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 Unpublished cases appear in *Italics*.

2. No opinion associated with this universal parallel citation number will appear in the N.C. App. Reports.

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3. This opinion was moved from its original filing date and is published in Volume 287 of the N.C. App. Reports.

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AT

RALEIGH

IN THE MATTER OF D.S.

No. COA22-190

Filed 18 October 2022

1. Child Abuse, Dependency, and Neglect—neglect—child left unattended for brief time—no impairment found—conclusions unsupported

The trial court erred in adjudicating an infant child neglected because the court's conclusions were not supported by the findings of fact or the evidence. The findings did not establish neglect as defined in N.C.G.S. § 7B-101(15) where, although the child had been left unattended in his crib for approximately five minutes in respondent father's home (while respondent was not present in the home), there were no findings that the failure to provide proper care or supervision led to the child suffering an impairment of any kind, that there was a substantial risk of such impairment, or that the child lived in an environment injurious to his welfare. Findings regarding prior issues with the child's mother (substance abuse and unstable housing, and the fact that the child tested positive for THC at birth) were insufficient to show a further risk of harm where the child had been placed in respondent father's care.

2. Child Abuse, Dependency, and Neglect—dependency—statutory factors—sufficiency of findings

The trial court erred in adjudicating an infant child dependent on the basis that the child had been left unattended in his crib for approximately five minutes in respondent father's home (while respondent was not present in the home) where its conclusions were not supported by the findings of fact. Although the facts recited

prior issues with the child's mother (substance abuse and unstable housing, and the fact that the child tested positive for THC at birth), the child was then placed with respondent father, and there was no indication that respondent father had not provided proper care since that time or that the child was at risk of being harmed during the five minutes he was left unattended. The court's minimal facts failed to establish, as required by N.C.G.S. § 7B-101(9), that both parents were incapable of providing care or supervision and that they lacked appropriate alternative child care arrangements.

Appeal by respondent father from order entered 8 November 2021 by Judge Luis J. Olivera in District Court, Cumberland County. Heard in the Court of Appeals 20 September 2022.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky Brammer, for respondent-father.

Parker Poe Adams & Bernstein LLP, by Eric H. Cottrell, for guardian ad litem.

Patrick A. Kuchyt, for appellee Cumberland County Department of Social Services.

STROUD, Chief Judge.

¶ 1 Respondent Father appeals from an order adjudicating his infant son neglected and dependent. Father argues the trial court erred by adjudicating his son neglected because his son was not put at a substantial risk of harm by Respondent parents' conduct and the trial court failed to make findings of fact required to adjudicate his son neglected. Father also argues the trial court erred by adjudicating his son dependent because Father "presented an approved alternative caregiver pre-petition" and the statutory requirements to adjudicate a juvenile dependent were unmet. Because the evidence and findings of fact do not support the trial court's conclusions of law, we reverse the trial court's adjudications of neglect and dependency.

I. Background

¶ 2 On 17 August 2020, Dallas[1] was born to Respondent Mother and Respondent Father. Around the time of Dallas's birth Mother lived in

1. We use the pseudonym stipulated to by the parties.

Cumberland County and Father lived in Bladen County. Shortly after Dallas was born both Mother and Dallas tested positive for THC, a metabolite of marijuana. Dallas was also placed in the NICU due to low blood sugar before he was discharged from the hospital, and the Cumberland County Department of Social Services ("CCDSS") received a Child Protective Services referral the day after Dallas was born. Ultimately, Mother agreed to place Dallas with Father after he was discharged from the hospital; after Dallas was discharged he lived with Father in Bladen County.

¶ 3 Approximately two weeks after Dallas was discharged from the hospital, on 2 September 2020, Social Worker V.C. contacted law enforcement in Bladen County and requested a "courtesy check" on Father and Dallas. A Bladen County Sheriff's Office deputy assisted a Bladen County CPS social worker in performing the "courtesy check" on 2 September 2020 at approximately 6 p.m. An Incident Report filed by the deputy after the courtesy check stated the deputy first drove past Father's residence to confirm the address, and when the deputy drove by the residence the deputy "did see what appeared to be a black male standing in the yard." The deputy continued driving and waited at a nearby intersection for the social worker to arrive. "After approximately three minutes," the social worker arrived and the deputy "escorted her to the residence to attempt to make contact with" Father. The deputy knocked on the door of the residence twice, then walked around the side of the house when no one answered. The deputy "located a vehicle" and "was about to run the vehicle information to confirm if [the deputy and the social worker] were at the right address" when Father arrived. The deputy informed Father of the courtesy call, and Father allowed the deputy and social worker inside the residence to "observe[ ] a newborn infant sleeping in a crib." The social worker then contacted CCDSS and "made the decision to have the infant removed from the home." Father's cousin arrived at the residence and took Dallas to her home. The deputy estimated in the Incident Report that the deputy and social worker arrived at the residence "approximately five minutes" before Father. A case report filed by the Bladen County CPS social worker confirmed the deputy's recitation of the 2 September 2020 incident and also stated that Father asked the deputy while the deputy was in the home if the deputy saw Father "standing outside in the yard" when the deputy initially drove by. The deputy answered "he did see someone when he went by but that he could not tell if" the person in the yard was Father. The CPS document stated the social worker estimated "there was about 7 minutes that there was no one home with the baby."

¶ 4 On 4 September 2020, CCDSS filed a petition alleging Dallas was a neglected juvenile (1) because he "[did] not receive proper care, supervision, or discipline" from Father and (2) because he "live[d] in an environment injurious to [his] welfare." The petition also alleged Dallas was a dependent juvenile because his "parent, guardian, or custodian [was] unable to provide for the care or supervision of [Dallas] and lack[ed] an appropriate alternative child care arrangement." As to neglect the petition alleged:

> 1. The Cumberland County Department of Social Services (CCDSS) received a Child Protective Services (CPS) referral on 8/18/2020 concerning the safety of the juvenile.
>
> 2. Respondent Mother has prior CPS history for neglect in September of 2019, due to substance abuse and unstable housing.
>
> 3. Respondent Mother tested positive for THC when the child was born. Respondent Mother initially refused for the minor child to be tested. However, she later agreed, and he also tested positive for THC.
>
> 4. The minor child was placed in the NICU due to low blood sugar.
>
> 5. Respondent Mother indicated that she had appropriate housing and employment. However, [Social Worker G.] has not been able to see the home or verify employment.
>
> 6. Respondent Mother agreed to place the minor child with Respondent Father upon his discharge from the hospital.
>
> 7. [Social Worker V.C.] contacted Bladen County on 9/2/2020 to ask for a courtesy check on the Respondent Father.
>
> 8. Law Enforcement for Bladen County arrived first, and no one was home. The [social worker] for Bladen County arrived several minutes later. A few minutes later the Respondent Father pulled into the yard.
>
> 9. [Bladen County social worker] asked Respondent Father where the minor child was, and he

> indicated that he was inside the home. Respondent Father went inside and retrieved the minor child. When asked who was with the minor child the Respondent Father indicated no one was with the minor child and that he was gone "30 seconds".
>
> 10. Based on the allegations herein, the juvenile(s) are at risk of imminent irreparable harm if they are returned to the physical custody of Respondents.
>
> 11. Based on the allegations herein, the Petitioner cannot ensure the safety of the juvenile(s) and is in need of a Non-Secure Custody Order in favor of the Petitioner.

The petition repeated identical allegations when alleging Dallas was a dependent juvenile.

¶ 5 On 4 September 2020, the Cumberland County District Court entered a nonsecure custody order in favor of CCDSS. Dallas was placed with a "suitable relative" pursuant to a "Temporary Safety Placement agreement" that Dallas's parents could remove him from "at any time without court involvement." The nonsecure custody order did not identify that relative and the record does not contain the "Temporary Safety Placement agreement" referred to by the trial court. On 9 September 2020, the trial court held a review hearing and entered an order for continued nonsecure custody on 28 October 2020. The trial court incorporated the factual basis from the petition as alleged by CCDSS and concluded Dallas should remain in foster care while CCDSS attempted to find him an alternative placement. The order set a hearing on continued nonsecure custody for 14 September 2020. The case was heard on 14 September, Dallas remained in CCDSS custody, and an order was entered 23 October 2020. The trial court set the initial date for an adjudication hearing for 20 October 2020.

¶ 6 The adjudication hearing was repeatedly continued through 2020 and 2021.[2] During this time Father was incarcerated for 40 days for

2. There were significant delays between hearings in the District Court and the entry of orders in this case. The adjudication was continued after the 20 October 2020 hearing in an order entered 25 November 2020; after a 17 November 2020 hearing in an order entered 1 February 2021; after a 20 January 2021 hearing in an order entered 19 February 2021; after a 17 February 2021 hearing in an order entered 15 March 2021; after a 17 March 2021 hearing in an order entered 27 April 2021; after a 14 April 2021 hearing in an order entered

"assault[ing] a Cumberland County Sheriff's Deputy as they attempted to arrest him" for being disruptive during a hearing in this matter on 20 October 2020; Father completed a mental health assessment and was later allowed visitation again; Mother was arrested; and Dallas was ultimately placed in foster care.[3] Both CCDSS and Father filed motions for review; CCDSS filed its first motion on or about 1 March 2021 and its second motion approximately 4 June 2021.[4] Father apparently filed his motion for review prior to the 9 June 2021 hearing but the record does not indicate this motion was ever heard by the trial court and the trial court's order does not address the motion. CCDSS's first motion was granted after Mother's arrest and Dallas was removed from her home, CCDSS took a voluntary dismissal on its second motion at the 9 June 2021 hearing, and the record does not show whether Father's motion for review was ever ultimately heard or ruled upon by the trial court.

¶ 7 Almost one year after the filing of the petition, the adjudicatory hearing was finally held 17 August 2021 in Cumberland County District Court.[5] The trial court received stipulations of fact under North Carolina General Statute § 7B-807(a), as stated in a written stipulation dated 21 July 2021:

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7 June 2021; after a 12 May 2021 hearing in an order with an illegible file stamp, signed on 23 August 2021; after a 9 June 2021 hearing in an order entered 1 September 2021 in which Judge Olivera was substituted for the previously presiding judge; and after a 14 July 2021 hearing in an order also entered 1 September 2021.

3. The trial court's orders on continued nonsecure custody which continued the adjudicatory hearing in this case are not discussed in full here because the trial court did not incorporate these prior orders into its final Adjudication and Disposition Order.

4. CCDSS's second motion for review and Father's motion for review are not in the record on appeal. CCDSS's second motion is discussed in the trial court's 1 September 2021 order from the 9 June 2021 hearing. Father's motion came up for hearing on both 9 June 2021 and again on 14 July 2021. The trial court's orders for both of these hearing dates are dated 1 September 2021, and neither order addresses Father's motion for review.

5. Our record does not provide any satisfactory reason for the delay of a year. This hearing is required by law to be held within 60 days from the filing of the petition. "(c) The adjudicatory hearing shall be held in the district at such time and place as the chief district court judge shall designate, but no later than 60 days from the filing of the petition unless the judge pursuant to G.S. 7B-803 orders that it be held at a later time." N.C. Gen. Stat. § 7B-801 (2021) (effective 1 October 2011). We note that the multiple continuances through 2020 appear based on North Carolina General Statute § 7B-506 (establishing procedures for continuing hearings on nonsecure custody), but none of the trial court's orders continuing the adjudication reference North Carolina General Statute § 7B-803, which governs continuances of adjudication hearings. *See* N.C. Gen. Stat. § 7B-803 (2021) (effective 1 October 2013) (allowing an adjudication hearing to be continued "for good cause . . . as long as is reasonably required to receive additional evidence, reports, or assessments . . .

1. The Cumberland County Department of Social Services (CCDSS) received a Child Protective Services (CPS) referral on 8/18/2020 concerning the safety of the juvenile.

2. Respondent Mother has prior CPS history for neglect in September of 2019, due to substance abuse and unstable housing. The Disposition for that case was heard on June 15, 2020; the Disposition Order was filed on July 14, 2020.

3. Respondent Mother tested positive for THC when the child was born. Respondent Mother initially refused for the minor child to be tested. However, she later agreed, and he also tested positive for THC.

4. The minor child was placed in the NICU due to low blood sugar.

5. REMOVED.

6. Respondent Mother agreed to place the minor child with Respondent Father upon his discharge from the hospital.

7. [Social Worker V.C.] contacted Bladen County on 9/2/2020 to ask for a courtesy check on the Respondent Father.

8. Bladen Co law enforcement arrived on the scene first. The Bladen County Social Worker arrived a few minutes later. They knocked on the door for a period of time, but no one came to the door. A few minutes later, Respondent Father pulled into the yard.

9. The Social Worker asked where the juvenile was; Respondent Father said that the juvenile was inside of the home. Law enforcement, the Social Worker, & Respondent Father went inside; law enforcement & the Social Worker observed the

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in the best interests of the juvenile . . . . Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.").

> child in the room. When asked, Respondent Father said that the juvenile was under supervision & that Respondent Father was only gone "for 30 seconds." Neither law enforcement nor the Social Worker saw anyone else present in the home.

(Emphasis removed.) The stipulated facts were signed by the social worker, a CCDSS staff attorney, both parents, counsel for both parents, and the GAL attorney advocate. The stipulated facts do not include the date Dallas was discharged from the hospital after his birth on 17 August. In addition to the stipulated facts, the trial court also "accepted and incorporated into evidence" Father's Exhibit 1, comprised of the "Bladen County Incident Report" from the Bladen County Sheriff's Office, "Pictures of Respondent Father's home," and the "Bladen County Social Worker Dictation."

¶ 8 Aside from the findings on the stipulated facts and exhibits, the trial court's order made one additional substantive finding, apparently based upon the evidence submitted by Father for purposes of establishing a factual basis for the adjudicatory portion of the hearing:

> 10. On September 2, 2020, Deputy [ ] and a Bladen County Social Worker arrived at Respondent Father's residence. Respondent Father arrived approximately five (5) minutes after Deputy [ ] and the Bladen County Social Worker arrived. Once inside the residence, Deputy [ ] and the Bladen County Social Worker observed no one else to be in the home with the juvenile. Based on these findings, the Court finds that the juvenile was left unsupervised in Respondent Father's home.

¶ 9 Based solely upon these facts, the trial court adjudicated Dallas both neglected and dependent. The trial court entered an "Adjudication and Disposition Order" ("ADO"), (capitalization altered), on 8 November 2021 reflecting its findings from the adjudicatory hearing on 17 August 2021.[6] The trial court adopted the stipulated facts as findings of fact "by

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6. We note the ADO was entered nearly 90 days after the hearing. "The order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period

clear, cogent, and convincing evidence," and based upon these stipulated facts adjudicated Dallas "dependent and neglected as defined under 7B[,]" and moved on to the dispositional phase of the hearing. Based on the adjudicatory findings, the trial court concluded:

> 1. The evidence presented rises to the level of neglect pursuant to N.C. Gen. Stat. § 7B-101(15) in that the juvenile did not receive proper care, supervision, or discipline from their parent, guardian, custodian, or caretaker, and the juvenile lived in an environment injurious to their welfare due to: Respondent Mother's history of substance abuse, the juvenile and Respondent Mother testing positive for THC at the time of the juvenile's birth, and the juvenile being left unsupervised by Respondent Father. . . . .
>
> 2. The evidence presented rises to the level of dependency pursuant to N.C. Gen. Stat. § 7B-101(9) in that the juvenile's parent, guardian, or custodian is unable to provide for the care or supervision of the juvenile and lacks an appropriate alternative child care arrangement due to: Respondent Mother's history of substance abuse, the juvenile and Respondent Mother testing positive for THC at the time of the juvenile's birth, and the juvenile being left unsupervised by Respondent Father. . . .
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> . . .
>
> 4. The juvenile [Dallas] is a neglected juvenile within the meaning of N.C. Gen. Stat. § 7B-101(15), in that at the time of the filing of the Petition, the juvenile did not receive proper care, supervision, or discipline from their parent, guardian, custodian, or caretaker, and the juvenile lived in an environment injurious to their welfare.
>
> 5. The juvenile [Dallas] is a dependent juvenile within the meaning of N.C. Gen. Stat. § 7B-101(9)

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to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection." N.C. Gen. Stat. § 7B-807(b) (2021) (effective 1 October 2013).

> in that the juvenile's parent, guardian, or custodian is unable to provide for the care or supervision of the juvenile and lacks an appropriate alternative childcare arrangement.

¶ 10 Father appealed and only challenges the adjudicatory portion of the ADO. Mother did not appeal.

II. Jurisdiction

¶ 11 The ADO is a final judgment appealable by right. N.C. Gen. Stat. § 7A-27(b)(2) (2021) (effective 1 July 2021) ("[A]ppeal lies of right directly to the Court of Appeals in any of the following cases: . . . (2) From any final judgment of a district court in a civil action."); N.C. Gen. Stat. § 7B-1001(a)(3) (2021) (effective 1 October 2021) ("In a juvenile matter under [Subchapter 1. Abuse, Neglect, Dependency], only the following final orders may be appealed directly to the Court of Appeals: . . . (3) Any initial order of disposition and the adjudication order upon which it is based."). The ADO was filed 8 November 2021 and Father timely filed his Notice of Appeal on 8 December 2021, but the Certificate of Service for Father's Notice of Appeal was filed on 20 December 2021 and shows the Notice of Appeal was untimely served on 15 December 2021. *See* N.C. R. App. P. 3.1(b) (requiring a notice of appeal to conform with N.C. Gen. Stat. § 7B-1001); N.C. Gen. Stat. § 1A-1, Rule 5 (2021).

