustment determined that petitioners' residence and garage were in violation of the county's 2014 unified development ordinance (2014 UDO) by encroaching into a street side yard setback, the superior court erred in affirming the board's decision where the county failed to carry its burden of proof. The structures were built years before the county adopted the 2014 UDO and there was no basis in the record for applying the 2014 UDO to the structures, as the record did not contain pertinent sections of the 2014 UDO or any applicable permits (which the county had purged from its records as a matter of course). As for the residence, because the county could not possibly show a violation of the 2014 UDO's section regarding violations of previous ordinances, remand would be futile. As for the garage, petitioners admitted that it was constructed without a permit, so the matter was remanded for a determination of whether the garage violated the ordinance in effect at the time of its construction and thus was a continuing violation under the 2014 UDO.

3. Zoning—unified development ordinance—encroaching into setback—statutory vested rights—permitted property

Where a county board of adjustment determined that petitioners' residence and garage were in violation of the county's 2014 unified development ordinance (2014 UDO) by encroaching into a street

side yard setback, the superior court erred in affirming the board's decision as to the residence because the decision directly conflicted with former N.C.G.S. § 153A-344. The county had purged its permit records and chosen to presume that a permit had been issued for the residence, so petitioners had a statutory vested right to maintain the residence where it was located. But because petitioners admitted that the garage was unpermitted, they had no statutory vested right to maintain the garage where it was located.

Appeal by petitioners from orders entered 9 November 2020 by Judge Hunt Gwyn in Superior Court, Union County. Heard in the Court of Appeals 16 November 2021.

Ferguson Chambers & Sumter, PA, by Geraldine Sumter, for petitioners-appellants.

Perry, Bundy, Plyler & Long, LLP, by Ashley J. McBride, for respondent-appellee.

STROUD, Chief Judge.

¶ 1 Willie and Earlene Thompson ("Appellants") appeal from a Superior Court order affirming a decision by the Union County Board of Adjustment ("BOA") which upheld zoning Notices of Violation and a fine issued to Appellants by Union County. Appellants argue (1) the Superior Court erred in failing to make findings of fact and conclusions of law in compliance with North Carolina Rule of Civil Procedure 52(a)(1); (2) erred by retroactively applying the 2014 Union County Unified Development Ordinance ("2014 UDO") to a property constructed prior to enactment of the 2014 UDO; (3) the County's enforcement actions are barred by statutes of limitations in accordance with North Carolina General Statutes §§ 1-49(3) and 1-51(5); and (4) the Superior Court erred by affirming a decision by the BOA without sufficient findings of fact and conclusions of law. Because Appellants' residence is presumed lawful if it was in compliance with the ordinance in effect at the time of construction and any applicable issued permits, and because the prior ordinance applicable to the residence and garage was not in evidence, Union County failed to show the structures are in violation of the 2014 UDO. The BOA and Superior Court therefore erred in holding Appellants' property in violation of the 2014 UDO. For these reasons, the Superior Court's order is reversed in part and vacated and remanded in part.

I. Background

¶ 2 Appellants purchased a residence with two detached garages located behind the house in Indian Trail, Union County on 20 June 2018. The property is accessed by a 60-foot private right-of-way which connects to Stinson Hartis Road, a public street. At issue in this case are the single-family residence and the larger of the two detached garages.

¶ 3 The property was developed between 2004 and 2009. The residence was built in 2004, and the larger garage was later constructed in 2009. The property was sold to Appellants' immediate predecessor in interest in 2013. For purposes of this appeal, we assume a permit was issued for construction of the residence in 2004. At the BOA hearing, James King, Union County Zoning Administrator, acknowledged as to the residence that

> we cannot verify whether or not a permit was issued because we purge our records after 6 years . . . . It has been destroyed, so we don't know if there's a permit or not. We're going to assume for the benefit of the resident that the permit was issued and we're just going to go with that.

As to the large garage, Appellant Earlene testified that the garage was built without a permit and presented a 3 May 2018 application for a building permit to the BOA. The BOA made no findings as to the existence of a permit for either structure. As noted by the Zoning Administrator, Union County maintains a policy of purging permitting records after six years, and copies of the permits and applications no longer exist.

¶ 4 Years after the construction of the residence and garages, on 6 October 2014, Union County enacted the UDO which contains minimum setback requirements. Under the UDO, the Appellants' property is zoned "R-20," allowing for single-family residential development. The minimum setback requirements for property zoned R-20 under the UDO require a home or structure to be set back at least 20 feet from side property lines or rights-of-way, commonly called street side yard setbacks.

¶ 5 The property was later listed for sale, and on 2 January 2018 the property was surveyed in connection with a potential purchase. According to the survey, based upon the 2014 UDO the larger of the two garages encroached upon the private right-of-way and was in violation of the UDO 20-foot setback requirement. This survey also showed the residence was in violation of the same 2014 UDO 20-foot street side yard setback, although the survey did not identify the exact extent of the encroachment.

¶ 6 In April 2018, the survey was presented to Mr. King. On 1 June 2018, after reviewing the survey, Mr. King issued a Notice of Violation to Appellants' predecessor in interest, noting that a "portion of both the principal structure and one of the accessory structures encroach into the required street side yard setback." The property was left on the market for sale, and the Multiple Listing Service (MLS) listing for the property noted "133K BELOW APPRAISED VALUE, SEE APPRAISAL. CASH OFFERS ONLY-HOUSE IS ENCROACHING ON PRIVATE DRIVE BESIDE HOUSE. Being sold AS IS, NO REPAIRS." Appellants purchased the home 20 June 2018. They also received a $10,000 credit from seller at closing because of the encroachment violation.

¶ 7 After Appellants purchased the property, the Union County Zoning Administrator issued a Notice of Violation to them on 6 September 2018. This Notice called for an additional survey to determine the extent of the violation by the residence and noted the setback violation as "the accessory structures encroaches [sic] into the required street side yard setback and there is a potential encroachment with a portion of the principal structure as well." This Notice also required removal of any portion of a structure violating the setback requirement. Appellants were subsequently fined $50 for the setback violation on 3 October 2018; this citation again noted violations by both structures, called for a new survey, and required removal of any portions of the structures that violated the UDO setback requirements. Another Notice of Violation was issued 31 January 2019, referencing the 2 January 2018 survey and again stating both the garage and residence were in violation of the minimum setback requirements.

¶ 8 Appellants appealed the Notices of Violation and the fine to the Union County Board of Adjustment. Hearings were held for the appeal on 11 February 2019 and 13 May 2019. Both parties presented testimony and evidence. The Board of Adjustment affirmed the Notices and determined that the residence and larger garage were encroaching into the street side yard setback in violation of the UDO.

¶ 9 Appellants petitioned for Writ of Certiorari to the Superior Court of Union County and requested the Court reverse and vacate the BOA's decision. The Superior Court entered an Order 9 November 2020 affirming the Union County BOA's decision. Appellants timely appealed to this Court.

II. Standard of Review

¶ 10 In this case, the Superior Court sat as an appellate court, reviewing the BOA's decision on a writ of certiorari. *See Dellinger v. Lincoln*

County, 248 N.C. App. 317, 322, 789 S.E.2d 21, 26 (2016). At the time of the BOA decision and Superior Court proceeding, former North Carolina General Statute § 160A-388 provided that "[e]very quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393." N.C. Gen. Stat. § 160A-388(e2)(2) (2019) (repealed by S.L. 2019-111, § 2.3 as amended by S.L. 2020-25, § 51(b), eff. June 19, 2020) (recodified at N.C. Gen. Stat. § 160D-406(k) (2021)); *see also Four Seasons Management Services v. Town of Wrightsville Beach*, 205 N.C. App. 65, 75, 695 S.E.2d 456, 462 (2010). The Superior Court's functions when reviewing the decision of a board sitting as a quasi-judicial body include:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of [the Board] are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Dellinger, 248 N.C. App. at 322, 789 S.E.2d at 26 (citation omitted). This Court's review of the Superior Court is limited to determining whether the Superior Court exercised the appropriate standard of review, and whether that standard of review was correctly applied. *See Overton v. Camden County*, 155 N.C. App. 391, 393–94, 574 S.E.2d 157, 160 (2002); *Appeal of Willis*, 129 N.C. App. 499, 501–02, 500 S.E.2d 723, 726 (1998).

¶ 11 When reviewing administrative decisions, determining the appropriate standard of review to be applied depends on "the substantive nature of each assignment of error." *Morris Communications Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 155, 712 S.E.2d 868, 870 (2011) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004)). When the assignment of error alleges an error of law, *de novo* review is appropriate. *Dellinger*, 248 N.C. App. at 323, 789 S.E.2d at 26. Under a *de novo* standard of review, "a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions

of law." *Morris Communications Corp.*, 365 N.C. at 156, 712 S.E.2d at 871. The court shall consider the interpretation of the decision-making board but is not bound by that interpretation and may freely substitute its judgment as appropriate. *Id.*

¶ 12 When the assignment of error alleges that a board's decision was not supported by evidence, or was arbitrary and capricious, the appropriate review is the whole record test. *Amanini v. North Carolina Dept. of Human Resources, N.C. Special Care Center*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). "The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Id.* " 'Substantial evidence' is that which a reasonable mind would consider sufficient to support a particular conclusion . . . ." *Id.* at 682, 443 S.E.2d at 122.