¶ 12 Father filed a Petition for Writ of Certiorari pursuant to Rule 21 acknowledging his "right to prosecute an appeal has been lost by failure to take timely action." Neither CCDSS or the Guardian ad litem filed a response to Father's PWC. We exercise our discretion and grant Father's petition. *See* N.C. R. App. P. 21; *State v. Gardner*, 225 N.C. App. 161, 165, 736 S.E.2d 826, 829 (2013).

III. Standard of Review

¶ 13 Father alleges the trial court erred by adjudicating Dallas neglected and dependent because the findings of fact do not support the trial court's conclusions as to neglect and dependency.

> In North Carolina, juvenile abuse, neglect, and dependency actions are governed by Chapter 7B of the General Statutes, commonly known as the Juvenile Code. Such cases are typically initiated when the local department of social services (DSS) receives a report indicating a child may be in need of protective services. *See* N.C.G.S. §§ 7B–301, –302 (2005). DSS conducts an investigation, and if the allegations

> in the report are substantiated, it files a petition in district court alleging abuse, dependency, or neglect. *See Id.* §§ 7B–302, –400, –403 (2005). The first stage in such proceedings is the adjudicatory hearing. *See Id.* § 7B–807 (2005). If DSS presents clear and convincing evidence of the allegations in the petition, the trial court will adjudicate the child as an abused, neglected, or dependent juvenile. *Id.* § 7B–807(a). If the allegations in the petition are not proven, the trial court will dismiss the petition with prejudice and, if the juvenile is in DSS custody, returns the juvenile to the parents. *Id.*

In re A.K., 360 N.C. 449, 454-55, 628 S.E.2d 753, 756-57 (2006). "The role of this Court in reviewing a trial court's adjudication of neglect and [dependency] 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) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)). "Clear and convincing evidence is evidence which should fully convince. Whether a child is [neglected or] dependent is a conclusion of law, and we review a trial court's conclusions of law de novo." *In re N.K.*, 274 N.C. App. 5, 8, 851 S.E.2d 389, 392 (2020) (quoting *In re M.H.*, [272] N.C. App. [283], [286], 845 S.E.2d 908, 911 (2020)).

IV. Adjudication

A. Neglect

¶ 14 **[1]** Father argues "[t]he adjudicatory evidence and findings raise two possible concerns[,]" that Dallas was left alone for five minutes and Mother tested positive for THC at Dallas's birth, and "[t]aken together, both concerns are insufficient as a matter of law to support a neglect adjudication."

¶ 15 When the petition was filed, North Carolina General Statute § 7B-101(15) defined a neglected juvenile as:

> Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare . . . . 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.

N.C. Gen. Stat. § 7B-101(15) (2021) (effective 1 December 2019 to 30 September 2021). Our courts have expanded upon § 7B-101(15):

> "Rather, in concluding that a juvenile 'lives in an environment injurious to the juvenile's welfare,' N.C.G.S. § 7B-101(15), the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile." *Id.* Indeed, our Courts have "additionally 'required that there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide "proper care, supervision, or discipline" ' in order to adjudicate a juvenile neglected." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901–02 (1993)) (emphasis in original).

In re G.C., 2022-NCCOA-452, ¶ 15. "This Court has also stated, however, '[w]here there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding." *In re B.P.*, 257 N.C. App. 424, 433, 809 S.E.2d 914, 919 (2018) (quoting *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003)).

¶ 16 As to Mother's prior CPS involvement, this Court has noted that prior closed cases, standing alone, cannot support a new adjudication of neglect as to another child:

> "[A] prior and closed case with other children . . . *standing alone*, cannot support an adjudication of current or future neglect." *In re J.A.M.*[,] 372 N.C. [1,] 9, 822 S.E.2d [693,] 699 [(2019)] (internal quotations omitted) (citation omitted) (emphasis in original). "Instead, we 'require[ ] the presence of other factors to suggest that the neglect or abuse will be repeated.' " *Id.* at 9–10, 822 S.E.2d at 699 (quoting *In re J.C.B.*, 233 N.C. App. 641, 644, 757 S.E.2d 487, 489 (2014)).
>
> Likewise, this Court has recognized that in determining whether a juvenile is neglected based on prior

> abuse or neglect of other children by an adult who regularly lives in the home: "The decision of the trial court regarding whether the other children in the home are neglected, 'must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.' " *In re S.M.L.*, 272 N.C. App. 499, 515, 846 S.E.2d 790, 801 (2020) (quoting *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999)). "*If the trial court relies on instances of past abuse or neglect of other children in adjudicating a child neglected*, the court is required to find 'the presence of other factors to suggest that the neglect or abuse will be repeated.' " *Id.* at 516, 846 S.E.2d at 801 (quoting *In re J.C.B.*, 233 N.C. App. 641, 644, 757 S.E.2d 487, 489 (2014)).

In re G.C., ¶¶ 15-16 (emphasis in second paragraph added).

¶ 17 Father stipulated to the adjudicatory facts and does not specifically challenge any finding of fact; the findings are therefore binding on appeal. *In re R.S.*, 254 N.C. App. 678, 680, 802 S.E.2d 169, 171 (2017) ("Uncontested findings of fact are 'presumed to be supported by competent evidence and [are] binding on appeal.' " (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991))). We review the trial court's conclusions *de novo* to determine if they are supported by the trial court's findings of fact. *See In re T.H.T.*, 185 N.C. App. at 343, 648 S.E.2d at 523; *In re M.H.*, 272 N.C. App. at 286, 845 S.E.2d at 911.

¶ 18 The trial court accepted the stipulation, *see generally* N.C. Gen. Stat. § 7B-807(a) (2021) (establishing requirements for a trial court to utilize stipulated facts in an adjudicatory hearing), and found:

> [8]*a. The Cumberland County Department of Social Services (CCDSS) received a Child Protective Services (CPS) referral on 8/18/2020 concerning the safety of the juvenile.*
>
> [8]*b. Respondent Mother has prior CPS history for neglect in September of 2019, due to substance abuse and unstable housing. The disposition for that case was heard on June 15, 2020, and the dispositional order was filed on July 14, 2020.*
>
> [8]*c. Respondent Mother tested positive for THC when the child was born. Respondent Mother*

> *initially refused for the minor child to be tested. However, she later agreed, and he also tested positive for THC.*
>
> [*8*]*d. The minor child was placed in the NICU due to low blood sugar.*
>
> [*8*]*e. Respondent Mother agreed to place the minor child with Respondent Father upon his discharge from the hospital.*
>
> [*8*]*f.* [*Social Worker V.C.*] *contacted Bladen County on 9/2/2020 to ask for a courtesy check on Respondent Father.*
>
> [*8*]*g. Bladen County Law Enforcement arrived [at Father's residence] first and a Bladen County Social Worker arrived a few minutes later. They knocked at the door for a period of time, but no one came to the door. A few minutes later Respondent Father pulled into the yard.*
>
> [*8*]*h.* [*The Social Worker*] *asked Respondent Father where the minor child was, and he indicated that he was inside the home. Law Enforcement, the Social Worker, and Respondent Father went inside. Law Enforcement and the Social Worker observed the juvenile in his room. When asked who was with the minor child the Respondent Father indicated the juvenile was under supervision and that Respondent Father was only gone for thirty seconds. Neither law enforcement nor the Social Worker saw anyone else present in the home at that time.*

(Original italics and formatting altered.) The trial court also found Father arrived at the home "approximately five (5) minutes" after the Bladen County deputy and social worker. The trial court then concluded:

> 1. The evidence presented rises to the level of neglect pursuant to N.C. Gen. Stat. § 7B-101(15) in that the juvenile did not receive proper care, supervision, or discipline from their parent, guardian, custodian, or caretaker, and the juvenile lived in an environment injurious to their welfare due to: Respondent Mother's history of

> substance abuse, the juvenile and Respondent Mother testing positive for THC at the time of the juvenile's birth, and the juvenile being left unsupervised by Respondent Father. Therefore, the juvenile is a neglected juvenile within the meaning of N.C. Gen. Stat. § 7B-101(15).
>
> . . .
>
> 4. The juvenile [Dallas] is a neglected juvenile within the meaning of N.C. Gen. Stat. § 7B-101(15), in that at the time of the filing of the Petition, the juvenile did not receive proper care, supervision, or discipline from their parent, guardian, custodian, or caretaker, and the juvenile lived in an environment injurious to their welfare.

¶ 19 The trial court's findings of fact do not support its conclusions of law. Finding 8(b) does not support the court's conclusions Dallas was neglected for several reasons. First, the stipulations did not address when the prior DSS involvement with Mother began or what happened, other than the general reference to substance abuse and unstable housing. The trial court's findings do not address " 'the presence of other factors to suggest that the neglect or abuse' " from Mother's prior case would be repeated, and the court did not "assess whether there is a substantial risk of future abuse or neglect of [Dallas] based on the historical facts of [that] case." *See In re G.C.*, ¶ 16 (quotation omitted). Upon his release from the hospital after his birth, Dallas was placed with Father, with DSS's knowledge, and not with Mother, because both she and Dallas tested positive for THC. There was no indication of prior DSS involvement or drug use as to Father; instead, Dallas went home with Father when he was released from the hospital.

¶ 20 Assuming Findings 8(c) and 8(d) are true and accurate, as we must, the trial court does not show how these findings constitute "some physical, mental, or emotional impairment of the juvenile or" how these findings present "a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline' " of Dallas as to render his environment "injurious to [his] welfare." *See id.*, ¶ 15 (emphasis removed); N.C. Gen. Stat. § 7B-101(15). The trial court simply states that both Mother and Dallas tested positive for THC and that Dallas had low blood sugar at birth. There is no finding of any relationship between low blood sugar at birth and the positive THC test, nor how a low blood sugar level at birth is relevant to the child's condition

months later, nor how a low blood sugar level months prior to the petition created a "substantial risk of such impairment" at the time the petition was filed. Nor do these findings show that Mother "[d]oes not provide proper care, supervision, or discipline" to Dallas or that Dallas lives in an "environment injurious to [his] welfare." N.C. Gen. Stat. § 7B-101(15). The trial court must find that there were "current circumstances" that rendered Dallas's environment unsafe, *see In re G.C.*, ¶ 15, and there is a logical step missing from the trial court's findings. Additionally, when we review "all the evidence" that might support a finding Dallas was impaired or at substantial risk of impairment, *see In re B.P.*, 257 N.C. App. at 433, 809 S.E.2d at 919, the evidence does not support such a finding. The sum of the evidence regarding Mother's drug use and Dallas's low blood sugar was as recited in the trial court's findings; there is no additional adjudicatory evidence showing Dallas was at any further risk of harm from Mother's prior drug use after he was discharged from the hospital and placed in Father's care. The adjudicatory evidence is instead limited to these stipulations and the incident on 2 September 2020 when Dallas was briefly left alone by Father, which we address in greater detail below.[7] Findings 8(b), 8(c), and 8(d) do not support the court's conclusion Dallas was a neglected juvenile.

¶ 21 Findings 8(g) and 8(h) are the only findings relevant to Father's actions. These address the 2 September 2020 incident when Dallas was left unattended in his crib at Father's home for "approximately five (5) minutes." As to whether Findings 8(g) and 8(h) support the trial court's conclusion that Dallas was neglected, both Father and the guardian ad litem discuss this Court's decision in *In re D.C.*, 183 N.C. App. 344, 644 S.E.2d 640 (2007), in which the trial court adjudicated a child neglected after her mother left her alone in a hotel room for at least 30 minutes. *See id.* at 351-52, 644 S.E.2d at 644. When her child was "approximately sixteen months old, [the mother] left [the child] unsupervised in a motel room where she was later found by a motel employee." *Id.* at 347, 644 S.E.2d at 641. An employee entered the mother's motel room after other motel guests reported the child had been "crying continuously" and found the child alone. *Id.* The motel employee contacted the police, and the mother returned after the police arrived and stated "she had been gone for only ten or fifteen minutes." *Id.* DSS took nonsecure

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7. The trial court's prior orders indicate Mother drove with Dallas while possibly inebriated and injured a law enforcement officer when the officer attempted to take possession of Dallas on 24 February 2021. However, the trial court did not incorporate any of its prior orders for adjudicatory purposes. The court only found "The facts as admitted by the parties, constitute the factual basis for this adjudication . . . ."

custody of the child and filed a petition alleging the child was neglected; the trial court later adjudicated the child and her sibling neglected. *Id.* at 347-48, 644 S.E.2d at 641-42.

¶ 22 This Court held the motel incident, alongside "numerous additional findings[,]" proved by clear and convincing evidence, could "support [the trial court's] conclusion that [the child] is a neglected juvenile as defined by N.C. Gen. Stat. § 7B-101(15)." *Id.* at 351, 644 S.E.2d at 644. In *In re D.C.*, there was clear and convincing evidence the mother left the child at the motel. A hotel clerk testified he found the child "sitting alone on the floor beside the door crying[,]" and "approximately thirty minutes elapsed between the time he received the complaint and the time he called the police[,] [and] [the mother] did not return to the motel before the police arrived." *Id.* at 351-52, 644 S.E.2d at 644. The incident also occurred at approximately 4 a.m. *Id.* at 353, 644 S.E.2d at 645. The trial court made four findings detailing the incident, and this Court found the findings supported the conclusion the child was neglected because the child was exposed to "an injurious environment that put [her] in an unacceptable risk of harm and emotional distress." *Id.* (alteration in original).

¶ 23 This case is distinguishable from *In re D.C.* Here, the stipulated facts indicate Dallas was alone, sleeping in his crib at his Father's home, for a very brief period of time. The trial court found "Respondent Father arrived approximately five (5) minutes after" the Bladen County deputy and social worker arrived. The five-minute period Dallas was unsupervised is notably less than the 30-minute period testified to by the clerk in *In re D.C.* Additionally, the child in *In re D.C.* was left in a hotel room at 4:00 a.m., not her own crib at home in the early evening. At 16 months old, the child in *In re D.C.* was capable of exploring and encountering various hazards and was in significant distress when she was found by the front desk clerk. *See id.* at 351, 644 S.E.2d at 644 ("When [the clerk] entered room 214 he found [the child] sitting alone on the floor beside the door crying."). Here, the stipulated facts state the Bladen County deputy and social worker simply "observed the child in the room." There is no indication Dallas was in distress or in circumstances where he may be subject to risk from being left alone for five minutes. The trial court did not make any finding that Dallas was impaired or disturbed by his Father's brief absence, unlike the child in *In re D.C.* The trial court also did not make any finding that Dallas was at a "substantial risk of harm" as a consequence of Father's brief absence, *see In re G.C.*, ¶ 15; the court's Finding 10 merely states Dallas was "left unsupervised." Indeed, based upon the stipulations and other adjudicatory evidence, there is no

indication Dallas was at any more risk than he would have been if Father were sleeping in another room of the house. The trial court's Findings 8(g), 8(h), and 10 do not support its conclusions that Dallas was a neglected juvenile.

¶ 24 CCDSS, relying on N.C. Gen. Stat. § 14-318 (2021) (establishing a Class 1 misdemeanor for leaving a child under 8 years old alone while confined in a building or dwelling due to the potential risk of exposing the child to fire), argues it "would be reasonable to conclude that leaving a juvenile under the age of eight (8) in a home unsupervised is *per se* neglect when taking into account the criminal statute. Therefore, the trial court properly concluded that Dallas received improper supervision and was exposed to a substantial risk of harm." This argument is not persuasive. First, CCDSS did not make this argument before the trial court. On appeal, CCDSS argues we should use the criminal statutes to define what constitutes neglect of a juvenile, but the definition of neglect is provided by North Carolina General Statute § 7B-101(15). Certainly, evidence of the actual commission of a crime involving a child may be relevant to an adjudication of neglect or dependency, but CCDSS's argument here is merely hypothetical. The purpose of Chapter 7B is to "provide procedures for the hearing of juvenile cases," to "develop a disposition in each juvenile case that reflects consideration of the facts," to protect juveniles by means that respect traditional family rights, to "provide standards for the removal, *when necessary*, of juveniles from their homes . . . consistent with *preventing the unnecessary or inappropriate separation of juveniles from their parents*," and to "provide standards . . . ensuring that the best interests of the juvenile are of paramount consideration by the court . . . ." N.C. Gen. Stat. § 7B-100 (2021) (emphasis added). Section 14-318 does not establish standards applicable to juvenile proceedings under Chapter 7B, and we do not read § 7B-101(15) to require the use of criminal statutes to define neglect because our General Assembly has expressly divided the two without reference to each other. To illustrate, § 7B-101(1) extensively utilizes General Statutes Chapter 14 to define "abused juveniles," but § 7B-101(15) does not reference any section of Chapter 14 other than § 14-43.15 (establishing child trafficking as grounds for neglect), which is inapplicable here. *See generally* N.C. Gen. Stat. § 7B-101. We see no reason to link two distinct Chapters of our General Statutes when our legislature intentionally drafted § 7B-101(15) without reference to Chapter 14 when it easily could have chosen to, particularly where this connection was first argued on appeal. *See Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) ("The principal goal of statutory construction is to accomplish the legislative intent.").

¶ 25 Second, Father asserts, and we agree, that a *per se* rule of neglect as proposed by CCDSS would result in harsh, undesirable consequences. Under CCDSS's proposed *per se* rule even a moment's lack of supervision could result in an adjudication of neglect under Chapter 7B every time a juvenile's parent or parents stepped outside for a few minutes to check the mail, let out a pet dog, or bring in the groceries from the car. Such a rule is directly contrary to the purpose of Chapter 7B as described in § 7B-100, "[t]o provide standards for the removal, *when necessary*, of juveniles from their homes and for the return of juveniles to their homes consistent with *preventing the unnecessary or inappropriate separation of juveniles from their parents*." N.C. Gen. Stat. § 7B-100 (emphasis added). CCDSS's proposed rule would result in "neglect" every time a juvenile's parent steps out of the home to complete the most minimal of household tasks, even if the child is left safely sleeping in his crib. "[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Mazda Motors of America, Inc. v. Southwestern Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (quoting *State v. Barksdale*, 181 N.C. 621, 107 S.E. 505 (1921)). Chapter 7B is not intended to punish parents; it is intended to ensure the wellbeing of juveniles. *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) (holding, in a termination of parental rights case, "In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, *not the fault or culpability of the parent*." (emphasis added)).

¶ 26 The trial court's findings do not support its conclusions that Dallas was neglected. The findings do not establish Father did not provide "proper care, supervision, or discipline" to Dallas or that Dallas "lives in an environment injurious to [his] welfare[.]" N.C. Gen. Stat. § 7B-101(15). The findings at most support the conclusion that Dallas's Mother had a prior substance abuse problem and Dallas was exposed to THC during the pregnancy, but Dallas was then discharged from the hospital into Father's care. There are no findings that Father's home was inappropriate in any way and no findings of substance abuse by Father. Instead, Dallas was left unattended for "approximately five (5) minutes" in his own home and nothing more. We decline to adopt CCDSS's proposed *per se* rule as to juvenile neglect based upon a child being left unsupervised in a safe place in his own home for five minutes because it is inconsistent with the purposes of Chapter 7B. The portion of the order adjudicating Dallas neglected is reversed.

B. Dependency

¶ 27 **[2]** Father also challenges the trial court's adjudication of Dallas as a dependent juvenile. Again, the trial court's findings of fact do not support its conclusions adjudicating Dallas dependent.

¶ 28 A dependent juvenile is "in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2021) (effective 1 December 2019 to 30 September 2021). "In determining whether a juvenile is dependent, the trial court must address *both* (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative childcare arrangements." *In re Q.M.*, 275 N.C. App. 34, 38-39, 852 S.E.2d 687, 691 (2020) (emphasis in original) (quoting *In re T.B.*, *C.P.*, *& I.P.*, 203 N.C. App. 497, 500, 692 S.E.2d 182, 184 (2010)). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *Id.* at 42, 852 S.E.2d at 693. " 'Moreover, although N.C.G.S. § 7B-101(9) uses the singular word "the [ ] parent" when defining whether "the [ ] parent" can provide or arrange for adequate care and supervision of a child, our caselaw has held that a child cannot be adjudicated dependent where she has at least "a parent" capable of doing so.' " *Id.* (quoting *In re V.B.*, 239 N.C. App. [340,] 342, 768 S.E.2d [867,] 868 [(2015)]).

¶ 29 Father again does not challenge any specific findings of fact. Father raises general arguments that "the adjudicatory evidence and the court's findings" do not support its conclusions. The trial court's conclusions of law must be supported by its findings of fact. *See id.* The trial court's findings are binding on appeal, *see In re R.S.*, 254 N.C. App. at 680, 802 S.E.2d at 171; *Koufman* 330 N.C. at 97, 408 S.E.2d at 731 ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal."), and thus we address whether the trial court's conclusions are supported by the findings.

¶ 30 The trial court's conclusions as to dependency state:

> 2. The evidence presented rises to the level of dependency pursuant to N.C. Gen. Stat. § 7B-101(9) in that the juvenile's parent, guardian, or custodian is unable to provide for the care or supervision of the juvenile and lacks an

> appropriate alternative child care arrangement due to: Respondent Mother's history of substance abuse, the juvenile and Respondent Mother testing positive for THC at the time of the juvenile's birth, and the juvenile being left unsupervised by Respondent Father. Therefore, the Court finds that the juvenile is dependent within the meaning of N.C. Gen. Stat. § 7B-101(9).
>
> . . .
>
> 5. The juvenile [Dallas] is a dependent juvenile within the meaning of N.C. Gen. Stat. § 7B-101(9) in that the juvenile's parent, guardian, or custodian is unable to provide for the care or supervision of the juvenile and lacks an appropriate alternative childcare arrangement.

The trial court repeats the same findings to support its conclusions Dallas was dependent as it did to support its conclusions that Dallas was neglected. These findings do not address the requirements of North Carolina General Statute § 7B-101(9), and do not support the trial court's conclusions. *See In re Q.M.*, 275 N.C. App. at 38-39, 852 S.E.2d at 691 ("In determining whether a juvenile is dependent, the trial court must address *both* (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative childcare arrangements.").

¶ 31 The trial court's findings recite that Mother had prior CPS history, she and Dallas tested positive for THC at Dallas's birth, Dallas was placed in the NICU because he had low blood sugar, and that after Dallas was discharged from the hospital Father briefly left the home at the same time a courtesy check was made by a Bladen County deputy and social worker. These findings show Mother was not capable of providing care for Dallas when he was discharged from the hospital, but she did have an appropriate "alternative childcare arrangement": Father. Dallas was discharged into his care. The only finding regarding Father is that he left Dallas alone in his crib for "five minutes." There was no indication his home was inappropriate or that Father had not provided proper care for Dallas since his release from the hospital. There was no indication Dallas was subjected to any risk from the five minutes alone in his room. We do not suggest a parent should leave a newborn alone in the home for any particular period of time, but under the minimal facts as stipulated here, these findings do not establish both of Dallas's parents (1) were incapable of providing care or supervision to Dallas and (2) lacked

appropriate alternative childcare arrangements. *See* N.C. Gen. Stat. § 7B-101(9); *In re Q.M.*, 275 N.C. App. at 38-39, 852 S.E.2d at 691.

> A review of the adjudication and disposition order entered in the instant case reveals that the court failed to make any findings regarding *the availability to the parent of alternative child care arrangements*. Where previous case law makes clear that such a finding is required, we must reverse the lower court as to the finding and conclusion that [Dallas] is a [neglected and] dependent juvenile . . . .

In re B.M., 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (emphasis added). Because the findings do not establish either prong required by N.C. General Statute § 7B-101(9) and our case law, where they must address both, *see In re Q.M.*, 275 N.C. App. at 38-39, 852 SE.2d at 691, the trial court's conclusions adjudicating Dallas dependent are unsupported and must be reversed. *See id.* at 42, 852 S.E.2d at 693-94.

V. Disposition

¶ 32 Because we reverse the adjudicatory portion of the trial court's ADO, there is no legal basis for disposition and we must also necessarily vacate the dispositional portion. *See id.* at 42-43, 852 S.E.2d at 694 (citing *In re S.C.R.*, 217 N.C. App. 166, 170, 718 S.E.2d 709, 713 (2011)).

VI. Conclusion

¶ 33 We conclude the trial court's findings do not support its conclusions adjudicating Dallas neglected and dependent. We reverse the trial court's conclusions in the ADO as to the adjudications of neglect and dependency of Dallas. The trial court's findings were inadequate to establish Dallas neglected under § 7B-101(15) or dependent as defined by § 7B-101(9). The adjudicatory portion of the ADO is reversed, and the dispositional portion of the ADO is necessarily vacated.

REVERSED IN PART; VACATED IN PART.

Judges ZACHARY and MURPHY concur.

KELLY v. STATE OF N.C.

[286 N.C. App. 23, 2022-NCCOA-675]

TAMIKA WALKER KELLY, KRISTY MOORE, AMANDA HOWELL, KATE MEININGER, ELIZABETH MEININGER, JOHN SHERRY, AND RIVCA RACHEL SANOGUEIRA, PLAINTIFFS

v.

STATE OF NORTH CAROLINA AND NORTH CAROLINA STATE EDUCATIONAL ASSISTANCE AUTHORITY, DEFENDANTS

AND

PHILIP E. BERGER IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE IN HIS OFFICIAL CAPACITY AS SPEAKER OF NORTH CAROLINA HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANTS

AND

JANET NUNN, CHRISTOPHER AND NICHOLE PEEDIN, AND KATRINA POWERS, INTERVENOR-DEFENDANTS

No. COA21-709

Filed 18 October 2022

Constitutional Law—challenge to legislative act—motion to transfer to three-judge panel—as-applied versus facial challenge—scope of remedy

Where plaintiffs' constitutional challenge to a state program that provides scholarships for attendance at nonpublic schools constituted a facial challenge—because, if successful, the remedy would result in invalidating the program in its entirety—and not an as-applied challenge, the trial court erred by denying defendants' and legislative-intervenors' motions to transfer the case to a three-judge panel pursuant to N.C.G.S. § 1-267.1 and Civil Procedure Rule 42(b)(4).

Judge DIETZ concurring in the result.

Judge HAMPSON dissenting.

Appeal by Defendants and Intervenor-Defendants from order entered 7 May 2021 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 8 June 2022.

Patterson Harkavy LLP, by Burton Craige, Narendra K. Ghosh, Trisha S. Pande, and Paul E. Smith, for Plaintiff-Appellees.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamika Henderson and Special Deputy Attorney General Laura H. McHenry, for the State.

Womble Bond Dickinson (US) LLP, by Matthew F. Tilley and Russ Ferguson; and Liberty Justice Center, by Jeffrey D. Jennings, for Legislative-Intervenor-Defendant-Appellants.

Nelson Mullins Riley & Scarborough, LLP, by John E. Branch, III and Andrew D. Brown; and Institute for Justice, by Ari Bargil, Michael Bindas, Joseph Gray, and Marie Miller, for Parent Intervenor-Defendant-Appellants.

WOOD, Judge.

¶ 1 The State and the North Carolina Education Assistance Authority ("Defendant SEAA") (collectively, the "Defendants"); Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official Capacity as Speaker of the North Carolina House of Representatives (collectively, the "Legislative-Intervenors"); and Janet Nunn, Christopher and Nichole Peedin, and Katrina Powers (collectively, the "Parent-Intervenors") appeal from an order denying the Defendants' and Legislative-Intervenors' motions to transfer this case to a three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1 and N.C. Gen. Stat. § 1A-1, Rule 42(b)(4). On appeal, Legislative-Intervenors, Parent-Intervenors (collectively, the "Intervenor-Defendants"), and Defendants assert various arguments contending the constitutional claims within Plaintiffs' complaint constitute facial challenges. Defendants and Intervenor-Defendants all filed petitions for writ of certiorari to this Court. In our discretion, we grant their petitions for writ of certiorari. After a careful review of the record and applicable law, we re-verse the trial court's order and remand to the trial court to enter an order to trans-fer this case to a three-judge panel of the Superior Court of Wake County pursuant to N.C. Gen. Stat. § 1-267.1 and Rule 42(b)(4).

I. Factual and Procedural Background

¶ 2 In 2013, the North Carolina General Assembly enacted the Opportunity Scholarship Program (the "Program"). This program operated to provide funds to eligible North Carolina students to assist in paying tuition at any nonpublic school. N.C. Gen. Stat. § 115C-562.2(a) (2020). This program "allows a small number of students in lower-income families to receive scholarships from the State to attend private school." *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284-85 (2015).

¶ 3 Under this program, Defendant SEAA makes applications available each year for "eligible students for the award of scholarship grants

to attend any nonpublic school." § 115C-562.2(a) (2020). A "nonpublic school" is a "school that meets the requirements of Part 1 [private church schools and schools of religious charter] or Part 2 [qualified nonpublic schools] of this Article as identified" in Chapter 115C, Article 39 of our General Statutes. N.C. Gen. Stat. § 115C-562.1(5) (2020); *see Hart* 368 N.C. at 127, 774 S.E.2d at 285. An "eligible student" is one who secures admission to a nonpublic school and is a child 1) who was a full-time student attending a North Carolina public school or Department of Defense school in North Carolina the previous semester, 2) who was a scholarship recipient from the previous year, 3) who is entering either Kindergarten or first grade, 4) who is in foster care, 5) whose adoption decree was not entered more than one year prior, or 6) who has a full-time active duty military parent or a parent who received honorable discharge less than 12 months prior. § 115C-562.1(3)(a)(1)-(7). The student must, furthermore, reside "in a household with an income level not in excess of one hundred fifty percent (150%) of the amount required for the student to qualify for the federal free or reduced-price lunch program"[1] or be "in foster care as defined in G.S. 131D-10.2." § 115C-562.1(3)(b).

¶ 4 Defendant SEAA awards the Program's scholarships to students. § 115C-562.2(a). Preference is given first to students who received a scholarship grant the year prior, then to students in lower-income families, and finally to any other eligible students. § 115C-562.2(a)(1)-(2). An eligible student may receive a scholarship award up to $4,200.00. After a student has satisfied the eligibility criteria and received a scholarship award, Defendant SEAA then transfers the funds directly to the participating school on the student's behalf.

¶ 5 On July 27, 2020, Plaintiffs filed a complaint concerning the Program against Defendants. Their complaint raised three claims, alleging, *inter alia*, the program violates Article I, Sections 13 and 19 of the North Carolina Constitution by subjecting them to religious discrimination and interferes with their rights of conscience and Article I, Sections 13-15 and 19 and Article V, Sections 2(1) and 2(7) of the North Carolina

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1. In 2013, the designated statutory limit was "one hundred thirty-three percent (133%) of the amount required for the student to qualify for the federal free or reduced-price lunch program." N.C. Gen. Stat. § 115C-562.1(3)(b) (2013). In 2020, our General Assembly increased this limit to "one hundred fifty percent (150%) of the amount required for the student to qualify for the federal free or reduced-price lunch program." N.C. Gen. Stat. § 115C-562.1(3)(b) (2020). Our General Assembly raised the limit once again in 2021 to "one hundred seventy-five percent (175%) of the amount required for the student to qualify for the federal free or reduced-price lunch program." N.C. Gen. Stat. § 115C-562.1(3)(b)(1) (2021).

Constitution. Within the first claim, Plaintiffs contend the Program violates their rights under Article I, Sections 13 and 19 in the following manner: The Program subjects them to religious discrimination and interferes with their rights of conscience by 1) funding educational opportunities that are conditioned on the Plaintiffs' and their family members' religious faiths and sexual orientations, 2) creating a program in which a student's choice of schools is limited by his or her religious faith, 3) funding schools that condition enrollment on the adoption of religious beliefs condemning homosexuality, 4) directing their taxpayer dollars to schools that discriminate against those who adhere to Plaintiffs' religious faiths, 5) dividing communities by religion, and 6) denying Plaintiffs the ability to live in a community without state-supported discrimination.

¶ 6 In Plaintiffs' second claim for relief, they contend the program as implemented violates Article I, Sections 13, 14, and 19 and Article V, Sections 2(1) and 2(7) of the North Carolina Constitution in that it funds schools which,

> [1)] refuse admission to students whose beliefs do not conform with the school's official doctrine[;] . . . [2)] reserve the right to discipline or expel students whose spiritual beliefs diverge from the school's official doctrine[;] . . . [3)] require students and their family members to conform their lifestyle to the school's religious dictates, both in and out of school[;] . . . [4)] condemn homosexuality and bisexuality; forbid gay students and their family members from being open about their sexual orientation; threaten to expel gay, bisexual, or gender nonconforming students if they are open about their sexual orientation, gender identity, or transgender status; prohibit students from expressing support for LGBTQ rights; and require students to adopt religious beliefs that condemn LGBTQ rights[;] . . . [5)] require students and their families to regularly attend services at certain religious institutions, and admit only students whose families are willing to regularly attend services at certain religious institutions. . . . [and 6)] mandat[e] religious services, activities, and instruction [as] a central and integral part of the school's curriculum.

¶ 7 Lastly, Plaintiffs' final claim contends the program violates Article 1, Section 15 and Article V, Sections 2(1) and 2(7) of the North Carolina

Constitution because "[t]he transfer of taxpayer funds to private schools without any accountability or requirements ensuring that students will actually receive an education is not for the purpose of education or for any other public purpose." Plaintiffs further bolster their third claim by arguing Defendant SEAA has "abdicated its statutory obligations regarding oversight of the Program." Plaintiffs, in their prayer for relief, requested the trial court to declare the Program to be unconstitutional as implemented; enter a permanent injunction enjoining selection of voucher recipients, disbursement of funds, and appropriations to the reserve fund; award them costs; and award any other legal and equitable relief as the trial court deemed necessary.

¶ 8 Thereafter, the Parent-Intervenors filed a motion to intervene on August 19, 2020. The trial court denied their motion on October 14, 2020. In response, the Parent-Intervenors first filed a notice of appeal, then filed a motion for clarification or, in the alternative, a motion to stay and ultimately filed a joint motion with the Plaintiffs requesting the trial court reconsider the October 14, 2020 order. The latter motion came before the trial court for a hearing the following month, and the trial court subsequently entered an order permitting the Parent-Intervenors to intervene in this case under Rule 24(b). Additionally, the Legislative-Intervenors intervened in this case.