¶ 13 "[W]hether competent, material and substantial evidence is present in the record is a conclusion of law." *Dellinger*, 248 N.C. App. at 324–25, 789 S.E.2d at 27 (alteration in original) (quoting *Clark v. City of Asheboro*, 136 N.C. App. 114, 119, 524 S.E.2d 46, 50 (1999)). The initial issue of whether the evidence presented by Appellants met the requirements of being competent, material, and substantial is subject to *de novo* review, but the BOA's ultimate decision about how to weigh that evidence is subject to whole record review. *Id.* at 325, 789 S.E.2d at 27. "The reviewing court should not replace the [BOA's] judgment as between two reasonably conflicting views; while the record may contain evidence contrary to the findings of the agency, this Court may not substitute its judgment for that of the agency." *SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 27, 539 S.E.2d 18, 22 (2000) (quotation, citations, and alterations in original omitted). In reviewing the sufficiency and competency of evidence before the Superior Court, the question is not whether the evidence supported the Superior Court's order. *Dellinger*, 248 N.C. App. at 323, 789 S.E.2d at 26. The question is whether the evidence before the BOA was supportive of the BOA's decision. *Id.*

III. Analysis

A. The Superior Court's Application of Standards of Review

¶ 14 **[1]** This Court's first task is determining whether the Superior Court applied the correct standards of review. *See Overton*, 155 N.C. App. at 393–94, 574 S.E.2d at 160. It appears that the Superior Court correctly identified *de novo* review and the whole record test as the appropriate standards to apply. The Superior Court reviewed the decision to determine whether there was "substantial, admissible evidence in the record

to support the findings of fact set forth in the Decision," and conducted a *de novo* review of the decision to determine whether the conclusions of law were supported by the findings of fact. The Superior Court also reviewed the BOA decision *de novo* to determine whether the decision was affected by other errors of law.

¶ 15 Before moving on to this Court's second task, reviewing the Superior Court's application of these standards, we note Appellants allege that the Superior Court's order does not comply with our Rules of Civil Procedure.

1. Application of North Carolina Rule of Civil Procedure 52 to the Superior Court's Order

¶ 16 Appellants' first argument asserts the Superior Court erred in failing to issue an order with findings of fact in compliance with North Carolina Rule of Civil Procedure 52(a)(1). We disagree. Rule 52(a)(1) has no application in the present case.

¶ 17 North Carolina Rule of Civil Procedure 52(a)(1) states, in relevant part, "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2019). But this Court has repeatedly held that a superior court, when sitting as an appellate court, is not required to "make findings of fact and enter a judgment thereon in the same manner as the court would be when acting in its role as trial court." *Shepherd v. Consolidated Judicial Retirement System*, 89 N.C. App. 560, 562, 366 S.E.2d 604, 605 (1988) (citing *Markham v. Swails*, 29 N.C. App. 205, 208, 223 S.E.2d 920, 922 (1976) (discussing the application of Rule 52 to a trial court's appellate review of agency decisions in accordance with North Carolina General Statutes §§ 143-314, 315)). "The trial court, when sitting as an appellate court to review an administrative agency's decision, must [only] set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Sutton v. North Carolina Dept. of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 342 (1999). Separate findings of fact are not required, and Rule 52 has no application where the superior court sits in the posture of an appellate court. *See Myers Park Homeowners Ass'n, Inc. v. City of Charlotte*, 229 N.C. App. 204, 214, 747 S.E.2d 338, 346 (2013) (citing *Markham*, 29 N.C. App. at 208, 233 S.E.2d at 922).

¶ 18 The Superior Court is not the trier of fact; that is the function of the town board. *Coastal Ready-Mix Concrete Co., Inc. v. Board of Com'rs of Town of Nags Head*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980). The

Superior Court "may affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings." *Hampton v. Cumberland County*, 256 N.C. App. 656, 662, 808 S.E.2d 763, 768 (2017) (quoting N.C. Gen. Stat. § 160A-393(*l*) (repealed by S.L. 2019-111, § 2.3 as amended by S.L. 2020-25, §51(b), eff. June 19, 2020) (recodified at N.C. Gen. Stat. § 160D-1402(k) (2021)); *see also id.* at 671, 808 S.E.2d at 773 (summarizing *Myers Park Homeowners Ass'n* as interpreting North Carolina General Statute § 160A-393 and "affirming a superior court's denial, in a *de novo* review of a board of adjustment's order interpreting a zoning ordinance, of motions requesting additional findings of fact under Rule[] 52 . . . on the basis that 'the superior court functions as an appellate court rather than a trier of fact' " (quoting *Myers Park Homeowners Ass'n*, 229 N.C. App. at 214, 747 S.E.2d at 341 (alterations from internal quotation omitted))). This Court has even held that a superior court may err by making its own findings of fact after a *de novo* review of an agency decision. *See Hampton*, 256 N.C. App. at 668, 808 S.E.2d at 772; *Carroll*, 358 N.C. at 660–61, 599 S.E.2d at 895.

¶ 19 Because the Superior Court's order is sufficient to allow this Court to identify the scope and standards of review applied by the court below, and findings of fact according to Rule 52 are not required when the Superior Court sits as an appellate court, Appellants' argument is overruled.

B. Application of Standards of Review by the Superior Court

¶ 20 **[2]** This Court's second task is determining if the Superior Court correctly applied the appropriate standards of review. *See Overton*, 155 N.C. App. at 393–94, 574 S.E.2d at 160. This Court reviews alleged errors of law *de novo*. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 140 N.C. App. 99, 102–03, 535 S.E.2d 415, 417 (2000).

¶ 21 Appellants contend the Superior Court did not apply the standard of review properly because (1) the 2014 UDO is unenforceable against Appellants' property, and (2) the UDO should not have been applied to the property because the statutes of limitations in North Carolina General Statutes §§ 1-49(3) and 1-51(5) both prohibit the assessment of the civil penalty and the issuance of the Notices of Violation. Because Appellants failed to raise the statute of limitations defense before the Board of Adjustment and first raised the defense in their Petition for Writ of Certiorari before the Superior Court, while the court sat as an appellate court, this defense was waived. N.C. Gen. Stat. § 1A-1, Rule 8(c); *Gragg v. W.M. Harris & Son*, 54 N.C. App. 607, 609, 284 S.E.2d 183,

185 (1981) ("[T]he statute of limitations is a technical defense, and must be timely pleaded or it is deemed waived."); *Delp v. Delp*, 53 N.C. App. 72, 76, 280 S.E.2d 27, 30 (1981) ("Where a defendant does not raise an affirmative defense in his pleadings or [before the BOA], he cannot present it on appeal."). We therefore only address Appellants' arguments that their property was exempted from the 2014 UDO or the 2014 UDO was otherwise inapplicable to the Appellants' property.

¶ 22 Appellants assert the Superior Court's decision was erroneous because Appellants' residence and garage predate the enactment of the 2014 UDO. The residence was constructed in 2004, the garage in 2009, and the 2014 UDO did not become effective until 6 October 2014. The County did not issue a citation under the 2014 UDO to the Appellants until September 2018. Appellants identify three errors of law and bases for reversal of the lower court's decision: (1) their property was exempted from enforcement by the plain language of the 2014 UDO, (2) Appellants have a vested right under North Carolina General Statute § 153A-344 to maintain their structures where currently located, and (3) it was error to affirm the retroactive application of the UDO to Appellants' property.

1. Application of the 2014 UDO under UDO § 1.120-A(1) and UDO § 1.120-B

¶ 23 Appellants challenge several of the BOA's findings of fact, but before we address the findings, we must first determine the ordinances applicable to analysis of the issues on appeal. The interpretation of an ordinance is reviewed *de novo*. *See Westminster Homes*, 140 N.C. App. at 102–03, 535 S.E.2d at 417.

¶ 24 The residence and garage on the property were constructed prior to the adoption of the 2014 UDO, and the land use ordinance in effect prior to 2014 is not in the record. Appellants argue the plain language of the 2014 UDO exempts their property from enforcement under Section 1.120-A(1), but this Section is also not in the record and we cannot take notice of municipal ordinances not in the record. *High Point Surplus Co. v. Pleasants*, 263 N.C. 587, 591, 139 S.E.2d 892, 895 (1965); *Fulghum v. Town of Selma*, 238 N.C. 100, 105, 76 S.E.2d 368, 371 (1953) ("We cannot take judicial notice of municipal ordinances."). Appellants quote Section 1.120-A(1) to us in their brief as:

> Any building, development or structure for which a building permit was issued . . . before the effective date specified in Section 1.030 may be completed in comformance [sic] with the issued building permit . . .

> even if such building, development or structure does not comply with the provisions of this ordinance.

(Alterations in original.)