¶ 9 On October 20, 2020, Defendants filed a motion to transfer the case to a three-judge panel. Defendants argued Plaintiffs' complaint "clearly asserts a facial constitutional challenge" and thus "must be heard by a three-judge panel of the Superior Court of Wake County" pursuant to N.C. Gen. Stat. § 1-267.1 and North Carolina Rules of Civil Procedure 42(b)(4). The Legislative-Intervenors, likewise, filed a motion to transfer to a three-judge panel on January 6, 2021.[2]

¶ 10 These motions came before the trial court for a hearing on May 6, 2021. The next day, the trial court entered an order denying the motions to transfer to a three-judge panel, finding "Plaintiffs' Complaint presents an as-applied challenge to the Program, not a facial challenge to the Program." Defendants and Intervenor-Defendants all filed timely notices of appeal.

¶ 11 Parent-Intervenors filed a motion for clarification, or in the alternative a motion to stay, with the trial court on June 14, 2021, requesting the

2. Parent-Intervenors did not file a motion to transfer to a three-judge panel. However, they did specify at the hearing they were "in support of the motions by the state defendants and the legislative-intervenors" and proceeded to provide additional argument.

trial court stay its order denying a transfer to a three-judge panel. One week later, on June 21, 2021, Plaintiffs filed a motion to amend the pleading. On July 28, 2021, the trial court entered an order declining to rule on Plaintiffs' motion to amend the pleadings, concluding because the case had been appealed, their motion is, in turn, automatically stayed. The same day, the trial court entered an order denying Parent-Intervenors' motion for clarification and a motion in the alternative to stay. The trial court explained it "declines to issue a blanket order that all potential matters that may arise in this case would constitute proceedings 'upon the judgment appealed from' or a matter 'embraced' within the May 7, 2021, order," thereby allowing Plaintiffs to conduct discovery.

¶ 12 Thereafter, Plaintiffs commenced discovery by sending subpoenas for documents and deposition testimonies and notices of depositions. On August 6, 2021, Parent-Intervenors filed with the trial court a motion to confirm that pending third-party subpoenas are stayed, or in the alternative a motion to stay those subpoenas. The trial court denied this motion by order entered September 24, 2021.

II. Jurisdiction

¶ 13 At the outset, we must determine whether this Court has jurisdiction to consider the present appeal. In their petitions, Defendants and Intervenor-Defendants maintain the trial court erred by failing to transfer this case to a three-judge panel, and hence, it is in the interest of justice and a matter of great public importance for this Court to issue a writ of certiorari. Based upon the reasons below, we grant Defendants' and Intervenor-Defendants' petitions for writ of certiorari to permit review of this case.

¶ 14 The North Carolina Rules of Appellate Procedure provides 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, or when no right of appeal from an interlocutory order exists." N.C. R. App. P. 21(a)(1). "Certiorari is a discretionary writ," *State v. Ore*, 2022-NCCOA-380, ¶ 15 (emphasis omitted) (quoting *State v. Rouson*, 226 N.C. App. 562, 564, 741 S.E.2d 470, 471 (2013)), and only should be "issued for good and sufficient cause shown." *State v. Gantt*, 271 N.C. App. 472, 474, 844 S.E.2d 344, 346 (2020) (citation omitted). The decision of "[w]hether to allow a petition and issue the writ of certiorari is not a matter of right and rests within the discretion of this Court." *State v. Biddix*, 244 N.C. App. 482, 486, 780 S.E.2d 863, 866 (2015). We

"may only consider certiorari when the petition shows merit, meaning that the trial court probably committed error at the hearing." *State v. Ricks*, 378 N.C. 737, 738, 2021-NCSC-116, ¶ 1; *see Ore*, at ¶ 15 ("A petition for the writ of certiorari must show merit or that prejudicial and reversible error was probably committed below." (brackets omitted)).

¶ 15 As discussed below, we conclude this appeal presents the appropriate circumstances contemplated by Rule 21(a)(1). Therefore, in our discretion, we grant Defendants' and Intervenor-Defendants' petitions for writ of certiorari under Rule 21(a)(1) so as to reach the merits of their appeal.

III. Standard of Review

¶ 16 Under provisions which mandate a three-judge panel,

> 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).

Lakins v. W. N.C. Conf. of United Methodist Church, 2022-NCCOA-337, ¶ 19 (quoting *Holdstock v. Duke Univ. Health Sys.*, 270 N.C. App. 267, 281, 841 S.E.2d 307, 317 (2020)).

¶ 17 As such, the trial court's order in the present case raises questions regarding statutory construction and subject matter jurisdiction. *Id.* We review these types of questions *de novo*. *See In re N.P.*, 376 N.C. 729, 2021-NCSC-11, ¶ 5 ("The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent. . . . We review questions of law de novo."); *Applewood Props., LLC v. New S. Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013) ("This matter presents a question of statutory interpretation, which we review de novo." (internal brackets omitted)). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Bartley v. City of High Point*, 2022-NCSC-63, ¶ 14 (citation omitted); *see also In re Application for Reassignment of Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964) ("The word '*de novo*' means fresh or anew; for a second time; and a *de novo* trial in appellate court is a trial had as if no action whatever had been instituted in the court below.").

IV. Discussion

¶ 18 The sole argument of Defendants and Intervenor-Defendants on appeal is Plaintiffs' complaint constitutes a facial challenge to the Program, and, thus, the trial court erred when it denied their motion to transfer this case to a three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1 and North Carolina Rule of Civil Procedure 42(b)(4). Plaintiffs disagree and maintain their complaint is an as-applied challenge to the Program. After a careful review of the record and applicable laws, we agree with Defendants and Intervenor-Defendants and conclude Plaintiffs' complaint is a facial challenge to the Program.

¶ 19 N.C. Gen. Stat. § 1-267.1 is a part of a statutory scheme enacted by the North Carolina General Assembly in 2014 requiring certain cases be transferred to a three-judge panel of the Superior Court of Wake County. Under N.C. Gen. Stat. § 1-267.1,

> any *facial challenge* to the validity of an act of the General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County, organized as provided by subsection (b2) of this section.

N.C. Gen. Stat. § 1-267.1(a1) (2020) (emphasis added). Rule 42(b)(4) complements Section 1-267.1, stating:

> Pursuant to G.S. 1-267.1, any *facial challenge* to the validity of an act of the General Assembly, other than a challenge to plans apportioning or redistricting State legislative or congressional districts, shall be heard by a three-judge panel in the Superior Court of Wake County if a claimant raises such a challenge in the claimant's complaint or amended complaint in any court in this State, or if such a challenge is raised by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading.

N.C. Gen. Stat. § 1A-1, R. 42(b)(4) (2020) (emphasis added).

¶ 20 Under the plain language of N.C. Gen. Stat. § 1-267.1 and Rule 42(b)(4), the requirement that a case be transferred to a three-judge panel is predicated on whether a plaintiff's challenge to the validity of an act by our General Assembly is a facial or an as-applied challenge. Therefore, the

primary question before us is whether Plaintiffs' complaint is properly construed as an as-applied challenge or a facial challenge to the Program.

¶ 21 An as-applied challenge to a statute contest whether it "can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable." *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015) (citing *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (1999), *rev'd on other grounds*, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017); *see Lakins v. W. N.C. Conf. of United Methodist Church*, 2022-NCCOA-337 ¶ 23 ("[A]s-applied challenge[s] represent[] a party's protest against how a statute was applied in the particular context in which the party acted or proposed to act . . . ." (brackets omitted)). An as-applied challenge is "strongly influenced by the facts" of that specific case. *State v. Grady*, 372 N.C. 509, 522, 831 S.E.2d 542, 554 (2019) (quoting *Packingham*, 368 N.C. at 393, 777 S.E.2d at 749).

¶ 22 In contrast, a facial challenge "is an attack on the statute itself" rather than its application. *Grady*, 372 N.C. at 522, 831 S.E.2d at 554 (quoting *City of Los Angeles v. Patel*, 576 U.S. 409, 415, 135 S. Ct. 2443, 2449, 192 L. Ed. 2d 435, 443 (2015)); *see also Young v. Hawaii*, 992 F.3d 765, 779 (9th Cir. 2021) ("A facial challenge is a claim that the legislature has violated the Constitution, while an as-applied challenge is a claim directed at the execution of the law."), *vacated on other grounds*, 142 S. Ct. 2895 (Mem) (June 30, 2022). "A facial challenge maintains that no constitutional applications of the statute exist, prohibiting its enforcement in any context." *Packingham*, 368 N.C. at 383, 777 S.E.2d at 743; *see also United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697, 707 (1987); *Hart*, 368 N.C. at 131, 774 S.E.2d at 288 (stating the party raising a facial challenge must "meet the high bar of showing that there are no circumstances under which the statute might be constitutional" (citation and internal quotation marks omitted)); *Grady*, 372 N.C. at 522, 831 S.E.2d at 554.

¶ 23 There is no clear-cut test to distinguish facial challenges from as-applied challenges. *See Citizens United v. FEC*, 558 U.S. 310, 331, 130 S. Ct. 876, 893, 175 L. Ed. 2d 753, 776 (2010) ("[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge."); *Grady*, 372 N.C. at 546, 831 S.E.2d at 569; *AFSCME Council 79 v. Scott*, 717 F.3d, 851, 865 (11th Cir. 2013) ("[T]he line between facial and as-applied relief is a fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation."). As such, a court is not restricted

per se by a party's categorization of its challenge as facial or as-applied and may conduct its own review to determine whether the party's challenge is facial or as-applied. *See Doe v. Reed*, 561 U.S. 186, 194, 130 S. Ct. 2811, 2817, 177 L. Ed. 2d 493, 501 (2010). For instance, in *Islamic Community Center for Mid Westchester v. City of Yonkers*, the trial court determined plaintiffs' claims were as-applied challenges notwithstanding plaintiffs' assertion that their claims were facial challenges. *Islamic Cmty. Ctr. for Mid Westchester v. City of Yonkers Landmark Pres. Bd.*, 258 F. Supp. 3d 405, 415 (2017), *aff'd*, 742 Fed. App'x 521 (2d Cir. July 6, 2018) (unpublished); *see also Cryan v. Nat'l Council of YMCAs of the U.S.A.*, 280 N.C. App. 309, 2022-NCCOA-612, ¶ 22; *Short Term Rental Owners Ass'n of Ga. v. Cooper*, 515 F. Supp. 3d 1331, 1340 (N.D. Ga. 2021). Thus, "[t]he label is not what matters." *Doe*, 561 U.S. at 194, 130 S. Ct. at 2817, 177 L. Ed. 2d at 501.

¶ 24 When determining whether a challenge is as-applied or facial, the court must look to the breadth of the remedy requested. *Id.*; *Citizens United*, 558 U.S. at 331, 130 S. Ct. at 893, 175 L. Ed. 2d at 776 (2010) ("The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint."), *accord*, *Grady* 372 N.C. at 546, 831 S.E.2d at 569; *see also AFSCME Council 79*, 717 F.3d at 862. A claim is properly classified as a facial challenge if the relief that would accompany it "reach[es] beyond the particular circumstances of these plaintiffs." *Doe*, 561 U.S. at 194, 130 S. Ct. at 2817, 177 L. Ed. 2d at 501. A claim is properly classified as an as-applied challenge if the remedy "is limited to a plaintiff's particular case." *Libertarian Party v. Cuomo*, 300 F. Supp. 3d 424, 439 (W.D.N.Y. 2018), *overruled on other grounds by N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 211, 213 L. Ed. 2d 387 (2022).

¶ 25 In the case *sub judice*, the parties disagree over whether Plaintiffs' claims are properly classified as a facial or an as-applied challenge. Plaintiffs assert three claims in their complaint: 1) the Program as implemented violates Article 1, Sections 13 and 19 of the North Carolina Constitution; 2) "[t]he Program as implemented violates Article I, Sections 13, 14, and 19, and Article V, Sections 2(1) and 2(7)" of the North Carolina Constitution; and 3) "[t]he Program as implemented violates Article 1, Section 15, and Article V, Sections 2(1) and 2(7) of the North Carolina Constitution." Plaintiffs contend their complaint does not facially challenge the Program but challenges how "it has been implemented and applied." The trial court agreed with Plaintiffs' characterization of their claims, finding Plaintiffs stated over eighteen times in their brief that their challenge to the Program is "as implemented." The trial court

concluded "Plaintiffs' Complaint presents an as-applied challenge to the Program, not a facial challenge to the program."

¶ 26 Notwithstanding Plaintiffs' repeated assertions, this court is not limited by Plaintiffs' classification of their claims. *See Doe*, 561 U.S. at 194, 130 S. Ct. at 2817, 177 L. Ed. 2d at 501. Rather, we must look to the scope of relief requested by Plaintiffs to determine whether Plaintiffs' claims are properly viewed as a facial or an as-applied challenge.

¶ 27 In their prayer for relief, Plaintiffs requested the following:

> (1) Declare that the Program as implemented is unconstitutional under the North Carolina Constitution;
>
> (2) Enter a permanent injunction enjoining the selection of voucher recipients, any further disbursements of money from the Reserve Fund, and any further appropriations to the Reserve Fund;
>
> (3) Award plaintiffs costs pursuant to N.C. Gen. Stat. § 1-263;
>
> (4) Award such other and further legal and equitable relief as this Court deems necessary, just, and proper.

¶ 28 By examining Plaintiffs' claims in conjunction with the relief requested, we note Plaintiffs' claims "would, if successful, effectively preclude all enforcement of the statute." *Copeland v. Vance*, 893 F.3d 101, 107 (2d Cir. 2018). In other words, the remedy sought by Plaintiffs "reach[es] beyond the particular circumstances of these plaintiffs." *Doe*, 561 U.S. at 194, 130 S. Ct. at 2817, 177 L. Ed. 2d at 501. Although Plaintiffs attempt to disguise their complaint as an as-applied challenge, the remedy they seek is to void the statute in its entirety, thereby reaching far beyond their particular circumstance. *See Frye*, 109 F. Supp. 2d at 439 ("[I]f successful in an as-applied claim the plaintiff may enjoin enforcement of the statute only against himself or herself in the objectionable manner, while a successfully mounted facial attack voids the statute in its entirety and in all applications."). To the extent Plaintiffs argue the possibility of broad relief does not alter the nature of their claims, our case law firmly establishes a holding is indicative of a party's facial challenge when "it is not limited to defendant's particular case but enjoins application . . . to other . . . individuals." *Grady*, 372 N.C. at 547, 831 S.E.2d at 570.

¶ 29 Plaintiffs' complaint primarily raises issues with religious schools receiving scholarships under the Program, explaining "[n]othing in

Plaintiffs' Complaint alleges, or even suggests, that the Program would be unconstitutional if the State were not sending funds to schools that discriminate against them and others with similar attributes." However, our General Assembly specifically structured the Program so that religious schools may obtain funding through the Program. A "nonpublic school" as used in N.C. Gen. Stat. § 115C-562.2(a) is defined as a "school that meets the requirements of Part 1 [*private church schools and schools of religious charter*] or Part 2 [qualified nonpublic schools] of this Article as identified" in Chapter 115C, Article 39 of our General Statutes. N.C. Gen. Stat. § 115C-562.1(5) (2020). By arguing the Program is unconstitutional as applied because religious schools may receive funding, Plaintiffs are actually attacking the constitutionality of N.C. Gen. Stat. §§ 115C-562.1 to 562.8. *See Grady*, 372 N.C. at 522, 831 S.E.2d at 554; *Hart*, 368 N.C. at 131, 774 S.E.2d at 288; *Young*, 992 F.3d at 779.

¶ 30 Our review of the record shows, although Plaintiffs pepper their complaint with the words "as implemented," they never pleaded facts necessary to support or demonstrate an as-applied challenge. In order for a court to determine whether a statute as applied is constitutional, *it must examine the pertinent facts for a particular defendant in a particular case*. *Grady*, 372 N.C. at 522, 831 S.E.2d at 554; *Packingham*, 368 N.C. at 383, 777 S.E.2d at 743. In other words, the trial court's ability to examine an as-applied challenge is predicated upon the existence of facts specific to a defendant from which to determine whether the statute is unconstitutional as applied. Here, there are no particular facts alleged from which a determination of whether the Program is unconstitutional as applied may be made. None of the Plaintiffs alleged they applied for a scholarship under the Program, were unconstitutionally denied enrollment into the Program, or applied to an eligible school under the Program. Plaintiffs' complaint reveals they seek to prove their claims by solely attacking the portion of the Program's schools which have religious characteristics. Plaintiffs fail to allege the pertinent facts relating to their particular circumstances necessary to assert an as-applied challenge.[3] Accordingly, because no Plaintiff has applied for a scholarship under the terms of the Program, it is unclear to this Court what facts, if any, exist to support Plaintiffs' individual claims that the Program as applied to him or her is unconstitutional.

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3. Regarding the religious nature of some schools within the Program, "[t]he Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2416, 213 L. Ed. 2d. 755, 765 (2022). Even if the Program specifically excluded religious schools, such exclusion may no longer make

¶ 31 The success of Plaintiffs' claims would effectively preclude any enforcement of N.C. Gen. Stat. §§ 115C-562.1-115C562.8, because the plain language of the statute expressly allows for private church schools and schools with religious charters to receive funding. Since Plaintiffs have failed to plead facts and circumstances sufficient to assert an as-applied challenge, we deem the complaint to be a facial challenge to the statute making transfer to a three-judge panel mandatory under N.C. Gen. Stat. § 1-267.1 and Rule 42(b)(4).[4] *See* N.C. Gen. Stat. § 1-267.1(a1) (2020) ("[A]ny 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 . . . ." (emphasis added)); § 1A-1, R. 42(b)(4) ("[A]ny facial challenge to the validity of an act of the General Assembly, other than a challenge to plans apportioning or redistricting State legislative or congressional districts, *shall be heard* by a three-judge panel in the Superior Court of Wake County . . . ." (emphasis added)). As such, the trial court erred by denying Defendants' and Legislative-Intervenors' motions to transfer to a three-judge panel.

¶ 32 Our learned colleague in his dissent concedes that the key factor in assessing whether a claim is a facial or as-applied challenge is "the breadth of the remedy employed by the Court, not what must be pleaded in the complaint." Tellingly, even when given the chance at oral argument, Plaintiffs have been unable to identify any conceivable remedy for their claims that would not require either rewriting the statute or imposing sweeping court supervision on scholarship approvals by regulators. These remedies are unmistakable markers of a facial challenge. Nevertheless, the dissent insists that any "concern as to what relief, if any, might be available to Plaintiffs or what relief, if any, might be granted by a Superior Court Judge in an as-applied challenge is premature. This case simply isn't there yet." This is a strange argument in light of the fact that the trial court has no subject matter jurisdiction if this is a facial challenge. *Cryan v. Nat'l Council of Young Men's Christian Ass'ns of the U.S.A.*, 280 N.C. App. 309, 2021-NCCOA-612,

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N.C. Gen. Stat. §§ 115C-562.1 to 562.8 neutral. *See id.* at 2422, 213 L. Ed. 2d at 772. ("A government policy will fail the general applicability requirement if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way . . . ." (internal quotation marks omitted)).

4. In our holding today, we are cognizant of the fact a "trial court is not free to impute a facial challenge argument on a party." *Cryan v. Nat'l Council of YMCAs of the U.S.A.*, 280 N.C. App. 309, 2021-NCCOA-612, ¶ 23. This statement in *Cryan* does not, in turn, mean a trial court is required to turn a blind eye to a party's obvious attempt to disguise a facial challenge as an as-applied challenge.

¶ 16. The court system cannot wait for the case to be over to make that jurisdictional assessment. It must be made at the beginning of the case. "A court's subject matter jurisdiction over a particular case is invoked by the pleading." *Boseman v. Jarrell*, 364 N.C. 537, 546, 704 S.E.2d 494, 501 (2010). Thus, we cannot put on blinders and ignore the relief that Plaintiffs seek simply because we haven't reached the final stages of this litigation. Because Plaintiffs cannot identify any way to obtain a remedy for their claims that would not require all-encompassing changes to the Opportunity Scholarship Program, their claims are facial in nature and must be transferred to a three-judge panel.

¶ 33 Finally, we pause to note even if Plaintiffs' complaint only asserted an as-applied challenge, which it does not, the primary issue in Plaintiffs' complaint is that the Program unconstitutionally funds religious schools. Notably, because the legislature specifically included private church schools and schools of religious charter, to affirm Plaintiffs' argument, the trial court would "have to rewrite the statute" to specifically exclude religious schools and "not interpret it, . . . [which] we are without constitutional authority to do so." *State v. Minton*, 223 N.C. App. 319, 322, 734 S.E.2d 608, 611 (2012); *see* N.C. Gen. Stat. § 115C-562.1(5) (2020); *see also* N.C. Const. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."); *State v. Scoggin*, 236 N.C. 19, 23, 72 S.E.2d 54, 57 (1952) ("It is our duty to interpret and apply the law as it is written, but it is the function and prerogative of the Legislature to make the law.").

V. Conclusion

¶ 34 A party's "label" of whether a claim is designated a facial challenge or an as-applied challenge "is not what matters." *Doe*, 561 U.S. at 194, 130 S. Ct. at 2817, 177 L. Ed. 2d at 501. Because 1) the relief sought by Plaintiffs, if successful, would effectively invalidate the Program in its entirety; 2) they failed to plead facts particular to them in a particular set of facts; and 3) our General Assembly specifically authorized private church schools and schools of religious charter to receive funding through the Program pursuant to N.C. Gen. Stat. § 115C-562.1(5), we hold the claims asserted by Plaintiffs are facial challenges to the validity of the act of the General Assembly. N.C. Gen. Stat. §§ 115C-562.1 to 562.8. Therefore, the trial court erred by denying Defendants' and Legislative-Intervenors' motions to transfer to a three-judge panel as mandated by N.C. Gen. Stat. § 1-267.1 and Rule 42(b)(4). We reverse and remand to the trial court for this case to be transferred to a three-judge panel of the Superior Court of Wake County pursuant to N.C. Gen. Stat. § 1-267.1 and Rule 42(b)(4). It is so ordered.

REVERSED AND REMANDED.

Judge DIETZ concurs in result.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

¶ 35 To decide at this preliminary stage that Plaintiffs' asserted as-applied constitutional challenge in this case—as a matter of fact and law—can only be a facial constitutional challenge required to be heard by a three-judge-panel is premature and runs counter to the statutory procedure set forth by our General Assembly. This interlocutory appeal should be dismissed, and the Petition for Writ of Certiorari denied. By failing to allow this litigation to proceed in normal fashion in our trial courts, the majority acts contrary to the statutory scheme which requires the Superior Court to make the determination of whether and when it is necessary to transfer the matter to a three-judge panel. In doing so, contrary to our Court's precedent, the majority forces Plaintiffs to make a facial constitutional challenge Plaintiffs have not pled and expressly disavow. Moreover, it does so based on the relief it erroneously assumes would be imposed should Plaintiffs eventually prevail. I, therefore, dissent.

I.

¶ 36 First, this appeal is interlocutory and does not affect a substantial right which would be lost absent immediate appeal. A substantial right is defined as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right." *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (quotation marks omitted). Further, a substantial right giving rise to a right of immediate appeal "is one which will clearly be lost if the order is not reviewed before final judgment, such that the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed." *Cryan v. Nat'l Council of YMCA of the United States*, 280 N.C. App. 309, 2021-NCCOA-612, ¶ 12.

¶ 37 Defendants' and Intervenors' primary contention is that N.C. Gen. Stat. § 1-267.1 (2021) constitutes a mandatory venue statute which provides them a substantial right to three-judge panel review. We have now repeatedly rejected this assertion. *Id.* ¶¶ 13-16; *see also Lakins v. W. N. Carolina Conf. of United Methodist Church*, 2022-NCCOA-337, ¶ 11;

Hull v. Brown, 279 N.C. App. 570, 2021-NCCOA-525, ¶ 18 (denial of motion to transfer to three-judge panel premature prior to other claims being decided).

¶ 38 Parent-Intervenors assert two further alleged substantial rights. First, they claim the trial court's Order affects the right "of parents to use Program scholar-ships to direct their children's upbringing and education." This contention is meritless. The Order quite clearly does no such thing. Rather, it simply retains jurisdiction over this matter rather than immediately transferring the matter to a three-judge panel. Likewise, Parent-Intervenor's argument the trial court's Order implicates the "ecclesiastical entanglement doctrine" is also baseless. The trial court's Order makes no ruling on the ecclesiastical entanglement doctrine and, indeed, the ecclesiastical entanglement doctrine has zero bearing on whether this matter is an "as-applied" challenge to be heard by a single judge or a facial challenge properly transferred to a three-judge panel. *See Lakins*, 2022-NCCOA-337, ¶ 13.

¶ 39 Moreover, even if the trial court's Order rejecting transfer of this case to a three-judge panel at this stage of the litigation could be deemed one involving a matter of substance or a material right, it does not involve any right that would be lost absent an immediate appeal. Defendants' and Intervenors' primary concern is that at the conclusion of this litigation, a trial court may (or may not) impose broad relief mirroring a declaration the Program is facially unconstitutional by imposing a sweeping, permanent statewide injunction prohibiting the State from any operation of the Program. To be fair, Plaintiffs' Complaint, as it currently stands, does include a prayer for relief that may be read as seeking broad relief under an as-applied challenge. However, this is not dispositive. Indeed, as the Supreme Court of the United States has indicated the difference between an as-applied challenge and a facial challenge is less about the pleadings and more about the relief ultimately imposed:

> the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, *not what must be pleaded in a complaint.*

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 331, 130 S. Ct. 876, 893, 175 L. Ed. 2d 753, 776 (2010) (emphasis added). Under North

Carolina law, the fact Plaintiffs seek equitable injunctive relief only underscores this point. This is be-cause trial courts retain discretion to formulate the proper equitable relief.

> When equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion. This discretion is normally invoked by considering an equitable defense, such as unclean hands or laches, or by balancing equities, hardships, *and the interests of the public and of third persons*.

Roberts v. Madison Cty. Realtors Ass'n, Inc., 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996) (emphasis added). Moreover, an inexact prayer for relief does not preclude proper relief being granted. " 'It is well-settled law in North Carolina that the party is entitled to the relief which the allegations in the pleadings will justify. . . . It is not necessary that there be a prayer for relief or that the prayer for relief contain a correct statement of the relief to which the party is entitled.' " *Harris v. Ashley*, 38 N.C. App. 494, 498–99, 248 S.E.2d 393, 396 (1978) (quoting *E. Coast Oil Co. v. Fair*, 3 N.C. App. 175, 178, 164 S.E.2d 482, 485 (1968)).

¶ 40 Defendants' and Intervenors' concern as to what relief, if any, might be available to Plaintiffs or what relief, if any, might be granted by a Superior Court Judge in an as-applied challenge is premature. This case simply isn't there yet. If a Superior Court Judge enters a final order declaring the statute facially unconstitutional: Defendants and Intervenors may appeal then. Likewise, if a Superior Court Judge enters a final order granting relief which Defendants and Intervenors believe improper for an as-applied challenge: Defendants and Intervenors may appeal at that time. This fragmentary appeal is wholly unnecessary. On this Record, at this stage, there is no indication the trial court has any intent to exceed its authority or approach this claim as a facial challenge. To the contrary, the trial court addressing the Motion at issue here quite plainly understood by not transferring the case to a three-judge panel, Plaintiffs would proceed only upon their as-applied challenge theory.

¶ 41 The reality is there is more litigation to be undertaken (not to mention the not-so-small matter of deciding whether Plaintiffs can establish the merits of their claim) before any consideration of an appropriate remedy in this case may be contemplated. Indeed, on this Record there is a pending Motion to Amend the Complaint, which seeks to amend the Complaint to add more particularized allegations as to the individual plaintiffs and making a narrower prayer for relief. If allowed, this

Amended Complaint may obviate the need to transfer the case or result in a three-judge panel no longer having jurisdiction over this case–rendering this Court's opinion effectively an advisory one.[1]

¶ 42 Moreover, if during this ongoing litigation, it becomes evident that relief cannot be granted without a determination as to the facial constitutionality of the Program, the transfer statutes expressly contemplate that very situation. First, all the parties here generally agree a sole Superior Court Judge in this case may not declare the Program facially invalid under N.C. Gen. Stat. § 1-267.1. *See* N.C. Gen. Stat. § 1-267.1 (c) (2021) ("No order or judgment shall be entered affecting the validity of any act of the General Assembly that . . . finds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law, except by a three-judge panel of the Superior Court of Wake County"). If it is necessary to decide the facial validity of the Program, our statutory Rules of Civil Procedure provide for the trial court to transfer the matter to the three-judge panel after resolving all other issues:

> 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. . . . [T]he original court shall stay all matters that are contingent upon the outcome of the challenge to the act's facial validity pending a ruling on that challenge and until all appeal rights are exhausted. Once the three-judge panel has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge

1. Another possibility arising from the majority opinion is that the three-judge panel rules on the facial constitutionality of the Program, declares it constitutional (if for no other reason than Plaintiffs do not contest the facial validity of the Program) and then remands the matter to the trial court for determination of Plaintiffs' as-applied claims. Alternatively, if the three-judge panel determines Plaintiffs have alleged only a facial challenge to the statute, this would not necessarily preclude Plaintiffs or others similarly situated from bringing an as-applied challenge in a future lawsuit. Again, this is all rather unnecessary and does not promote the swift administration of justice.

> panel or the trial court in which the action originated for resolution of any outstanding matters, as appropriate.

N.C. Gen. Stat. 1A-1, Rule 42(b)(4) (2021). Additionally, the transfer statutes also contemplate a bifurcated process when a facial validity determination is necessary to resolve a case involving other claims or issues of law.

> Venue lies exclusively with the Wake County Superior Court with regard to any claim seeking an order or judgment of a court, either final or interlocutory, to restrain the enforcement, operation, or execution of an act of the General Assembly, in whole or in part, based upon an allegation that the act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law. Pursuant to G.S. 1-267.1(a1) and G.S. 1-1A, Rule 42(b)(4), claims described in this subsection that are filed or raised in courts other than Wake County Superior Court or that are filed in Wake County Superior Court shall be transferred to a three-judge panel of the Wake County Superior Court if, after all other questions of law 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 issues in the case.

N.C. Gen. Stat. Ann. § 1-81.1(a1) (2021). As such, the trial court here may still, after resolving all issues it can, decide transfer to a three-judge panel is required if it determines at any stage of the litigation the facial validity of the statute is at issue in this case and necessary to resolution of the case. *See Holdstock v. Duke Univ. Health Sys., Inc.*, 270 N.C. App. 267, 281, 841 S.E.2d 307, 317 (2020) ("If the trial court decides, after all issues not contingent on the outcome of Plaintiffs' facial challenge are resolved, that resolution of Plaintiffs' facial challenge . . . is still required to permit resolution of remaining issues, it shall, 'on its own motion, transfer that portion of the action . . . to the Superior Court of Wake County for resolution by a three-judge panel[,]' and 'stay all matters that are contingent upon the outcome of . . . that challenge and until all appeal rights are exhausted.' ").

¶ 43 At this interlocutory stage, it is clear from the Record the trial court is allowing Plaintiffs to proceed on—and only on—an as-applied

challenge. The entire point of an as-applied challenge is the concept that a law that is otherwise constitutional and enforceable may be unconstitutional in its application to a particular challenger on a particular set of facts. "An as-applied challenge contests whether the statute can be constitutionally applied to a particular [party], even if the statute is otherwise generally enforceable." *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015) (citation omitted), *rev'd and remanded on other grounds*, ___ U.S. ___, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017). Here, Plaintiffs concede they are not challenging the facial validity of the Program. The proper course here, then, is to permit Plaintiffs to proceed under their theory of the case. If, at the end of the day, they cannot show that the otherwise valid and enforceable Program is not constitutionally applied as to them, the result is simple: dismiss the Complaint (or Amended Complaint) and enter Judgment against Plaintiffs and in favor of Defendants and Intervenors. This also has the appellate benefit of resulting in a final appealable order.

¶ 44 Thus, Defendants and Intervenors have not established any substantial right that would be lost absent immediate appeal. Therefore, there is no right of immediate interlocutory appeal in this case. Consequently, this Court has no jurisdiction to entertain this appeal on a Notice of Appeal.

II.

¶ 45 The majority in this case does not expressly disagree with the above analysis, but, nevertheless, grants certiorari to review this case. Granting certiorari here is improvident. In reaching this conclusion, I echo many of the same concerns raised in Judge Carpenter's dissent in *Cryan*. In *Cryan*, this Court granted certiorari to review and ultimately reverse a trial court's order transferring a case to a three-judge panel. In his dissenting opinion, Judge Carpenter explained:

> This Court's grant of a petition for writ of certiorari to consider whether jurisdiction is proper with a three-judge panel in Wake County Superior Court based solely on Defendant's assertion its constitutional challenge is 'as-applied' shortcuts the statutory scheme prescribed by the legislature, would be an inappropriate circumvention of the process, and therefore would not 'promote judicial economy,' but would interfere with the 'efficient administration of justice.'

Cryan, 2021-NCCOA-612, ¶ 28 (Carpenter, J., dissenting). Judge Carpenter further noted:

> In granting Defendant's petition for writ of certiorari, this Court will create precedent for a new procedure whereby a party that disagrees with a trial judge's referral of a constitutional challenge to a three-judge panel can petition this Court for a writ of certiorari. In such an instance, this Court will be tasked with explaining why the raised constitutional challenge in the case currently before it is distinguishable from any future constitutional challenge.

Id. at ¶ 29. Judge Carpenter also expressed concern

> granting Defendant's petition for writ of certiorari creates an avenue for a party to draw out litigation, contrary to our goal of promoting judicial economy. The majority's grant incentivizes parties who wish to delay a trial on the merits of a case to petition this Court for a decision as to whether the referral of an issue to the three-judge panel was proper in every instance.

Id. at ¶ 31.