¶ 25 Appellants contend a permit was issued for construction of the residence and garages prior to "the effective date specified in Section 1.030," 6 October 2014, and the structures were "completed in comformance [sic] with the issued building permit . . . ." Thus, even if the residence and garages do not comply with the setback provisions of the 2014 UDO, they comply with this provision of the 2014 UDO and are not in violation of the ordinance. Appellee contends the purported Section 1.120-A(1) applies only to the narrow scenario in which a permit was issued prior to enactment of the ordinance, but construction was incomplete or had not started by the time of enactment. Appellee contends Section 1.120-A(1) does not apply to this case because the structures were both completed long before the effective date of the 2014 UDO.

¶ 26 Appellee instead argues that Section 1.120-B, entitled "Violations Continue," is applicable to Appellant's structures and cites Section 1.120-B to us as: "[A]ny violation of the previous land use ordinance will continue to be a violation under this ordinance and be subject to penalties and enforcement under Article 95." Appellee asserts the setbacks in the prior land use ordinance are the same as the 2014 UDO, and therefore the encroachment by the garage and the residence are both continuing violations. Additionally, because the garage encroaches on not only the setback, but the right-of-way, regardless of the setback distance under the previous land use ordinance the garage is a continuing violation punishable under the 2014 UDO. Appellee contends neither structure could have been constructed "in conformance with [an] issued building permit" as asserted by Appellants. However, the actual permits, if any, no longer exist since Appellee purged its records. Additionally, Appellee's argument suffers the same fatal flaw as the Appellants' argument, since Section 1.120-B is not in the record before us and we cannot take notice of it. *High Point Surplus Co.*, 263 N.C. at 591, 139 S.E.2d at 895; *Fulghum*, 238 N.C. at 105, 76 S.E.2d at 371.

¶ 27 For purposes of appellate review, we must consider only the evidence and ordinances in the record. *High Point Surplus Co.*, 263 N.C. at 591, 139 S.E.2d at 895; *Fulghum*, 238 N.C. at 105, 76 S.E.2d at 371. The burden of proof to show the existence of a violation of the ordinance is upon the Appellee. *See Shearl v. Town of Highlands*, 236 N.C. App. 113, 116–17, 762 S.E.2d 877, 881 (2014) ("As to the first question, the burden of proving the existence of an operation in violation of the local zoning ordinance is on Respondent. Thus, it was Respondent's responsibility to

present evidence that Petitioner's commercial use of his storage building was in violation of Respondent's zoning ordinance when the notice of violation was issued on 19 August 2009." (citation omitted)).

> Ordinarily, once a town meets its burden to establish the existence of a current zoning violation, the burden of proof shifts to the landowner to establish the existence of a legal nonconforming use or other affirmative defense. *See City of Winston–Salem* [*v. Hoots Concrete Co., Inc.*], 47 N.C. App. [405,] 414, 267 S.E.2d [569,] 575 [(1980)] ("The defendant, of course, has the burden of establishing all affirmative defenses, whether they relate to the whole case or only to certain issues in the case. As to such defenses, he is the actor and has the laboring oar. The city had the burden of proving the existence of an operation in violation of its zoning ordinance. It was defendant's burden to prove the city had already made a determination that the operation was permissible and did not violate the zoning ordinance." (internal quotation marks and citation omitted)). Here, however, Respondent has seriously handicapped Petitioner's ability to prove the location of the zoning line in 1993 because Respondent has lost the Official Zoning Map adopted with the 1990 zoning ordinance.

Shearl, 236 N.C. App. at 118, 762 S.E.2d at 882.

¶ 28 The plain language of Section 1.120-A(1) and Section 1.120-B as quoted to us appears to support Appellee's argument that Section 1.120-B applies to this situation, since the residence and garage were completed long before adoption of the 2014 UDO. But Appellee failed to carry its burden of proving the residence and garage were in violation of the ordinance in effect when they were built since they produced neither the permits nor the applicable ordinance from the time of the construction. Additionally, Section 1.120-B is not in the record, and we cannot determine whether Section 1.120-B is applicable and whether Appellants' property is a continuing violation under the 2014 UDO. Appellee's argument that the residence and garage are in violation of Section 1.120-B is based upon assumptions unsupported by the record. Appellee's arguments as to Section 1.120-B are based upon its representations as to the provisions of the ordinance in effect at the time Appellants' residence and garages were built, but that ordinance is not in our record and was not presented to the Superior Court either; our

record includes only the portion of the 2014 UDO providing for setbacks in residential districts. In addition, Appellee acknowledged it had purged the records of the permits and thus has no evidence of the permits or any specific requirements of the permits.

¶ 29 Appellee asks us to assume the residence was not constructed in compliance with its permit and both structures were in violation of the prior land use ordinance when constructed in 2004 and 2009 and thus are continuing violations under Section 1.120-B, but there is no legal or evidentiary basis for this assumption. In *Shearl*, this Court addressed a similar situation where the Town had lost the zoning maps which would purportedly show the location of a zoning line at issue in that case. 236 N.C. App. at 118, 762 S.E.2d at 882. The *Shearl* Court noted, "Respondent has seriously handicapped Petitioner's ability to prove the location of the zoning line in 1993 because Respondent has lost the Official Zoning Map adopted with the 1990 zoning ordinance." *Id.* The Court also noted that the parties conceded some of the relevant maps and other evidence were not in the record, but this deficiency was not the fault of the appellant in that case. *Id.* at 117, 762 S.E.2d at 881. The case was remanded for further proceedings where all the relevant maps and evidence could be considered, with the burden upon the Town to prove the zoning violation.

> We believe that where, as here, a town fails to comply with its obligations under local ordinances and state law by failing to keep official zoning maps on record for public inspection, the appropriate remedy is to place the burden back on the town to establish the location and classification of zoning districts when the landowner began his or her nonconforming use. Because the BOA placed the burden on Petitioner to establish the location of the zoning line when he began his nonconforming use in 1993, the Superior Court's order affirming that allocation of proof must be vacated and the matter remanded for a new hearing. At the new hearing, Respondent must: (1) present evidence establishing the existence of a current zoning violation, and (2) present evidence that the 1990 zoning ordinance moved the zoning line on the subject property from 230 feet to 150 feet from the centerline of Highway 28. Petitioner must be allowed to offer additional evidence in rebuttal.

Id. at 119, 762 S.E.2d at 882.

¶ 30 As in *Shearl*, Appellee failed to carry its burden of proving a violation of the ordinance in effect at the time the residence and garage were constructed because it failed to present evidence of the permits (or lack thereof) and the applicable ordinance at the time of construction. With no evidence of terms of the permits or of the ordinance in effect when the residence and garage were constructed, the BOA and Superior Court had no factual or legal basis upon which to find that the structures were not in compliance with any permits and applicable provisions of the ordinance in effect when the structures were built. There is no dispute the structures were all completed long before adoption of the 2014 UDO and the first Notice of Violation was not issued until 1 June 2018.

¶ 31 We must thus consider whether remand is proper in this case. In *Shearl*, the parties conceded that certain maps and evidence were missing from the record, but this Court determined the deficiency was not the fault of the appellant. *Id.* at 117, 762 S.E.2d at 881. In addition, in *Shearl*, the town had "lost" the maps, apparently inadvertently, *id.* at 118, 762 S.E.2d at 882, but here the Appellee had intentionally purged its records of permits more than 6 years old. Because the issue was the lack of information in the record, the *Shearl* Court remanded for a new hearing. Here, Appellee conceded it had purged its records of permits and permit applications more than 6 years old and presumed that a permit was issued for the residence, so remand for further consideration as to the residence would be futile. As to the residence, we will not hold Appellee's unilateral decision to purge its records as to permits after 6 years against the Appellants. Appellee had the burden of proving Appellants were in violation of the 2014 UDO but did not produce evidence of any applicable permits issued for the residence and did not provide the ordinance in effect at the time of the residence's construction to the Superior Court.

¶ 32 As to the garage, Appellants acknowledged it was constructed without a permit, so the garage could potentially be in violation under Section 1.120-B. But Section 1.120-B is not in the record before us and the BOA failed to make findings of fact regarding the garage and the prior ordinance. However, there may be relevant evidence available regarding the garage on remand. The survey and testimony in evidence address the requirements of the 2014 UDO but do not purport to show whether the garage violated the ordinance in effect at the time of the structure's construction and whether the garage is consequently a continuing violation under the 2014 UDO.

¶ 33 Because there was no basis to apply the 2014 UDO to Appellants' pre-existing residence and garage, the Superior Court erred in affirming

the BOA decision finding the structures in violation of the 2014 UDO. However, Appellant conceded at the BOA hearing the garage was constructed without a permit, so we remand for further proceedings with respect to Appellants' garage.

2. Vested Rights under North Carolina General Statute § 153A-344

¶ 34 **[3]** Appellants next challenge the Superior Court's affirmation of the BOA decision because the BOA decision directly conflicts with former North Carolina General Statute § 153A-344, which provided that:

> Amendments in zoning ordinances shall not be applicable or enforceable without consent of the owner with regard to buildings and uses for which either (i) building permits have been issued pursuant to G.S. 153A-357 prior to the enactment of the ordinance making the change or changes so long as the permits remain valid and unexpired pursuant to G.S. 153A-358 and unrevoked pursuant to G.S. 153A-362 . . . .