¶ 46 The majority's grant of certiorari to review the Order in this case declining to refer Plaintiffs' claims to a three-judge panel raises the same concerns expressed by Judge Carpenter in *Cryan*. There is simply no pressing need for this Court to take up this interlocutory appeal to decide what is at base a simple procedural issue that could be remedied or obviated by allowing the proceedings to continue below. By taking this appeal up now, this Court allows Defendants and Intervenors to delay proceedings and unnecessarily draw out this litigation interfering with the efficient administration of justice. Moreover, by granting certiorari, this Court again ratifies a process by which any decision on whether to refer a case to a three-judge panel may be immediately appealed. Here, it would instead be prudent to retain faith in our Superior Court trial judges to allow this matter to proceed in regular order. Certiorari should be denied in this case.

III.

¶ 47 While my respectful disagreement with the majority is grounded in the application of appellate procedure, in my view the majority's misapplication of appellate procedure leads to several substantive missteps. First, inconsistent with this Court's precedent, the majority forces Plaintiffs to make a facial challenge contrary to the precedent

of this Court. Second, in so doing, inconsistent with the statutes, the majority substitutes its own judgment for that of the trial court. Third, inconsistent with the Record, the majority erroneously characterizes Plaintiffs' claim as targeting all "religious schools" and opines on the merits of an overly broad remedy that Plaintiffs do not seek.

¶ 48 First, the majority erroneously imputes a facial challenge on Plaintiffs. The majority in *Cryan* stated: "While the trial court is free to transfer an action to a three-judge panel on its own motion based on a facial challenge to an act of the General Assembly, a trial court is not free to impute a facial challenge argument on a party." *Cryan*, 2021-NCCOA-612, ¶ 23.

> The plain language of the statutory scheme clearly provides that a party must affirmatively raise a facial challenge, and that facial challenge must be raised in either the claimant's complaint/amended complaint or the defendant's answer, responsive pleading, or within 30 days of the defendant's answer or responsive pleading. N.C. Gen. Stat. §§ 1-81.1, 1-267.1, and 1A-1, Rule 42(b)(4). No such facial challenge was raised here.

Id. ¶ 23.

¶ 49 Here, the trial court correctly determined not to impute a facial challenge on Plaintiffs—and, instead, permitted Plaintiffs to sink or swim with their chosen as-applied challenge. The majority, however, substitutes its own judgment for that of the trial court and forces Plaintiffs to pursue a facial challenge they disavow. As in *Cryan*, it is error to impute such a facial claim on Plaintiffs in order to force a transfer to a three-judge panel.

¶ 50 Second, by substituting its judgment for that of the trial court in this case, the majority provides parties a bypass around, and inconsistent with, the controlling statutes. In enacting N.C. Gen. Stat. § 1-267.1 along with N.C. Gen. Stat. § 1-81.1(a1) and N.C. R. Civ. P. 42(b)(4), the General Assembly set out a trial level procedure for trial judges to refer facial constitutional challenges—as required or in their discretion—to a three-judge panel. In so doing, it is plain the General Assembly intended a rolling process in which trial judges are required to remain mindful of the need to refer such cases to a three-judge panel while retaining jurisdiction to decide the issues that do not need referral. These statutes also clearly place these initial determinations of whether to refer a case or not solely in the hands of the trial court—not this Court. Indeed, the

General Assembly did not include an immediate right of appeal from an initial determination on whether to transfer a case to a three-judge panel. *See Cryan*, 2021-NCCOA-612, ¶ 29 (Carpenter, J. dissenting) ("The precedent that flows from the majority's opinion will create a dilemma in which any disagreement between the parties as to whether a constitutional challenge is 'facial' or 'as applied' will be decided by this Court, rather than by [the trial courts] as prescribed by statute.").

¶ 51 Third, having decided to overrule the trial court's interlocutory order by way of certiorari, the majority goes further by commenting on the merits and undertaking to re-frame Plaintiffs' claims and the remedy sought. The majority asserts: "Plaintiffs' complaint is that the Program unconstitutionally funds religious schools." But this is not accurate. Rather, Plaintiffs' Complaint is more nuanced. Plaintiffs claim that the Program, as currently implemented, unconstitutionally provides funding to certain schools that allegedly discriminate against them by way of alleged admission requirements, alleged forced religious doctrinal teachings, or alleged forced religious indoctrination, which, as a practical matter, results in Plaintiffs being excluded from being able to utilize the Program and have access to the same school choice as other similarly situated North Carolinians. Likewise, the majority's conjecture that the only suitable remedy in this case is rewrite the statute to exclude all religious schools from the Program is also unsupported by the Record. Plaintiffs do not seek to have all funding by the Program of all religious schools declared unconstitutional or religious schools to be excluded from the Program. Rather, Plaintiffs seek injunctive relief against the current implementation of the Program itself because, they claim, it is being used to allegedly unconstitutionally provide funding to schools that allegedly discriminate against Plaintiffs. Whether or not Plaintiffs can prevail on this claim remains to be seen. However, by virtue of the majority opinion in this case mandating a facial constitutional challenge to the Program, should Plaintiffs prevail, the enabling statute and the Program must be declared unconstitutional in their entirety not just as applied to Plaintiffs. North Carolinians, including Parent-Intervenors and students of modest means, will then be deprived of the benefit of the Program and the funds it provides.

THE ESTATE OF PAUL G. LADD, JR., BY ITS ADMINISTRATOR DIANNE LADD, AND DIANNE LADD, PLAINTIFFS

v.

THOMAS FUNDERBURK, MARY FUNDERBURK, THE THOMAS FUNDERBURK REVOCABLE LIVING TRUST, AND THE MARY FUNDERBURK REVOCABLE LIVING TRUST, DEFENDANTS / THIRD-PARTY PLAINTIFFS-APPELLEES

v.

TOWN OF MATTHEWS, NORTH CAROLINA, THIRD-PARTY DEFENDANT-APPELLANT

No. COA22-109

Filed 18 October 2022

Cities and Towns—governmental immunity—liability for tree falling on car—tree located on private property—no affirmative duty to maintain

A town was immune from tort liability for injuries sustained by motorists whose car was struck on a public street by a tree that fell from privately owned property. The town had no affirmative duty under state law or its own tree ordinance to maintain or preemptively cut down the tree, although it could have exercised its discretion to undertake that governmental activity. Finally, the town did not waive its immunity by purchasing a liability policy, which contained a clause explicitly preserving the town's defense of governmental immunity.

Appeal by Third-Party Defendant from order entered 17 September 2021 by Judge Jonathan W. Perry in Union County Superior Court. Heard in the Court of Appeals 7 September 2022.

Cranfill Sumner LLP, by Steven A. Bader and Patrick H. Flanagan, for Third-Party Defendant-Appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Allen C. Smith and C. Andrew Dandison, for Third-Party Plaintiffs-Appellees.

WOOD, Judge.

¶ 1 In this case we must determine if a town is immune from suit when a tree on private property falls upon a vehicle traveling on a public street.

I. Facts

¶ 2 The Town of Matthews is like many suburbs in our growing State. Though new businesses and homes have appeared in recent years, the natural charm of the Town is preserved in its several parks and the canopy of trees arching its streets. East John Street is one such street where towering oaks bow to the procession of traffic below. A winter storm in late 2018, however, disrupted the tranquility.

¶ 3 Paul and Dianne Ladd drove through this storm and down East John Street when a tree fell atop them—killing Mr. Ladd and injuring Mrs. Ladd. The tree originally stood in the front yard of property owned by Thomas and Mary Funderburk near the intersection of East John Street and Charles Buckley Way. It leaned more toward East John Street before eventually toppling at its roots.

¶ 4 Dianne Ladd and the estate of her deceased husband sued the Funderburks for wrongful death, negligence, and negligent infliction of emotional distress on July 18, 2019. Later, the Funderburks cross-sued the Town of Matthews for contribution under the Uniform Contribution Among Tortfeasors Act. The Town responded with a motion for summary judgment claiming that it was entitled to governmental immunity. Supporting its motion, the Town additionally argued that the State, and not the Town, maintained East John Street, and the Town, therefore, did not owe any affirmative duty to travelers on this street. The Funderburks countered that the tree could have fallen upon the nearby street, Charles Buckley Way, that was maintained by the Town and, therefore, the Town's alleged duty stemmed from its duties to travelers on that nearby street. The trial court denied the Town's motion for summary judgment. The Town now appeals to this Court.

II. Jurisdiction

¶ 5 "Usually, the denial of a motion for summary judgment is not immediately appealable, as it is interlocutory. However, denial of a motion for summary judgment 'on the grounds of sovereign and qualified immunity is immediately appealable.' " *Epps v. Duke Univ.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849 (1996) (citation omitted).

III. Standard of Review

¶ 6 "We review a trial court's order for summary judgment *de novo* to determine whether there is a 'genuine issue of material fact' and whether either party is 'entitled to judgment as a matter of law.' " *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007) (quoting *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003)).

"In reviewing a summary judgment order, we consider the evidence in the light most favorable to the nonmoving party." *Stone v. State*, 191 N.C. App. 402, 407, 664 S.E.2d 32, 36 (2008) (citing *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998)).

IV. Governmental Immunity

¶ 7 Municipal corporations, when acting as an "agen[t] of the sovereign," may take advantage of the same common-law doctrine of governmental immunity that the State enjoys. *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952). This doctrine offers a municipality immunity "from suit for the negligence of its employees in the exercise of governmental functions." *Estate of Williams v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (quoting *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004)). "In determining whether an entity is entitled to governmental immunity," we consider "whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature." *Id.* at 199, 732 S.E.2d at 141.

> [A] "governmental" function is an activity that is "discretionary, political, legislative, or public in nature and performed for the public good in [sic] behalf of the State rather than for itself." A "proprietary" function, on the other hand, is one that is "commercial or chiefly for the private advantage of the compact community."

Id. (quoting *Britt*, 236 N.C. at 450, 73 S.E.2d at 293). "[T]he analysis should center upon the governmental act or service that was allegedly done in a negligent manner . . . rather than the nature of the plaintiff's involvement." *Bynum v. Wilson Cnty.*, 367 N.C. 355, 359, 758 S.E.2d 643, 646 (2014). If the act or service is "governmental," immunity generally exists; if it is "proprietary" in nature, the municipality is not immune. *Id.* at 358, 758 S.E.2d at 646. In determining the difference, we utilize the "three-step inquiry" established in *Estate of Williams v. Pasquotank County Parks & Recreation Department*. *Id.*

¶ 8 First, we "consider whether our legislature has designated the particular function at issue as governmental or proprietary." *Estate of Williams*, 366 N.C. at 200, 732 S.E.2d at 141. The Funderburks contend that the Town's alleged failure to prevent the tree from falling violates one of the affirmative duties enumerated in N.C. Gen. Stat. § 160A-296(a). The statute reads in part, "A city shall have . . . [t]he duty to keep the public streets . . . open for travel and free from unnecessary

obstructions."[1] N.C. Gen. Stat. § 160A-296(a)(2) (2021). The Legislature has considered this duty to be one of proprietary rather than governmental function. *Cooper v. S. Pines*, 58 N.C. App. 170, 173, 293 S.E.2d 235, 236 (1982). However, we are not persuaded that the Town's actions or inactions fall within this statutory scheme.

¶ 9 A plain reading of Section 160A would not reveal that a municipality's duty to keep roadways clear would extend to obstructions on private property. Even so, we held in *Beckles-Palomares v. Logan* that vegetation and parked cars near an intersection could have created an "obstruction" under Section 160A. 202 N.C. App. 235, 244, 688 S.E.2d 758, 764 (2010). Conversely, in *Bowman v. Town of Granite Falls*, we held that a potentially dangerous tree on private property and near a street did not create an affirmative duty under Section 160A before the tree fell onto a car. 21 N.C. App. 333, 334, 204 S.E.2d 239, 240 (1974). The present case aligns more with *Bowman*. The Section 160A affirmative duty does not require preventative measures for trees on private property which are not already an obstruction. We therefore hold the statute does not apply to the Town's inaction here.

¶ 10 Next, we consider whether the "activity is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality." *Estate of Williams*, 366 N.C. at 202, 732 S.E.2d at 142. The Funderburks allege the Town failed to utilize its tree ordinance in order to protect the public traveling on its streets. The tree ordinance states that the Town "may order the removal of any tree declared to be a public nuisance" or, "[i]n situations involving an imminent threat to the public health, safety or welfare, the Town shall make reasonable attempts to contact the property owner but may proceed expeditiously without prior notice" to eliminate the threat. Only the Town could utilize the authority of the tree ordinance. A private party could not have, under color of the ordinance, walked onto the Funderburks' property and unilaterally cut down the tree. This was an activity preserved solely for the Town.

¶ 11 To the extent any affirmative duty resides in the Town's tree ordinance, we reaffirm the holding made in *Cooper v. South Pines*. "The fact that a [town] has the *authority* to make certain decisions . . . does not mean that the [town] is under an *obligation* to do so. The words 'authority' and 'power' are not synonymous with the word 'duty.' " *Cooper*, 58 N.C. App. at 173, 293 S.E.2d at 236. The tree ordinance authorizes the

1. As used here, " '[c]ity' is interchangeable with the term[] 'town.' " N.C. Gen. Stat. § 160A-1(2) (2021).

Town to enter private property and cut down trees in specific circumstances. Having empowered itself to do a thing does not mean, as in this case, that it must have done that thing. This is true even if the tree was within the Town's zone of control by virtue of its position near Charles Buckley Way.

¶ 12 If we were to hold that the service in question could have been performed by both private and governmental actors, the third and final inquiry would have us consider multiple factors. *Estate of Williams*, 366 N.C. at 202-03, 732 S.E.2d at 143. These factors include "whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider." *Id.* However, because we conclude that the service "could only be provided by a governmental agency or instrumentality," we need not reach this third inquiry. *Bynum*, 367 N.C. at 359, 758 S.E.2d at 646.

V. Waiver

¶ 13 Nevertheless, a municipality may opt to waive its governmental immunity. *Patrick v. Wake Cnty. Dep't of Hum. Servs.*, 188 N.C. App. 592, 595, 655 S.E.2d 920, 923 (2008). It may implicitly waive immunity by purchasing liability insurance. N.C. Gen. Stat. § 153A-435 (2021). The Town possesses an insurance policy covering tort liability; however, the policy contains the following "Preservation of Governmental Immunity" clause: "This insurance applies to the tort liabilities of any insured only to the extent that such tort liability is not subject to any defense of governmental immunity under North Carolina law."

¶ 14 We held that this exact language precludes waiver and "preserves the defense of governmental immunity" in *Hart v. Brienza*, 246 N.C. App. 426, 434, 784 S.E.2d 211, 217 (2016). There, as here, the county had a liability policy which included the following clause: "This insurance applies to the tort liability of any insured only to the extent that such tort liability is not subject to any defense of governmental immunity under North Carolina law." *Id.* We likewise hold here that the Town did not waive its governmental immunity by purchasing this liability insurance.

VI. Conclusion

¶ 15 The Town did not have an affirmative duty under this State's statutes or the Town's own ordinances to preemptively cut down the tree on private property. In opting not to take advantage of the authority it had under its tree ordinance, the Town engaged in an exclusively governmental action. We thus hold that the Town is entitled to the defense

of governmental immunity, and we reverse the decision of the trial court concluding otherwise.

REVERSED.

Judges HAMPSON and GRIFFIN concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF
v.
JOSHUA CARPENTER; ALL PRO BILLIARDS & SPAS, LLC; JAMES BANKS; KENNETH BARRETT; MARY BELUE AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DELMER EUGENE BELUE; SHANE BIDDIX; DOUGLAS C. BROWDER; JERRY BUCKNER; CHRISTOPHER A. CHURCHILL AS EXECUTOR OF ESTATE OF DAVID CHURCHILL; PAUL CLAUS; JAMES CLIMO, JR.; MEGAN CLIMO; JACK CLINARD; LOUIS ELDERS; KIMBERLY FERGUSON; ANNA FRANKS; WILLIAM GOOD; KIMBERLY GRANT; LINDA HARTLEY; CLIFTON HOYLE HELMS, JR.; CANDIA HIGGINS; ROGER HIGGINS; DAWSON HUNTER; EDWARD INGLE; MARILYN P. INGLE; ROBERT LAUGHTER; TINA LEDFORD; VICKI MCCARSON; VANESSA METCALF; SHELBY NIX; ANTHONY GLENN OWNBEY; WILLIAM PARKER; STEPHEN PARRIS; BRANDON PAYNE; MARCIA REITZ; ALBER RIOUX; MICHAEL ROGERS; ELIZABETH ROPER; JIMMY RUMFELT; MARVIN SCOTT; DELMAR SHERMAN; JOHN SHERMAN; ROSE SHETLEY; JAMIN SKIPPER; JUDY SMATHERS; JIMMY THOMAS; TERRI TOLLEY; RANDAL WEIS; HAROLD WOMICK; LINDA WOODY; PHYILLIS MARIE YOUNG; NORTH CAROLINA DEPARTMENT OF AGRICULTURE & CONSUMER SERVICES; STEPHEN BALDWIN; MAXINE CRAWFORD; JEREMY EDMONDS; JOHN GAVIN; VERONICA GRIER; ALBERT ISOM; JOHN LYDA; TIMOTHY MCFALLS; DEBORAH PARHAM; MICHAEL PETREY; SHARON SMITH; BRETT TEMPLE; RONAL MONSON; PEGGY DUNCAN; DENICE WILLIAMS; CRYSTAL HOLDER; RANDY HOUSTON; JAMES CLOW; MAYLON ARRINGTON; DARELL DOUGLAS CABLE; AND NATHAN DREW WALKER, DEFENDANTS

No. COA21-588

Filed 18 October 2022

Insurance—duty to defend—Legionnaires' disease outbreak—display hot tubs—judgment on pleadings

The trial court did not err by denying plaintiff insurance company's motion for judgment on the pleadings in a declaratory action in which plaintiff argued that the Fungi or Bacteria Exclusion in defendants' (the hot tub company and its owner) policy barred insurance coverage for damages caused by a Legionnaires' disease outbreak alleged to have occurred when defendants' hot tubs, which were on display at a state fair, diffused droplets of water containing the Legionnaires' disease bacteria into the air. There was ambiguity

in the pleadings as to whether the Legionnaires' disease bacteria was on or within the building where the hot tubs were displayed, so there was a possibility that the underlying suits were not barred by the Fungi or Bacteria Exclusion. In addition, plaintiff's duty to defend was also triggered by the Consumption Exception of defendants' policy, because the water within the display hot tubs was a good intended for the satisfaction of wants which relate to the body.

Appeal by Plaintiff from order entered 9 June 2021 by Judge George Collins in Wake County Superior Court. Heard in the Court of Appeals on 26 April 2022 in session at Elon University School of Law in the City of Greensboro pursuant to N.C. Gen. Stat. § 7A-19(a).

Young Moore and Henderson, P.A., by Walter E. Brock, Jr., David W. Early, and William F. Lipscomb, for plaintiff-appellant.

Patterson Harkavy LLP, by Christopher A. Brook and Narendra K. Ghosh, for defendants-appellees.

Barbour, Searson, Jones & Cash, PLLC, by W. Bradford Searson, for Joshua Carpenter and All Pro Billiards & Spa, LLC, defendants-appellees.

WOOD, Judge.

¶ 1 Plaintiff appeals from an order entered by the trial court denying its motion for judgment on the pleadings. The trial court concluded Plaintiff has a duty under an insurance policy it issued to defend certain underlying claims and stayed this action pending additional determinations relevant to the scope of any duty of Plaintiffs to indemnify for losses under its insurance policy. On appeal, Plaintiff argues 1) its Fungi or Bacteria Exclusion bars the underlying claims; 2) Defendant Joshua Carpenter ("Defendant Carpenter") and Defendant All Pro Billiards & Spas, LLC's ("Defendant All Pro") hot tubs were intended for display, and thus its Consumption Exception does not apply; and 3) it does not have a duty to indemnify Defendant Carpenter or Defendant All Pro. After a careful review of the record and applicable law, we affirm the order of the trial court.

I. Factual and Procedural Background

¶ 2 Plaintiff is an insurance company organized under the laws of North Carolina and whose principal place of business is also North Carolina.

Plaintiff issued a Commercial General Liability Policy (the "Policy") to Defendant Carpenter for the period of May 16, 2019, to May 16, 2020. This Policy had a per occurrence limit of $1,000,000.00 for Defendant Carpenter's business, All Pro, of which he is a co-owner. North Carolina Mountain State Fair is also named as an additional insured.

¶ 3 From September 6 to 15, 2019, the Western North Carolina Mountain State Fair was held at the North Carolina Agricultural Center. Thereat, various attractions and exhibits were displayed at the Davis Center. Defendant All Pro displayed hot tubs actively circulating water in the Davis Event Center.

¶ 4 Shortly after the fair concluded, the Buncombe County Department of Health and Human Services and Henderson County Health Department notified the North Carolina Division of Public Health ("NCDPH") that there had been an increase in cases of Legionnaires' disease on September 23, 2019.[1] All reported cases of Legionnaires' disease were connected to the North Carolina Mountain State Fair. The same day, the NCDPH, along with other health agencies, initiated an epidemiological and microbiological investigation to determine the source of the Legionnaires' disease. The NCDPH created a comprehensive list of aerosolized water sources at the fair which may have caused the outbreak of Legionnaires' disease. The NCDPH identified Defendants All Pro and Carpenter's hot tubs as possible sources of aerosolized water.

¶ 5 From September 25 to 27, 2019, the NCDPH collected twenty-seven water and environmental samples from the fair. The NCDPH's epidemiological investigation revealed,

> individuals who were sickened at the [f]air were twelve times more likely to have visited the Davis Event Center; twenty-three times more likely to report spending more than an hour in the Davis Event Center; more than nine times more likely to report walking by or spending time by the hot tubs; and more than thirty-six times more likely to have attended the [f]air during the last five days of the [f]air (September 11 to September 15, 2019).

Ultimately, the NCDPH concluded "that this outbreak most likely resulted from exposure to *Legionella* bacteria in aerosolized water from

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1. Legionnaires' disease is a serious form of legionellosis, an infection caused by the microorganism *Legionella*. "Legionellosis is caused by inhaling airborne droplets of water containing *Legionella*."

hot tubs on display in the Davis Event Center at the fair." The NDCPH was unable to obtain complete maintenance records for the hot tubs; as such, it was "impossible to determine if the chemicals in the hot tubs were adequate to prevent bacterial growth for the duration of the fair." As a result of the outbreak of Legionnaires' disease at the fair, one hundred and thirty-five cases of the disease were reported, ninety-six individuals were hospitalized, and four individuals died.

¶ 6 Thereafter, eleven separate lawsuits were filed against, *inter alia*, Defendants All Pro and Carpenter between September 15, 2019 and February 16, 2021. Additionally, one suit was filed against only Defendant All Pro.[2] Most of the claimants in these suits visited the Davis Center and fell ill because of, or relating to, Legionnaires' disease and suffered damages arising therefrom.[3] These suits alleged Defendants Carpenter or All Pro were negligent in maintaining their hot tub displays, and such negligence caused the outbreak of Legionnaires' disease at the fair.

¶ 7 On October 5, 2020, Plaintiff brought an action for declaratory relief, arguing, in relevant part, the Policy's Fungi or Bacteria Exclusion bars insurance coverage. The Policy's Fungi or Bacteria Exclusion provided,

> This insurance does not apply to:
>
> **Fungi or Bacteria**
>
> **a.** "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a

2. Each Defendant in the case *sub judice* except Mary Belue as personal representative of the estate of Delmer Eugene Belue, Jack Clinard, N.C. Dep't of Agriculture & Consumer Serv.'s, Peggy Duncan, Denice Williams, Crystal Holder, Randy Houston, and James Clow, was a party to these original suits.

3. Claimant Kimberly Grant ("Defendant Grant") was the only claimant who did not specify whether she did or did not enter the Davis Event Center. Defendant Grant's "Damages" section provided little information, only stating she "attended the 2019 NCMSF on September 15, 2019." Thus, this Court is unable to determine whether Defendant Grant entered the Davis Event Center.

Additionally, we note the only record information regarding damages incurred by Defendants Mary Belue as personal representative of the Estate of Delmer Eugene Belue, Jack Clinard, Peggy Duncan, Denice Williams, Crystal Holder, Randy Houston, and James Clow is found in Plaintiff's amended complaint: "The above-identified persons and estates have filed suit and/or asserted claims against Carpenter and/or All Pro for injury or death due to Legionnaires' disease allegedly contracted from Carpenter's hot tub display located in the Davis Event Center at the 2019 NC Mountain State Fair."

> building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
>
> **b**. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

However, the Policy's Consumption Exception provided the Fungi or Bacteria Exclusion did "not apply to any 'fungi' or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption." Based on the Fungi or Bacteria Exclusion, Plaintiff alleged in its complaint it had no "duty to defend or indemnify Carpenter [or] All Pro" from their present suits.

¶ 8 On November 16, 2020, after Plaintiff filed its original complaint, various Defendants filed a motion to change venue to Buncombe County, North Carolina. Additional claimants filed suits against Defendants All Pro and Carpenter, and as a result, Plaintiff filed an amended complaint on December 1, 2020, to include these additional claimants. Defendants filed a motion to stay the proceeding on December 31, 2020. On January 11, 2021, Defendants All Pro and Carpenter filed another motion to change venue with the trial court, again requesting the venue be moved to Buncombe County "[f]or the convenience of witnesses and to promote the ends of justice." Shortly thereafter, on March 22, 2021, Plaintiff moved for judgment on the pleadings. On May 17, 2021, Plaintiff withdrew its motion for judgment on the pleadings solely as it related to Defendant North Carolina Agriculture & Consumer Services.

¶ 9 All of the parties' motions came on for hearing before the trial court on May 25, 2021. By order entered June 7, 2021, the trial court denied Defendants' motion to change venue but granted Defendants' motion to stay the proceedings. The trial court denied Plaintiff's motion for judgment on the pleadings, finding "the exception to the bacteria exclusion in the insurance policy in question is ambiguous as applied to the facts alleged in the underlying cases" and thus, "there is at least a mere possibility that the policy covers this situation and the facts alleged, giving the Plaintiff a duty to defend in the underlying cases." Plaintiff filed a timely notice of appeal of the trial court's order.

II. Jurisdiction

¶ 10 At the outset, we note that "an appeal of an order denying . . . [a] motion for judgment on the pleadings is an interlocutory appeal." *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002); *see Webb v. Nicholson*, 178 N.C. App. 362, 363, 634 S.E.2d 545, 546 (2006). Since "there is no right of appeal from an interlocutory order," we must first determine whether Plaintiff's appeal is properly before us. *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (2015)*; see also Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978) (explaining the purpose of this rule "is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division").

¶ 11 As a general rule, a party may appeal an interlocutory order if

> (1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.

Currin & Currin Constr., Inc. v. Lingerfelt, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003).

¶ 12 "[A]n interlocutory order concerning the issue of whether an insurer has a duty to defend in the underlying action 'affects a substantial right that might be lost absent immediate appeal.' " *Cinoman v. Univ. of N.C.*, 234 N.C. App. 481, 483, 764 S.E.2d 619, 621-22 (2014) (quoting *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 4, 527 S.E.2d 328, 331 (2000)); *see Integon Nat'l Ins. Co. v. Villafranco*, 228 N.C. App. 390, 392, 745 S.E.2d 922, 925 (2013); *Enter. Leasing Co. Southeast v. Williams*, 177 N.C. App. 64, 67-68, 627 S.E.2d 495, 498 (2006); *Carlson v. Old Republic Ins. Co.*, 160 N.C. App. 399, 401, 585 S.E.2d 497, 499 (2003). Here, the trial court's denial of judgment on the pleadings also determined that Plaintiff had a duty to defend against the underlying claims and stayed this action until the scope of Plaintiff's alleged duty to indemnify could be resolved. Since the issue of whether Plaintiff actually has a duty to defend the underlying actions is directly implicated in this matter, it affects a substantial right. As such, Plaintiff's appeal is properly before us.

III. Standard of Review

¶ 13 This court reviews a trial court's denial of a motion for judgment on the pleadings *de novo*. *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016); *see Fisher v. Town of Nags Head*, 220 N.C. App. 478, 480, 725 S.E.2d 99, 102 (2012); *see also Bauman v. Pasquotank Cnty. ABC Bd.*, 270 N.C. App. 640, 642, 842 S.E.2d 166, 168 (2020) ("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.").

¶ 14 A motion for a judgment on the pleadings "must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). "On a motion for judgment on the pleadings, all well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *CommScope Credit Union*, 369 N.C. at 51, 790 S.E.2d at 659 (cleaned up) (quoting *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 682-83, 360 S.E.2d 772, 780 (1987)); *see Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499. For the purpose of the motion, "[a]ll allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion." *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499 (citations omitted). Judgment on the pleadings is proper when "the pleadings fail to reveal any material issue of fact with only questions of law remaining." *Fisher*, 220 N.C. App. at 480, 725 S.E.2d at 102 (citing *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499).

¶ 15 We note that the construction and interpretation of an insurance contract is a question of law, and thus the question of Plaintiff's "duty to defend may be resolved by judgment on the pleadings." *Erie Ins. Exch. v. Builders Mut. Ins. Co.*, 227 N.C. App. 238, 244, 742 S.E.2d 803, 809 (2013); *see Crandell v. Am. Home Assurance Co.*, 183 N.C. App. 437, 440, 644 S.E.2d 604, 606 (2007) ("This duty to defend is ordinarily measured by the facts as alleged in the pleadings." (cleaned up)).

IV. Discussion

¶ 16 Plaintiff's arguments on appeal are premised upon its assertion it has no duty to defend Defendants All Pro and Carpenter's underlying suits. As a general rule, an "insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315

N.C. 688, 691, 340 S.E.2d 374, 377 (1986). Our courts determine whether an insurer has a duty to defend by examining the facts of the pleadings. *Id.* "When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable." *Crandell v. Am. Home Assurance Co.*, 183 N.C. App. 437, 440, 644 S.E.2d 604, 606 (2007) (quoting *Waste Management of Carolinas, Inc.*, 315 N.C. at 691, 340 S.E.2d at 377). The "mere *possibility* that the insured is liable (and that the potential liability is covered) suffice[s] to impose a duty to defend upon the insurer." *Naddeo v. Allstate Ins. Co.*, 139 N.C. App. 311, 319, 533 S.E.2d 501, 506 (2000) (quoting *Waste Management of Carolinas, Inc.*, 315 N.C. at 691 n.2, 340 S.E.2d at 377 n.2). Notwithstanding this, "if the facts are not even arguably covered by the policy, then the insurer has no duty to defend." *Waste Management of Carolinas, Inc.*, 315 N.C. at 692, 340 S.E.2d at 378; *see also Crandall*, 183 N.C. App. at 440, 644 S.E.2d at 606.

¶ 17 To determine whether an insurer has a duty to defend an underlying lawsuit against an insured, we utilize a "comparison test." *Crandell*, 183 N.C. App. at 440, 644 S.E.2d at 606; *Holz-Her U.S. Inc. v. United States Fid. & Guar. Co.*, 141 N.C. App. 127, 128, 539 S.E.2d 348, 349 (2000); *Smith v. Nationwide Mut. Fire Ins. Co.*, 116 N.C. App. 134, 135, 446 S.E.2d 877, 878 (1994). Under the comparison test, "the pleadings are read side-by-side with the policy to determine whether the events as alleged are covered or excluded." *Erie Ins. Exch.*, 227 N.C. App. at 244-45, 742 S.E.2d at 809.

¶ 18 It is important to note that, in this case, Plaintiff's Fungi or Bacteria Exclusion operates to exclude coverage. Our Supreme Court, in *State Capital Insurance Company v. Nationwide Mutual Insurance Company*, explained the different rules of construction for an insurance policy provision which *extends* coverage and an insurance policy provision which *excludes* coverage:

> provisions of insurance policies and compulsory insurance statutes which extend coverage must be construed liberally so as to provide coverage, whenever possible by reasonable construction. *See Moore v. Hartford Fire Insurance Co.*, 270 N.C. 532, 155 S.E. 2d 128 (1967); *Jamestown Mutual Insurance Co. v. Nationwide Mutual Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410 (1966). On the other hand, . . . provisions which exclude liability of insurance companies are not favored and therefore all ambiguous provisions will be construed against the insurer and

> in favor of the insured. *Wachovia Bank & Trust Co. v. Westchester Fire Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970).

State Capital Ins. Co. v. Nationwide Mut. Ins. Co., 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986). The Fungi or Bacteria Exclusion falls into the latter category, and thus, we review it accordingly.

A. Fungi or Bacteria Exclusion

¶ 19 Plaintiff first argues the Fungi or Bacteria Exclusion fully applies to all of Defendants' pleadings. We disagree.

¶ 20 Plaintiff's Fungi or Bacteria Exclusion states,

> This insurance does not apply to:
>
> **Fungi or Bacteria**
>
> **a.** "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

As such, Plaintiff is not obligated to defend the underlying suits if 1) "bodily injury" was caused by " 'fungi' or bacteria," and 2) this " 'fungi' or bacteria" was "on or within a building or structure."

¶ 21 The terms of the Policy define "bodily injury" as "bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time." We define "bodily injury," then, as set out in the Policy. *Cf. Holz-Her U.S. Inc.*, 141 N.C. App. at 129, 539 S.E.2d at 350 (defining the term "occurrence" as defined in the insurance policy). Both Plaintiff and Defendants concede Legionnaires' disease is a form of legionellosis, which is caused by inhaling water droplets containing the *Legionella* bacteria. Thus, it is undisputed the bodily injuries alleged in the underlying suits arose due to the "actual, alleged, or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of" the *Legionella* bacteria.

¶ 22 The key to this case, however, is whether the pleadings allege *Legionella* bacteria was "on or within a building or structure" so as to

subject the underlying suits to the Bacteria and Fungi Exclusion. The Fungi or Bacteria Exclusion's terms "on," "within," "building," and "structure" are not defined within the Policy. We presume these terms to be nontechnical and, thus, "can be given the same meaning they usually receive in ordinary speech." *Waste Management of Carolinas, Inc.*, 315 N.C. at 694, 340 S.E.2d at 379; *see Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 95, 518 S.E.2d 814, 817 (1999) ("Use of the ordinary meaning of a term is the preferred construction . . . .").