N.C. Gen. Stat. § 153A-344(b) (2017)[1] (repealed by S.L. 2019-111, § 2.2, as amended by S.L. 2020-25, § 51(b), eff. June 19, 2020) (recodified at N.C. Gen. Stat. § 160D-108(c) (2021)).

¶ 35 Appellants argue the property's development was authorized by the County via building permits, inspections, and occupancy certificates, so North Carolina General Statute § 153A-344 provides Appellants with a vested right to maintain their residence and garage where currently located. The County was consequently barred from enforcing the UDO against Appellants without their written consent. As a result, it was erroneous for the Superior Court to affirm the Board's retroactive application of the UDO to structures completed 5 to 10 years prior to the enactment of the UDO. We agree in part.

¶ 36 North Carolina law provides a statutory vested right to maintain buildings constructed in conformity with a building permit, and the County presumed Appellants' residence was properly permitted since it had purged its records. Appellee had an opportunity to prove Appellants' property was not constructed in conformity with a building permit or the applicable ordinances, but instead chose to presume a permit was

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1. While this case was ongoing, the statute changed in July 2019. N.C. Gen. Stat. § 153A-344(b) (2019). The changes in the statute do not make a substantive difference, but we use the version of the statute in effect in 2018 because that is when the citations that started this case were issued.

issued and only pursued setback violations under the 2014 UDO. The absence of evidence of a permit should be held against the County, not the property owner. *See Shearl*, 236 N.C. App. at 118, 762 S.E.2d at 882. As to Appellants' garage, Appellant Earlene testified before the BOA that the garage was unpermitted. Therefore, there was no permit that may grant Appellants a vested right to maintain their garage where located.

¶ 37 Vested rights in a zoning ordinance can be established through one of two means. *See Browning-Ferris Industries of South Atlantic, Inc. v. Guilford County Bd. of Adjustment*, 126 N.C. App. 168, 171, 484 S.E.2d 411, 414 (1997). Vested rights may be created by qualification with certain statutes or by qualification under the common law. *See id.* Appellants only assert a statutory vested right, and we consequently limit our discussion.

¶ 38 Issuance of a building permit is a necessary prerequisite to the creation of a vested statutory right under North Carolina General Statute § 153A-344. *See* § 153A-344(b); *see also Sandy Mush Properties, Inc. v. Rutherford County ex rel. Rutherford County Bd. of Com'rs*, 181 N.C. App. 224, 233, 638 S.E.2d 557, 563 (2007) (interpreting § 153A-344 as applied to an office building with a valid permit). Additionally, any such right created under North Carolina General Statute § 153A-344 may be limited by the precise language of the permit. *See Sandy Mush Properties*, 181 N.C. App. at 235–36, 638 S.E.2d at 564. Should a permit contain language such as "all work will comply with the State Building Code and all other applicable State and Local laws and ordinances," then any rights created under North Carolina General Statute § 153A-344 would be limited to rights to construct buildings in conformity with North Carolina law, including local zoning ordinances. *See id.*

¶ 39 Appellee argues, based upon the testimony of the Union County Zoning Administrator, that any permit issued to Appellants to construct their residence would have included similar language. The BOA also appears to have considered the likelihood that any permit issued to Appellants would have declared setback requirements and that construction must comply with those requirements.

¶ 40 However, as to Appellants' residence, no evidence of the specific requirements of a building permit was presented. The only evidence regarding the permit was the statement by Mr. King that:

> we cannot verify whether or not a permit was issued because we purge our records after 6 years. . . . . It has been destroyed, so we don't know if there's a permit or not. *We're going to assume for the benefit of the*

> *resident that the permit was issued* and we're just going to go with that.

(Emphasis added.) The rest of the testimony before the BOA appears to focus on the 2 January 2018 survey, but the evidence does not address whether the residence's construction complied with a building permit or what the prior ordinance required in 2004. Additionally, the BOA made no findings as to the existence or nonexistence of a permit for Appellants' residence. According to the evidence and the County's concession it had purged its records and assumption that a permit was issued, we must also assume a permit was issued. Based upon the permit, Appellants have a vested right to maintain the residence where currently located. Appellee did not use its opportunity before the BOA to prove the absence of a permit for the residence, failure to comply with a permit, or that a permit was issued and expired but instead chose to assume a valid permit was issued to Appellants. Appellants have a vested right under North Carolina General Statute § 153A-344 to maintain the residence where currently located. But since no permit was issued for the garage, Appellants have no vested right under North Carolina General Statute § 153A-344 to maintain the garage where it is located.

C. Application of the Standard of Review to Findings of Fact

¶ 41 This Court must next determine if the Superior Court correctly applied the whole record test to challenged findings of fact. *See Dellinger*, 248 N.C. App. at 323, 789 S.E.2d at 26. Our duty is to determine, after a review of the whole record, if there was substantial evidence to support the BOA decision. *Id.* "The whole record test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Turik v. Town of Surf City*, 182 N.C. App. 427, 430, 642 S.E.2d 251, 253 (2007) (alterations and quotation omitted). But any "[f]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light . . . ." *State v. Moir*, 369 N.C. 370, 389, 794 S.E.2d 685, 698 (2016) (alteration in original) (quoting *Helms v. Rea*, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973)). The BOA's sole conclusion of law is reviewed *de novo*. *Westminster Homes*, 140 N.C. App. at 102, 535 S.E.2d at 417.

¶ 42 Appellant assigns error to three specific findings of fact, and the BOA's sole conclusion of law.

1. Board of Adjustment Finding of Fact No. 4

¶ 43 The BOA Finding of Fact No. 4 states: "A portion of the principal residential structure is located in the 20-foot side yard setback. The date that the encroachment first occurred is unknown." Appellant argues there was no competent evidence presented at either BOA hearing to support this finding, and that the testimony by the Union County Zoning Administrator indicates the County did not have sufficient information to conclusively determine if the house encroached upon the setback line. This finding is accurate in that the survey does show an encroachment, and the Zoning Administrator testified that an encroachment is evidenced by the survey, but it is the extent of the encroachment that is unknown. Regardless, the survey and testimony were based upon the 2014 UDO and thus this finding is not relevant to the issue of setback violations for the reasons stated above. This finding only shows that the property would be in violation of the 2014 UDO if the residence was built after the effective date of the UDO, not that Appellants' property is a continuing violation of the prior ordinance.

2. Board of Adjustment Finding of Fact No. 8

¶ 44 The BOA Finding of Fact No. 8 states: "At the time Thompson purchased the Thompson Residence, she was aware of both violations of the side yard setbacks." Appellants argue this finding is at odds with Appellant Earlene's testimony at the hearing, and that Appellants were only aware of a potential permitting issue with the garage. After a review of the evidence available to the BOA, we agree with Appellants' arguments for the reasons set forth in the prior section. Appellee had the burden of proving a violation of the 2014 UDO and failed to produce evidence to carry that burden. The BOA should not have applied the 2014 UDO against Appellants' property, and Appellants' knowledge of a survey showing an encroachment based upon the 2014 UDO has no bearing on whether either structure was in violation of the ordinance in effect when the structures were built. Ultimately, Appellants' knowledge of a potential violation of the 2014 UDO is not relevant.

3. Board of Adjustment Finding of Fact No. 12

¶ 45 The BOA Finding of Fact No. 12 states: "The various depictions and testimony of the location of the Thompson Residence and the accessory detached garage all show both buildings encroach into the required side yard setbacks." Appellants argue this finding is erroneous for the same reasons that Finding No. 4 is erroneous; there is no competent evidence to support the finding. Again, this finding is accurate because the survey

does show an encroachment, but the survey was based upon the 2014 UDO and thus this finding is not relevant to the issue of violation for the reasons stated above. For the same reasons as Finding No. 4, we conclude it was error for the Superior Court to affirm the BOA's findings applying the UDO when it was not shown that Appellants' property violated the prior ordinance in effect when the structures were built.

4. Board of Adjustment Conclusion of Law

¶ 46 Appellants also challenge the Board of Adjustment's sole conclusion of law. The BOA concluded that "both the Thompson Residence and the accessory detached garage encroach into the side yard setbacks and are thus in violation of the Union County Development Ordinance." As discussed above, this conclusion of law is based upon application of the 2014 UDO, but Appellee failed to show that the structures were in violation of the ordinance in effect when they were built. The Superior Court erred in affirming the BOA's conclusion of law.

IV. CONCLUSION

¶ 47 We conclude Appellants waived the defense of the statutes of limitations in North Carolina General Statutes §§ 1-49(3) and 1-51(5) as to the civil penalty and Notices of Violation by failure to raise this defense before the BOA. We conclude the Superior Court erred by affirming the BOA's decision because Appellee failed to carry its burden of proving the residence and garage were in violation of the 2014 UDO. As to Appellants' residence, the trial court's order is reversed. As to Appellants' garage, the trial court's order is vacated and remanded with instructions to remand to the BOA for further proceedings consistent with this opinion, with the burden upon Appellee to prove a zoning violation based upon the applicable ordinances.

REVERSED IN PART; VACATED AND REMANDED IN PART.

Judges ARROWOOD and JACKSON concur.

VIOLETTE v. TOWN OF CORNELIUS

[283 N.C. App. 565, 2022-NCCOA-383]

KEVIN SCOTT VIOLETTE, AND VIOLETTE FAMILY FARM, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, PLAINTIFFS
v.
THE TOWN OF CORNELIUS, A NORTH CAROLINA BODY POLITIC AND CORPORATE, BLUESTREAM PARTNERS, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, JACOB A/K/A "JAKE" J. PALILLO, AND WAYNE HERRON, DEFENDANTS

No. COA21-648

Filed 7 June 2022

Declaratory Judgments—rezoning challenge—lack of standing

In a challenge to a rezoning application, the trial court's grant of summary judgment to defendant town was affirmed where plaintiffs, owners of land adjacent to the property under review, lacked standing to bring the challenge.

Judges DIETZ and GRIFFIN concurring in result only.

Appeal by Plaintiffs from order entered on 14 May 2021 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 April 2022.

Davies Law Firm, PLLC, by Kenneth T. Davies, for Plaintiffs-Appellants.

Cranfill Sumner LLP, by Steven A. Bader and Ryan D. Bolick, for Defendants-Appellees Town of Cornelius and Wayne Herron.

Copeland Richards, PLLC, by Drew A. Richards, for Defendants-Appellees Bluestream Partners, LLC, and Jacob J. Palillo.

JACKSON, Judge.

¶ 1 Kevin Violette ("Mr. Violette") and Violette Family Farm, LLC (collectively, "Plaintiffs") appeal the trial court's order granting the Town of Cornelius ("the Town"), Bluestream Partners, LLC ("Bluestream Partners"), Jacob Palillo ("Mr. Palillo"), and Wayne Herron's ("Mr. Herron") (collectively, "Defendants") joint motion to dismiss or, in the alternative, for summary judgment. Because Plaintiffs lack standing to challenge the Town's rezoning of the property at issue, the order of the trial court is affirmed.

I. Background

¶ 2 The Forest at Bailey's Glen ("Bailey's Glen") is a phased construction, residential subdivision for residents 55 and older located in Cornelius, North Carolina. Bailey's Glen consists of 728 homes that have been built or are planned to be built and is bordered primarily by Bailey's Road to the west and Barnhardt Road to the south.

¶ 3 Plaintiffs own approximately 32 contiguous acres across the street from Bailey's Glen on Barnhardt Road. Mr. Violette lives there with his family. There are two homes on Plaintiffs' property. Mr. Violette lives in one and his adult son lives in the other. Some of the 32 acres were previously titled in Mr. Violette's name but were later deeded to Violette Family Farm, LLC, of which Mr. Violette is the manager and his trust is the sole member.

¶ 4 In December of 2017, Mr. Violette's neighbor across the street, Mr. William Clawson, died. On 26 April 2018, Mr. Clawson's estate sold the 13.57 acre tract where Mr. Clawson lived to Forestyle, LLC ("Forestyle"). Mr. Palillo is the managing member of Forestyle. He is also the managing member of Bluestream Partners, the developer of Bailey's Glen.

¶ 5 Bailey's Glen features an amenity center for residents and their guests. However, at the time Forestyle acquired Mr. Clawson's property, demand for the amenity center exceeded its capacity. Forestyle acquired Mr. Clawson's property to build a new amenity center for Bailey's Glen that better met the needs of Bailey's Glen residents.

¶ 6 On 26 March 2019, Mr. Palillo submitted an application on behalf of Bluestream Partners to the Town requesting rezoning of the property acquired by Forestyle from Mr. Clawson's estate from Rural Preservation to RP-CZ, a conditional district zoning under the Town's Land Development Code, to allow for construction of the new amenity center. The Town's Land Development Code provides that "[c]onditional [z]oning districts (CZ) may be utilized to create new unique districts[,] . . . in an effort to allow for those situations where a particular use or development, if properly planned, may have particular benefits and/or impacts on both the immediate area and the community as a whole[,]" which "cannot be predetermined or controlled by general district standards." In other words, the rezoning requested by Mr. Palillo on behalf of Bluestream Partners in March 2019 would have made construction of the new amenity center on the property compliant with the Town's Land Development Code even though it would not have been under the zoning of the property at the time it was acquired from Mr. Clawson's estate.

¶ 7 On 27 March 2019, the Town mailed Plaintiffs a Notice of a Community Meeting in connection with the rezoning request. The meeting was held on 15 April 2019. An employee of Plaintiffs' counsel attended the meeting and voiced opposition to the rezoning on Plaintiffs' behalf.

¶ 8 On 15 April 2019, the first public hearing on the rezoning request was held. Plaintiffs attended the hearing and again voiced opposition to the rezoning.

¶ 9 On 14 May 2019, Mr. Palillo submitted a second application on behalf of Bluestream Partners to rezone the property. This second application requested that the property be rezoned to CZ, or conditional zoning. The second application included two parcels that the first application had not.

¶ 10 On 20 May 2019, the Town mailed Plaintiffs a Notice of Hearing on the second application. On 3 June 2019, a public hearing on the second application was held. Plaintiffs attended the hearing and again voiced opposition to the rezoning. The hearing was continued to 17 June 2019. On 17 June 2019, the Town approved the second application.

¶ 11 On 7 August 2019, Plaintiffs filed suit against Defendants, requesting a declaratory judgment that the rezoning was invalid because of non-compliance with the procedural rules governing the approval of conditional zoning applications under the Town's Land Development Code and with applicable North Carolina General Statutes then in effect[1] and alleging that the Town's decision was arbitrary and capricious and *ultra vires*.[2] Bluestream Partners and Mr. Palillo answered on 7 October 2019 and moved to dismiss Plaintiffs' complaint under Rule 12(b)(6) of

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1. In 2019, the General Assembly enacted "An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State[,]" repealing N.C. Gen. Stat. §§ 160A-381 to 160A-385.1. 2019 S.L. 111 § 2.3. Session Law 2019-111 consolidated and reorganized the municipal and county land-use planning and development statutes into one Chapter of the General Statutes. *Id.* § 2.1(e). It also made various changes and clarifying amendments, *id.* § 1.1, *et seq.*, and gave persons aggrieved a separate cause of action, distinct from the certiorari statute, which it amended significantly, *id.* §§ 1.7, 1.9 (codified at N.C. Gen. Stat. §§ 160A-393, -393.1).

2. Plaintiffs also alleged that the rezoning violated separation of powers principles and their right to procedural due process, but Plaintiffs conceded that they were no longer pursuing those claims at the hearing on Defendants' motion to dismiss, or in the alternative, for summary judgment, and Plaintiffs offer no argument in their brief related to any errors in the trial court's order related to separation of powers or procedural due process violations, abandoning these issues. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

the North Carolina Rules of Civil Procedure. The Town and Mr. Herron answered on 11 October 2019 and moved to dismiss Plaintiffs' complaint under Rule 12(b)(6).

¶ 12 On 20 December 2019, Bluestream Partners voluntarily withdrew its earlier application and submitted a new rezoning application. A neighborhood meeting was held on the new application on 27 February 2020. The Town's Board of Commissioners held a public hearing on the application on 2 March 2020 and 5 October 2020. The Town's Planning Board reviewed and recommended approval of the application on 10 August 2020. The Town's Board of Commissioners approved the application on 5 October 2020. The purpose of the new application and meeting and hearing was to cure procedural deficiencies in the approval of the prior application.

¶ 13 On 1 December 2020, with Defendants' consent, Plaintiffs supplemented their complaint to include the approval of the December 2019 application on 5 October 2020. On 6 January 2021, Bluestream Partners and Mr. Palillo answered and moved to dismiss Plaintiffs' supplemental complaint under Rule 12(b)(6). On 2 February 2021, the Town and Mr. Herron answered and moved to dismiss Plaintiffs' supplemental complaint under Rule 12(b)(6).

¶ 14 On 8 April 2021, Defendants made a joint Motion to Dismiss, Motion for Judgment on the Pleadings, and Motion for Summary Judgment. The matter came on for hearing before the Honorable Daniel A. Kuehnert in Mecklenburg County Superior Court on 3 May 2021. The trial court granted the motion in an order entered 14 May 2021, ruling that Plaintiffs lacked standing to challenge the rezoning, and in the alternative, that if Plaintiffs had standing to challenge the rezoning, summary judgment in favor of Defendants was proper.

¶ 15 Plaintiffs timely noted appeal from the trial court's order.

II. Analysis

¶ 16 The dispositive issue in this appeal is Plaintiffs' lack of standing to challenge the rezoning.

A. Introduction and Standard of Review

¶ 17 " 'Standing' refers to the issue of whether a party has a sufficient stake in an otherwise justiciable controversy that he or she may properly seek adjudication of the matter." *Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C. App. 159, 165, 552 S.E.2d 220, 225 (2001) (citation omitted). It "is a necessary prerequisite to the court's proper exercise of

subject matter jurisdiction." *Id.* at 164, 552 S.E.2d at 225 (citations omitted). It has been described as "that aspect of justiciability focusing on the party seeking a forum rather than on the issue he wants adjudicated." *Id.* at 165, 552 S.E.2d at 225 (internal marks and citation omitted).

¶ 18 "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity, and without subject matter jurisdiction, a court has no power to act." *Boseman v. Jarrell*, 364 N.C. 537, 548, 704 S.E.2d 494, 502 (2010) (cleaned up). Because standing is a question of law, we review the issue de novo. *Smith v. Forsyth Cnty. Bd. of Adjust.*, 186 N.C. App. 651, 653, 652 S.E.2d 355, 357 (2007). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 32, 732 S.E.2d 614, 618 (2012) (citation omitted).

B. Standing in the Zoning Context

¶ 19 It has become difficult for a neighboring property owner to establish that they have standing to challenge a zoning decision. While prior law required only that the plaintiff have "a specific personal and legal interest in the subject matter" that was "directly and adversely affected" by a challenged ordinance, at least when the procedural vehicle for the challenge was an action for a declaratory judgment rather than a petition for certiorari to superior court from the proceedings before the relevant local governmental body, *Village Creek Prop. Owners' Ass'n*, 135 N.C. App. 482, 485, 520 S.E.2d 793, 795 (1999) (quoting *Taylor v. City of Raleigh*, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976)), today, neighboring property owners must suffer "special damages" from a zoning decision to have standing to challenge it in an action for a declaratory judgment, *Cherry Cmty. Org. v. City of Charlotte*, 257 N.C. App. 579, 584, 809 S.E.2d 397, 401 (2018).

¶ 20 Historically, "special damages" were merely defined as "a reduction in the value of [] [the neighbor's] property[.]" *Jackson v. Guilford Cnty. Bd. of Adjustment*, 275 N.C. 155, 161, 166 S.E.2d 78, 83 (1969). However, today, "general allegations that a property use will impair property values in the general area [] will not confer standing[,]" *Cherry v. Wiesner*, 245 N.C. App. 339, 349, 781 S.E.2d 871, 878 (2016), and "[m]ere proximity to the site of the zoning action . . . is insufficient to establish 'special damages[,]' " *Smith*, 186 N.C. App. at 654, 652 S.E.2d at 358. Instead, a neighboring property owner affected by a zoning change must "suffer special damages distinct from those [] to the public at large" to have standing to challenge the decision from which the change resulted.

Mangum v. Raleigh Bd. of Adjustment, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

¶ 21 Additionally, for over 100 years it was the law in North Carolina that the opinion of an owner of real property was presumptively competent evidence of its value, *see Gillis v. Arringdale*, 135 N.C. 295, 302, 47 S.E. 429, 432 (1904), but our Supreme Court overturned that rule in 2017 in *United Community Bank (Georgia) v. Wolfe*, 369 N.C. 555, 559-60, 799 S.E.2d 269, 272 (2017) ("*United Cmty. Bank*"). *Compare N.C. State Highway Comm'n v. Helderman*, 285 N.C. 645, 652, 207 S.E.2d 720, 725 (1974) ("Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value even though his knowledge on the subject would not qualify him as a witness were he not the owner.") *with Cherry Cmty. Org.*, 257 N.C. App. at 589, 809 S.E.2d at 404 ("Uncontroverted opinion is no longer sufficient evidence in North Carolina.") (Hunter, J., concurring in result) (citing *United Cmty. Bank*).

¶ 22 Accordingly, under current law, general diminution of property values in the area does not confer standing on a neighboring owner to challenge a zoning decision, *Mangum*, 362 N.C. at 644, 669 S.E.2d at 283, and the neighbor's opinion of the diminution in value of the property the neighbor owns is not competent evidence to establish the neighbor's standing to challenge the decision, *Cherry Cmty. Org.*, 257 N.C. App. at 589, 809 S.E.2d at 404.

¶ 23 Plaintiffs' complaint alleges:

> 28. Plaintiffs, as owners of property abutting, adjacent to, or in close proximity to the Rezoned Properties, will imminently suffer harm caused by the approval of the Rezoning, due to, *inter alia*:
>
> a. A material reduction in property values due to the use of the Rezoned Property as a Private Club and Event Center, which is entirely inharmonious with the rural residential, low density use of Plaintiffs' Properties; and
>
> b. The proposed development of the Rezoned Properties will cause Plaintiffs to suffer increases in intolerable noise, light, pollution, and traffic; diminution of the peaceful rural character of their neighborhood; loss of privacy; and loss in the use and enjoyment of Plaintiffs [sic] properties.

> 29. As set forth above, Plaintiffs have a specific legal and personal interest in the Plaintiffs' properties, which are directly and adversely affected by the Town's approval of the rezoning. In addition, Plaintiffs have been actively and continuously involved as much as possible throughout the rezoning process, in ways including, but not limited to, communicating with the developer, Bluestream, and the Town, by attending and speaking at meetings before the Board of Commissioners and the Community meeting.
>
> 30. The Rezoning is an invasion of Plaintiffs' protected interests and their injury from the Rezoning is concrete and particularized, and actual and imminent. A favorable decision in the current action will redress Plaintiffs' injury.
>
> 31. Plaintiffs have standing as interested parties to bring this action for declaratory judgment, pursuant to N.C. Gen. Stat. § 1-254, *et seq*. and Rule 57 of the North Carolina Rules of Civil Procedure, to resolve the justiciable controversy which exists and arises from, *inter alia*, the Rezoning, approved by the Town on 11 June 2019.

¶ 24 Plaintiffs' complaint was not verified, and an affidavit was not attached as an exhibit to substantiate the allegations above. In responses to written discovery, Plaintiffs disclosed that they did not intend to engage any experts to prepare any reports or affidavits or testify at trial and described their damages in essentially the same way they did in the allegations quoted above. At Mr. Violette's deposition, he testified that the challenged rezoning was a drastic change from the previous zoning of the adjacent land; that the road running alongside his land and the adjacent land was already very busy and unsafe because of the addition of a new high school nearby; and that construction of the amenity center would diminish the value of his property—which he opined was worth $10 million—by $5 or $6 million because of increased noise, traffic, and light.[3]

¶ 25 North Carolina law no longer recognizes the right of neighboring property owners like Plaintiffs to challenge a zoning change based on

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3. By contrast, Mr. Violette testified that construction of the amenity center would increase property values in Bailey's Glen, including the value of Mr. Palillo's home.

allegations and testimony like Plaintiffs'. Plaintiffs have failed to make the showing required by *Mangum* that they "will suffer special damages distinct from those [] to the public at large" from the challenged rezoning. 362 N.C. at 644, 669 S.E.2d at 283. Moreover, under *United Community Bank*, the record evidence of the diminution in value of Plaintiffs' property is not competent evidence. 369 N.C. at 559-60, 799 S.E.2d at 272-73. Accordingly, the trial court did not err in granting Defendants' motion.

III. Conclusion

¶ 26 The trial court is affirmed because Plaintiffs lacked standing to challenge the rezoning.

AFFIRMED.

Judges DIETZ and GRIFFIN concur in result only.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 JUNE 2022)

IN RE A.C. 2022-NCCOA-384 No. 21-769	Cumberland (18JA76)	Vacated and Remanded
IN RE B.V. 2022-NCCOA-385 No. 21-756	Davie (19JT10)	Affirmed
IN RE D.G. 2022-NCCOA-386 No. 21-624	Durham (21SPC593)	Vacated and Remanded
IN RE J.C. 2022-NCCOA-387 No. 21-658	Cumberland (17JA202)	Affirmed
IN RE J.C.M. 2022-NCCOA-388 No. 21-662	Mecklenburg (18JT140)	Affirmed
IN RE J.S. 2022-NCCOA-389 No. 21-787	Watauga (20JA34)	Affirmed
IN RE N.C.F. 2022-NCCOA-391 No. 21-646	Randolph (19JT43) (19JT44) (19JT45) (19JT46)	Affirmed.
IN RE P.O. 2022-NCCOA-392 No. 21-733	Durham (20JA151-152)	Affirmed
JOHNSON v. NIELAND 2022-NCCOA-393 No. 21-649	Wilkes (20CVS797)	Affirmed
KIRBY v. MISSION HOSP., INC. 2022-NCCOA-394 No. 21-606	N.C. Industrial Commission (13-706850)	Affirmed
MARKAJ v. MARKAJ 2022-NCCOA-395 No. 21-784	Wake (21CVD600449)	AFFIRMED IN PART AND VACATED IN PART.

RAINEY v. GOODYEAR TIRE & RUBBER CO. 2022-NCCOA-396 No. 21-454	N.C. Industrial Commission (16-021823)	Affirmed
STATE v. HARRIS 2022-NCCOA-397 No. 21-100	Wilson (16CRS53147) (18CRS51280) (18CRS51282-84) (18CRS51289) (18CRS51292) (18CRS51917) (18CRS52365-66)	Vacated and Remanded
STATE v. REYNOLDS 2022-NCCOA-398 No. 21-578	Rowan (16CRS50423) (19CRS53597) (19CRS54721)	No Error
STATE v. SANDERS 2022-NCCOA-399 No. 20-376	Lee (14CRS53533) (15CRS61) (17CRS206) (18CRS324-325)	No Error in Part; No Prejudicial Error in Part; Remanded for Additional Findings of Fact
STATE v. SLADE 2022-NCCOA-400 No. 21-209	Durham (15CRS2882-84) (15CRS57421-22)	No Error
STATE v. WALKER 2022-NCCOA-401 No. 21-535	Wake (98CRS102469-70)	Affirmed
WAKE CNTY. EX REL. WILLIAMS v. WILEY 2022-NCCOA-402 No. 21-347	Wake (18CVD3965)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

Abandonment of issues—admissibility of evidence—only one ground challenged on appeal—After the trial court ceased reunification efforts with respondent-father in an abuse, neglect, and dependency case, which centered on allegations that respondent-father had sexually abused his two minor daughters, respondent-father failed to show on appeal that the court erred by allowing a child medical examiner's reports (detailing her interviews and physical examinations of both daughters) into evidence. The trial court allowed the reports under the medical records and business records exceptions to the hearsay rule, but respondent-father only challenged the records' admissibility under the medical records exception and therefore waived under Appellate Rule 28(a) any argument challenging the other ground of admissibility. **In re A.W., 127.**

Abandonment of issues—denial of Rule 60(b) motion—failure to cite legal authority—In defendant's appeal from the denial of his Civil Procedure Rule 60(b)(4) motion seeking relief from an earlier order, in which the trial court awarded attorney fees to intervenors in defendant's child custody action and directed that those fees be taken from the proceeds of defendant's personal injury settlement following a recent car accident, defendant failed to cite any legal authority supporting his argument that the attorney fees award was void for lack of in rem or quasi in rem jurisdiction over his settlement proceeds. Therefore, defendant's argument was deemed abandoned pursuant to Appellate Rule 28(b)(6). **Roark v. Yandle, 223.**

Abandonment of issues—Rule 28(b)(6)—failure to cite legal authority—In a juvenile defendant's appeal from convictions for first-degree murder and attempted robbery with a firearm, defendant abandoned his argument that the trial court violated his right to due process by allowing the State to prosecute him under a felony murder theory, where defendant failed to cite any legal authority in his appellate brief, pursuant to Appellate Rule 28(b)(6), indicating that a juvenile may not be convicted of felony murder. **State v. Wilson, 419.**

Defective notice of appeal—petition for certiorari—criminal contempt citation—A criminal defendant's petition for a writ of certiorari to review his criminal contempt citation was allowed pursuant to Appellate Rule 21, where defendant's in-court notice of appeal was inadequate (the trial court indicated that he could appeal his contempt citation, to which defendant replied "thank you") but where defendant's intent to appeal could be fairly inferred and the State could not show any prejudice resulting from the defective notice. **State v. Ore, 524.**

Interlocutory orders—not immediately appealable—N.C.G.S. § 1-278—In a matter involving a contractual dispute over the sale of real property and several landlord-tenant claims, where the trial court resolved the issue of liability as to all claims while reserving the issue of damages for later determination, even though the order was interlocutory and not immediately appealable, the appellate court exercised jurisdiction over the appeal pursuant to N.C.G.S. § 1-278 because the order involved the merits and necessarily affected the judgment. **Johnston v. Pyka, 183.**

Interlocutory orders—substantial right—transfer to three-judge panel of Wake County Superior Court—ecclesiastical entanglement doctrine—Defendants' interlocutory appeal of the trial court's order transferring their motion to dismiss to a three-judge panel of the Wake County Superior Court, which the trial court did not certify for immediate appellate review pursuant to Rule 54(b), did not affect venue and therefore did not affect a substantial right, so it was not immediately appealable. In addition, because the trial court had not yet ruled on defendants' Rule 12(b)(1) motion to dismiss asserting immunity from the suit based on the ecclesiastical entanglement doctrine, that doctrine could not provide the basis for

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Case plan requirements—nexus to reason for removal—evidentiary support—In a child neglect proceeding, the trial court did not err by including in the disposition order case plan requirements for the father regarding drug screens, housing, and employment, where those requirements had a sufficient nexus with the conditions that led to the removal of the child from the home, including a domestic violence incident in the home that was based, in part, on the father's drinking, and the parents' refusal to allow the department of social services to have access to the child, which created a concern about the safety and stability of the home environment. **In re J.C., 486.**

Judicial bias—comments directed at parents during hearing—In a child neglect matter, where the father failed to allege a specific legal error arising from the trial court's comments from the bench regarding the parents' lack of effort in the case, there was no merit to his contention that the comments, even if some of them may have been unnecessary and unadvisable, constituted an abuse of discretion. **In re J.C., 486.**

Motion to continue—pointed questions—due process—In a child abuse and neglect case, the trial court did not violate respondent-mother's due process rights by allegedly denying her motion to continue and showing bias by asking pointed questions, where respondent-mother in fact did not make a motion to continue and where she did not preserve the issue regarding bias for appellate review. Even if she had preserved that issue, the trial court's pointed questions and comments were directed to all parties and were based on the evidence it heard during the hearing; there was no showing of bias or prejudice to her case. **In re N.L.M., 356.**

Neglect—findings—siblings adjudicated neglected—domestic violence in home—The trial court's unchallenged findings of fact supported its adjudication of the child as neglected where three older siblings had been adjudicated neglected and were in the custody of the department of social services (DSS), the child's parents were involved in a domestic violence incident while they were the child's sole caretakers, and the parents were not in compliance with their case plan because they refused to allow DSS access to the child and had not completed domestic violence classes. **In re J.C., 486.**

Reasonable efforts to prevent placement—findings of fact—children's health and safety—The trial court did not err in a child abuse and neglect case by concluding that the department of social services had made reasonable efforts to prevent the children's out-of-home placement where the findings, which respondent-mother did not challenge on appeal, showed the department's reasonable efforts—including presentation of an out-of-home family services agreement, foster care case management, child forensic evaluations, referrals of services for the parents, record requests for the parents' treatment providers, contact with the parents, and review of child protective services records. These efforts took into consideration the children's health and safety as the paramount concern where respondent had starved one of the children and physically abused her in other ways. **In re N.L.M., 356.**

Visitation plan—notification of right for review—harmless error analysis—In a child abuse and neglect case, while the trial court erred by failing to inform respondent-father of his right to file a motion for review of the visitation plan, the error was harmless because the trial court immediately scheduled the next permanency planning hearing and the father was aware of that hearing date. **In re N.L.M., 356.**

CIVIL PROCEDURE—Continued

trial court awarded attorney fees to intervenors in the case and directed that those fees be taken from the proceeds of defendant's personal injury settlement following a recent car accident. Under N.C.G.S. § 50-13.6, the court was permitted to enter an order for reasonable attorney fees, but it lacked authority to enter a civil judgment taxing the costs of attorney fees to a fund that was unrelated to the custody action. **Roark v. Yandle, 223.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Res judicata—child sexual abuse—prior suit—resulting in final judgment—applicability of SAFE Child Act—Plaintiff's civil claims against a Catholic diocese arising from alleged sexual abuse by a priest when plaintiff was a child were properly dismissed where plaintiff's previous suit alleging similar claims was dismissed with prejudice and that dismissal was affirmed on appeal. Although the legislature subsequently enacted the SAFE Child Act that extended the statute of limitations for child sexual abuse claims, based on the plain language of the Act, since plaintiff's previous suit resulted in a final judgment, all of his new claims were barred by principles of res judicata and could not be revived by the Act alone. **Doe 1K v. Roman Cath. Diocese of Charlotte, 171.**

Res judicata—child sexual abuse—prior suit—resulting in final judgment—applicability of SAFE Child Act—Plaintiff's claims against a Catholic diocese arising from alleged sexual abuse by a priest when plaintiff was a child were properly dismissed where plaintiff's previous suit alleging similar claims was dismissed with prejudice. Although the legislature subsequently enacted the SAFE Child Act that extended the statute of limitations for child sexual abuse claims, based on the plain language of the Act, since plaintiff's previous suit resulted in a final judgment, all of his new claims were barred by principles of res judicata and could not be revived by the Act alone. **Doe v. Roman Cath. Diocese of Charlotte, 177.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Admission to law enforcement—drug possession—not in custody—In a prosecution for multiple sexual offenses against a child and one charge of methamphetamine possession where, on the day of his arrest, defendant locked himself in a bedroom and threatened to commit suicide, police officers tried to convince defendant to come out without hurting himself, and defendant told them there was methamphetamine in the bedroom, the trial court properly denied defendant's motion to suppress his statement about the methamphetamine. At the time defendant made the statement, defendant was not in custody such that *Miranda* warnings were required where, although the officers had informed defendant that they were there to arrest him, they had not placed him under formal arrest, they had not restrained defendant's movement (he chose to lock himself in the bedroom), and all of their communications with defendant were for the purpose of convincing him to safely leave the bedroom. **State v. Conner, 253.**

By juvenile—Miranda rights—knowing and voluntary waiver—sufficiency of findings—expert testimony unnecessary—In a juvenile defendant's prosecution for murder, where the trial court's order denying defendant's motion to suppress his statements to police was remanded on appeal for further factual findings, the court's order denying the motion on remand was affirmed where the court's findings properly addressed the key factors—as identified in N.C.G.S. § 7B-2101(d)—in determining whether defendant knowingly and voluntarily waived his *Miranda* rights during

FRAUD—Continued

and co-beneficiaries with plaintiff—plaintiff's claim for constructive fraud against defendants in their individual capacities was properly dismissed where her complaint failed to allege a fiduciary relationship between the parties as a matter of fact. Plaintiff's allegations that she held a "special confidence and trust" in defendants based on their close familial relationship to her, their status as trustees, and their profession as licensed attorneys were mere conclusory assertions that were not supported by detailed factual allegations giving rise to a fiduciary relationship. **Fox v. Fox, 336.**

HOMICIDE

First-degree—felony murder—jury instruction on lesser-included offense—no evidentiary support—In a juvenile defendant's prosecution for first-degree murder and attempted robbery with a firearm, the trial court did not err by not instructing the jury on second-degree murder as a lesser-included offense because there was no evidence in the record showing the victim was killed other than in the course of an attempted robbery, and therefore no rational juror could possibly find defendant guilty of second-degree murder and not guilty of first-degree murder under a felony murder theory. **State v. Wilson, 419.**

Jury instructions—defense of others—felony disqualifier—causal nexus— Where defendant, a convicted felon, was carrying a firearm and fatally shot his cousin, the trial court erred by failing to fully instruct the jury on perfect defense of others in its instructions on first- and second-degree murder—including that the State was required to prove an immediate causal nexus between defendant's felonious possession of a firearm and his use of defensive force—because, when taken in the light most favorable to defendant, the evidence showed that the cousin, who was intoxicated and had a history of violence toward his girlfriend, told the girlfriend that he was going to kill her and was on top of her beating her. The error was prejudicial because there was a reasonable possibility that, if given the correct instruction, the jury would have found no causal nexus and that defendant acted in defense of the cousin's girlfriend. **State v. Williams, 538.**

Second-degree—jury instructions—self-defense—aggressor doctrine—evidentiary support—Defendant was entitled to a new trial on her second-degree murder charge because the trial court erred in instructing the jury on the aggressor doctrine. The record showed no evidence from which a reasonable jury could infer that defendant was the aggressor, showing instead that—over a span of roughly two minutes—the victim (defendant's lover) forcefully entered defendant's home even though she had asked him not to come over; the victim threatened to kill defendant and grabbed defendant's firearm from her nightstand, pointing it at her while demanding her cellphone; the victim relinquished the firearm and defendant armed herself with it, afraid that the victim would harm her, her teenage daughter, or her daughter's friend who was staying over; the victim repeatedly assaulted defendant during her multiple attempts to escape; and then defendant shot the victim. **State v. Hicks, 74.**

Second-degree—malice—knowingly driving while impaired—reckless driving—The trial court properly denied defendant's motion to dismiss a second-degree murder charge because the State presented substantial evidence that defendant acted with malice where he knowingly drove while impaired (after and while consuming alcohol over the course of several hours), drove recklessly while two passengers sat in the vehicle with him, and crashed the vehicle after falling asleep at the

MOTOR VEHICLES—Continued

driving—including the results of a warrantless blood draw—and admitting them over defendant's objection was harmless in light of the overwhelming evidence of defendant's guilt. After a witness who noticed defendant's slurred speech and impaired demeanor called police, law enforcement officers pulled defendant over and observed that defendant smelled strongly of alcohol, had red and glassy eyes, exhibited slurred speech, and was unable to remain steady on his feet. Although defendant did not fully cooperate, a breathalyzer test was positive for alcohol and field sobriety tests indicated impairment. **State v. Kitchen, 282.**

Insurance—underinsured motorist coverage—multiple policies—calculation of UIM coverage—The trial court properly calculated the amount of available underinsured motorist (UIM) coverage to be zero in a declaratory judgment action involving multiple underinsured tortfeasors and multiple UIM policies, where the liability insurers each exhausted their policy limits. The plain language of N.C.G.S. § 20-279.21(b)(4) was unambiguous regarding the method of calculation to be used in circumstances involving more than one UIM policy—that is, the amount of available UIM coverage is the difference between the total amount paid under all exhausted liability policies (here, $200,000) and the total limits of all applicable UIM policies (here, also $200,000). **Tutterow v. Hall, 314.**

Insurance—underinsured motorist coverage—right of UIM insurer to reimbursement of advance payment—In a declaratory judgment action to determine insurance coverage for a fatal car accident, where the trial court determined that the available underinsured motorist (UIM) coverage was zero, an insurer that had advanced $100,000 in UIM coverage (after the liability insurers tendered the limits of their policies but before plaintiff accepted both of them) and expressly reserved its right to seek reimbursement did not waive its right to a refund of the UIM payment. Since the UIM insurer had no obligation to pay any amount, the portion of N.C.G.S. § 20-279.21(b)(4) regarding waiver of subrogation rights upon failure to timely advance payment did not apply. **Tutterow v. Hall, 314.**

NEGLIGENCE

Contributory negligence—student hit while walking on school service road—summary judgment—Summary judgment was properly granted for a school board in plaintiff's claims for negligence and negligent infliction of emotional distress where there was no genuine issue of material fact regarding whether plaintiff—a student who was hit by another student's car while walking on a school service road—was contributorily negligent. The evidence demonstrated that plaintiff had headphones on and was listening to music and not paying attention with his back to oncoming traffic as he walked along the service road, and that his conduct contributed to his injury when he was hit from behind by a car. **Archie v. Durham Pub. Schs. Bd. of Educ., 472.**

POSSESSION OF STOLEN PROPERTY

Felonious—value of stolen truck—sufficiency of evidence—The State presented substantial evidence that the value of the truck stolen by defendant from an automobile dealership was more than $1,000 (necessary to prove felonious possession of stolen property) based on testimony from the dealership's manager regarding the truck's value before it was stolen and damaged during a car chase ($6,625) and also when it sold at auction ($1,325). **State v. Collins, 458.**

STATUTES OF LIMITATION AND REPOSE

Counterclaims—relation back to date action was filed—prior holdings—In a case arising from a motor vehicle accident, defendant's counterclaim—filed one day after both plaintiff's complaint and the expiration of the three-year statute of limitations in N.C.G.S. § 1-52(16)—was properly dismissed as time-barred by the statute of limitations. Acknowledging conflicting holdings in prior opinions, the Court of Appeals was bound to hold that the counterclaim did not relate back to the date that plaintiff's action was filed. **Upchurch v. Harp Builders, Inc., 321.**

Revocable trust—challenge to its validity—In an action brought by a decedent's wife (plaintiff) against the decedent's daughter and son-in-law (defendants) regarding the decedent's revocable trust, under which defendants were trustees and co-beneficiaries with plaintiff, plaintiff's claim challenging the trust's validity was properly dismissed as time-barred where plaintiff did not raise the claim until three years after the statute of limitations for challenging revocable trusts had passed. **Fox v. Fox, 336.**

TERMINATION OF PARENTAL RIGHTS

Findings of fact supporting termination—circumstances existing at time of hearing—required—An order terminating a mother's parental rights in her son under N.C.G.S. § 7B-1111(a)(1), (2), and (6) was vacated and remanded where the trial court based all of its findings of fact on circumstances as they existed about thirty-one months before the termination hearing rather than on circumstances as they existed at the time of the hearing. **In re S.O.C., 501.**

Findings of fact—sufficiency of evidence—The trial court's order denying a mother's petition to terminate her ex-husband's parental rights in their daughter was affirmed where the court's findings of fact—with three exceptions—were supported by clear, cogent, and convincing evidence. Notably, the court found that the father threatened to kill himself before the child was born but was neither threatening nor combative toward the mother during the incident; after the parties' divorce, the mother actively thwarted the father's attempts to have a relationship with their daughter; and, although the father frequently contacted the mother to ask about their daughter, the mother only responded when it benefitted her and mostly ignored him as part of an agenda to establish grounds for terminating his parental rights. **In re S.R., 149.**

Grounds for termination—failure to pay child support—evidentiary support—termination still within court's discretion—The trial court's order denying a mother's petition to terminate her ex-husband's parental rights in their daughter was affirmed after the court concluded that grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(4)(willful failure to pay child support) did not exist where the father regularly paid child support until the mother changed the payment collection method (evidence indicated that the mother was trying to create a scenario where she could file for termination of the father's parental rights). The trial court's failure to include a finding that a child support order was in effect at the time the petition was filed was harmless where, although the mother produced evidence that would have supported such a finding (and therefore a conclusion that grounds for termination existed), the ultimate conclusion about whether to terminate the father's parental rights was within the court's discretion. **In re S.R., 149.**

WORKERS' COMPENSATION—Continued