¶ 23 Here, Plaintiff concedes the Davis Event Center is a "building." Thus, we must determine if the underlying complaints allege the *Legionella* bacteria was "on" or "within" the Davis Event Center. After a careful review of the record, we find all but one of the underlying claimants specifically state they entered the Davis Event center where Defendants All Pro and Carpenter's hot tubs were on display. Notably, Kimberly Grant ("Defendant Grant") is the only claimant who did not claim she entered the Davis Event Center. Defendant Grant stated she only "*attended* the 2019 NCMSF on September 15, 2019." (emphasis added). Moreover, the record offers little information regarding whether Defendants Mary Belue as personal representative of the Estate of Delmer Eugene Belue, Jack Clinard, Peggy Duncan, Denice Williams, Crystal Holder, Randy Houston, and James Clow entered the Davis Event Center. Indeed, the only pertinent information for these Defendants is found in Plaintiff's amended complaint: "The above identified persons and estates have filed suit and/or asserted claims against Carpenter and/or All Pro for injury or death due to Legionnaires' disease allegedly contracted from Carpenter's hot tub display located in the Davis Event Center at the 2019 NC Mountain State Fair." This is not sufficient.

¶ 24 Without acknowledgment from these eight Defendants, the lack of specificity within the pleadings and underlying complaints as to whether Defendants actually entered the Davis Event Center or where they encountered *Legionella* bacteria creates ambiguity. The trial court was left to consider if *Legionella* bacteria was "on" or "within" the Davis Event Center. These "pleadings . . . disclose a *mere possibility* that . . . [Defendants All Pro and Carpenter are] liable and that the potential liability is covered." *Naddeo*, 139 N.C. App. at 319, 533 S.E.2d at 506. The bodily injuries resulting from the *Legionella* bacteria, therefore, potentially are not barred by the Fungi or Bacteria Exclusion, and thus potentially covered by the Policy. *See Crandell*, 183 N.C. App. at 443, 644 S.E.2d at 608 ("Since we cannot conclude that the facts alleged in the underlying complaint are not even arguably covered by the policy, we must hold that American Home had a duty to defend . . . ." (internal

quotation marks omitted)). Furthermore, Plaintiff "could reasonably ascertain facts that, if proven, would be covered by its policy" by inquiring of these eight Defendants whether they entered the Davis Event Center. *Waste Management of Carolinas, Inc.*, 315 N.C. at 691, 340 S.E.2d at 374-75. Consequently, the trial court did not err in its denial of Plaintiff's motion for judgment on the pleadings.

B. Consumption Exception

¶ 25 Even if the pleadings did not show the possibility that the underlying suits are not barred by the Fungi or Bacteria Exclusion, Plaintiff nonetheless has a duty to defend under the Consumption Exception.

¶ 26 The Consumption Exception is an exception to the Fungi or Bacteria Exclusion. It provides: "[The Fungi or Bacteria Exclusion] does not apply to any 'fungi' or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption." Because there is no disagreement that Legionnaires' disease is caused by a bacterium, the question before us becomes what constitutes a "good intended for bodily consumption." Since the Policy does not define "good" or "bodily consumption," we look to their ordinary meanings to deduce the definition of each term. *Eerie Ins. Exch.*, 227 N.C. App. at 245, 742 S.E.2d at 810.

¶ 27 Turning first to "good[,]" *Black's Law Dictionary* defines a "good" as "1. [t]angible or moveable personal property other than money; esp., articles of trade or items of merchandise . . . 2. Things that have value, whether tangible or not . . . ." *Goods*, Black's Law Dictionary (11th ed. 2019). Here, the "good" in question is a hot tub and, more specifically, the water therein. This Court has not yet addressed whether the water within a hot tub is considered a "good"; therefore, we are guided by the analysis in other jurisdictions' judicial decisions. In *Nationwide Mutual Fire Insurance Company v. Dillard House, Inc.*, plaintiff filed a declaratory judgment action arguing it was not liable to defend an underlying suit wherein a man died from legionnaires' disease after bathing in a hotel's hot tub. 651 F. Supp. 2d 1367, 1369 (N.D. Ga. 2009) [hereinafter *Dillard House*]. The primary insurance and umbrella insurance policy offered by the plaintiff in *Dillard House* both contained bacteria exclusions and consumption exceptions like the one in the case *sub judice*. *Id.* at 1370. The court, analyzing whether the hot tub's water constituted a "good" for the purpose of the consumption exceptions, concluded: "[W]ater in a hot tub is a good—indeed, it may most specifically be considered an 'economic good,' since it gives economic utility to the hot tub and because water is a commodity for which hotels and other users

pay." *Id.* at 1378; *see also Acuity v. Reed & Assocs. of TN, LLC*, 124 F. Supp. 3d 787, 795 (W.D. Tenn. 2015); *Westport Ins. Corp. v. VN Hotel Group, LLC*, 761 F. Supp. 2d 1337, 1346 (M.D. Fla. 2010), *remanded on other grounds*, 513 Fed. App'x 927 (11th Cir. 2013) (unpublished) ("At the outset, the court determined that bathing water in a hotel hot tub is a good, and there is no basis for deviating from that reasoning here.").

¶ 28 By concluding that a patron's use of and bathing in a hot tub gives the water economic utility, *Dillard House* established that the water within a hot tub constitutes a "good." We find the reasoning within *Dillard House* persuasive and adopt it herein. Surely, the water within Defendants All Pro and Carpenter's hot tub provided economic utility. Indeed, Defendants All Pro and Carpenter could have displayed their hot tubs without water, but the sight of the swirling water, smell of steam, and evaporation of vapors within the atmosphere of the Davis Event Center was utilized as a marketing device to attract customers to purchase a hot tub. The water within the hot tubs, by virtue of its marketing connection with the final product, was a part of the commodity for which purchasers of the hot tub paid when purchasing a hot tub from Defendants' All Pro and Carpenter. Therefore, notwithstanding that patrons did not bathe within Defendants All Pro and Carpenter's hot tubs at the Davis Event Center, the water therein constituted a "good" as it provided value to Defendants All Pro and Carpenter's selling of the hot tubs. Accordingly, the primary issue then becomes whether Defendant All Pro and Carpenter's hot tubs were intended for "bodily consumption." "Bodily" is defined as "1: having a body or a material form: PHYSICAL, CORPOREAL[;] 2 a: of or relating to the body[;] 2 b: concerning the body." *Dillard House*, 651 F. Supp. 2d at 1379 (emphasis omitted).

¶ 29 The term "consumption," however, is susceptible to multiple reasonable interpretations. Black's Law Dictionary defines "consumption" as "[t]he act of destroying a thing by using it; the use of a thing in a way that exhausts it." *Consumption*, Black's Law Dictionary (11th ed. 2019). *Dillard House* relies on Webster's Third New International Dictionary, Unabridged and defined "consumption" as

> 1 a: the act or action of consuming or destroying[;]
>
> 1 b: the wasting, using up, or wearing away of something[;]
>
> 2: *the utilization of economic goods in the satisfaction of wants* or in the process of production resulting in immediate destruction (as in the eating of foods), gradual wear and deterioration (as in the habitation

> of dwellings), no change aside from natural decay (as in the enjoyment of art objects), or transformation into other goods (as in manufacturing).

Dillard House, 651 F. Supp. 2d at 1378 (emphasis omitted) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2002)); *accord Westport Ins. Corp.*, 761 F. Supp. 2d at 1347-48. The *Dillard House* court found the second definition of "consumption" to be applicable, explaining "[s]urely, a hotel guest who bathes in a hot tub does so as a mean of indulging, or 'satisfying,' a desire, or 'want.' Given the second *Webster's* definition, the court finds that water in a hot tub falls squarely within a reasonable interpretation of the phrase 'good . . . intended for consumption.' " *Dillard House*, 651 F. Supp. 2d at 1378-79.

¶ 30 We are persuaded by *Dillard House*'s definition of "consumption" and adopt it here. Moreover, the term "bodily" as used in the Consumption Exception is properly viewed as a modifier to "consumption." *Westport Ins. Corp.*, 761 F. Supp. 2d at 1347. Therefore, this Court finds *Dillard House*'s and *Westport Insurance Corporation*'s conclusion that "bodily consumption" is defined as "the utilization of economic goods in the satisfaction of wants which relate to the body" is applicable in the case *sub judice*. *Id.* at 1348 (internal quotation marks omitted).

¶ 31 We pause to note Plaintiff asserts that, because Defendant All Pro and Carpenter's hot tubs were intended for marketing, it falls outside the definition of "consumption." Plaintiff's argument misses the point. The question is not whether Defendant All Pro and Carpenter's hot tubs were intended for consumption or marketing, but whether the water therein was.[4] Thus, having established that the water within the hot tubs is a "good," we next must determine whether the water was intended for the utilization of economic goods in the satisfaction of wants which relate to the body.

¶ 32 After a careful review of the record, we conclude the water within Defendant All Pro and Carpenter's hot tubs was intended to satisfy the wants which relate to the patrons' bodies. Although Defendant All Pro and Carpenter could have chosen to display their hot tubs without water, they did not. Rather, the circulating water within the hot tubs was intended to attract patrons to Defendant All Pro and Carpenter's display

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4. It is the water inside the hot tub, not the hot tub itself, which was the culprit of creating *Legionella* Bacteria. *See* MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/legionnaires-disease/symptoms-causes/syc-20351747 (last visited July 14, 2022) ("Most people catch Legionnaires' disease by inhaling the bacteria from *water* or soil." (emphasis added)).

at the Davis Event Center by offering an experience to interact with the hot tub in operation. Patrons could feel the mist and heat of the hot tubs, put their hands into the water, and smell its mist. Surely experiencing and possessing the ability to touch the water and inhaling and ingesting the water vapor caused patrons to satisfy their bodily wants by interacting with the hot tubs' water.

¶ 33 Our holding today is not novel in its conclusion. In *Westport Insurance Corporation v. VN Hotel Group, LLC*, the underlying complaints alleged hotels caused an accumulation of Legionella bacteria when they negligently maintained their potable water and plumbing system, and, thus, the underlying complainants "were infected with Legionnaires' disease when they *inhaled and ingested* water vapor from the guest room showers and hotel spa tub." 761 F. Supp. 2d at 1340 (emphasis added). Examining the insurance policy offered by plaintiff, the trial court found "the facts alleged . . . satisfy the Consumption Exception." *Id.* at 1348. The patrons in this case, likewise, were infected with Legionnaires' disease after inhaling and ingesting the water vapor from Defendants All Pro and Carpenter's hot tubs.

¶ 34 In sum, a reasonable interpretation of the Consumption Exception illustrates the underlying pleadings fall under this provision. The water within Defendants All Pro and Carpenter's hot tubs is a good which was intended to satisfy a patron's wants by allowing them to touch the water and inhale and ingest the water vapor. As such, Plaintiff has a duty to defend the underlying suits per the terms of the Consumption Exception.

C. Duty to Indemnify

¶ 35 Finally, Plaintiff argues since it has no duty to defend the underlying suits, it therefore has no duty to indemnify Defendants All Pro and Carpenter. The insurer's duty to defend is

> broader than the duty to indemnify *only* "in the sense that an unsubstantiated allegation requires an insurer to defend against it so long as the allegation is of a covered injury; however, even a meritorious allegation cannot obligate an insurer to defend if the alleged injury is not within, or is excluded from, the coverage provided by the insurance policy."

Kubit v. MAG Mut. Ins. Co., 210 N.C. App. 273, 279, 708 S.E.2d 138, 145 (2011) (quoting *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 7, 692 S.E.2d 605, 610-11 (2010)). Thus, "[b]ecause the duty to defend may be broader than the duty to indemnify we address

the duty to defend because if it fails, so too does the duty to indemnify." *N.C. Farm Bureau Mut. Ins. Co. v. Phillips*, 255 N.C. App. 758, 764, 805 S.E.2d 362, 366 (2017). In the case *sub judice*, we are holding Plaintiff *does* have a duty to defend Defendants All Pro and Carpenter; as such, we need not reach the merits of whether Plaintiff has a duty to indemnify Defendants All Pro and Carpenter.

V. Conclusion

¶ 36 Based on the foregoing, we conclude ambiguity exists as to whether the *Legionella* bacteria was "on" or "within" the Davis Event Center, and, as a result, there is a mere possibility that the underlying suits are not barred by the Fungi or Bacteria Exclusion. Accordingly, Plaintiff has a duty to defend the underlying suits. Moreover, because the water within Defendants All Pro and Carpenter's hot tubs was a good intended for the satisfaction of wants which relate to the body, Plaintiff's duty to defend is also triggered by the Consumption Exception. Accordingly, we affirm the order of the trial court.

AFFIRMED.

Judges MURPHY and HAMPSON concur.

RICHARD L. NEELEY, Plaintiff
v.
WILLIAM C. FIELDS, JR.; WILLCOX, McFADYEN, FIELDS & SUTHERLAND PLLC; NANCY Y. WIGGINS, as the Executrix of the ESTATE OF RICHARD M. WIGGINS; KENNETH B. DANTINNE; and McCOY WIGGINS, PLLC, Defendants

No. COA22-30

Filed 18 October 2022

Attorneys—legal malpractice—negligent drafting of deed—easement of record—within chain of title

In an action arising from the allegedly negligent drafting of a deed, where plaintiff sued two sets of attorneys—one that drafted the deed, the other that plaintiff hired to sue the first set, although no action was filed—there was no legal malpractice in the failure to include a landscape easement as an exception in the covenants clause of the deed because the general warranty deed's legal description excluded recorded easements and the landscape easement had previously been recorded and was in the chain of title. Therefore,

the trial court properly granted summary judgment to both sets of defendant attorneys.

Appeal by Plaintiff from order entered 19 July 2021 by Judge D. Jack Hooks, Jr., in Hoke County Superior Court. Heard in the Court of Appeals 8 June 2022.

Stevens, Martin, Vaughn & Tadych, PLLC, by Michael J. Tadych, Hugh Stevens, and K. Matthew Vaughn, for plaintiff-appellant.

Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr., for defendants-appellees William C. Fields, Jr., and Willcox, McFadyen, Fields & Sutherland PLLC.

Alexander Ricks PLLC, by Amy P. Hunt, for defendants-appellees Nancy Y. Wiggins, as the Executrix of the Estate of Richard M. Wiggins, Kenneth B. Dantinne, and McCoy Wiggins PLLC.

MURPHY, Judge.

¶ 1 Language excepting "covenants, easements, and restrictions of record" in the legal description of a deed is sufficient to except all easements that are a matter of public record and within the chain of title. The drafter of a general warranty deed does not commit legal malpractice in failing to include an exception to an easement of record in any other part of a general warranty deed if the exception has been noted within the general warranty deed's legal description. Summary judgment is therefore appropriate in a legal malpractice action arising out of an alleged failure to include an exception for easements of record in the covenants clause when such exception is provided within the general warranty deed's legal description.

BACKGROUND

¶ 2 Plaintiff, Richard L. Neeley, brought professional negligence claims against two different groups of lawyers arising from his sale of real estate located in Hoke County ("Parker Farm Land"). The first group is the "Hoke County lawyers," comprised of William C. Fields, Jr. and Willcox, McFadyen, Fields & Sutherland PLLC. The second group is the "Cumberland County lawyers," comprised of Richard M. Wiggins,[1]

1. The estate of Richard M. Wiggins, who has since deceased, is a party to this appeal.

Kenneth B. Dantinne, and the firm that has become known as McCoy Wiggins, PLLC.

¶ 3 After conducting a title search and finding a recorded landscape easement which had previously been recorded in Hoke County on 21 November 2001, the Hoke County lawyers drafted a deed on behalf of Neeley as the seller of the Parker Farm Land. The general warranty deed included the following language in the legal description of the property: "Together with and subject to covenants, easements and restrictions of record." The deed's covenants clause warranted the property previously described in the deed's legal description as follows:

> And the Grantor covenants with the Grantee, that Grantor is seized of the premises in fee simple, has the right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that Grantor will warrant and defend the title against the lawful claims of all persons whomsoever, other than the following exceptions:
>
> 1. Utility Easements, of record, if any.
>
> 2. 2013 ad valorem taxes.

After purchasing the Parker Farm Land, the buyer contacted Neeley about the landscape easement and stated the easement had not been made known at the time of sale. The buyer then filed suit against Neeley for breach of warranty.

¶ 4 Neeley hired the Cumberland County lawyers to defend him against the buyer and to make a claim against the Hoke County lawyers for negligent drafting of the deed. After the statutory deadline had passed and without filing any negligence claims against the Hoke County lawyers, the Cumberland County lawyers withdrew representation of Neeley, citing an unspecified non-waivable conflict. Neeley eventually settled the lawsuit with the buyer by reacquiring the property from the buyer for a price higher than when originally sold. Neeley then brought suit against the Cumberland County lawyers, alleging they committed professional malpractice by failing to timely file a claim against the Hoke County lawyers.

¶ 5 Neeley filed a verified complaint against both groups of lawyers on 4 October 2019. Both groups of lawyers filed motions for summary judgment, and the trial court granted both motions in an order filed on 19 July 2021. Neeley timely filed notice of appeal.

ANALYSIS

¶ 6 "The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

> Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). Moreover, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (internal quotation marks omitted).

Id. at 523-24, 649 S.E.2d at 385. In the instant case, the party opposing the motions that were granted by the trial court was Neeley. All inferences of fact are drawn in his favor in our de novo review of the motion to determine if there is a genuine issue as to any material fact. *Id.*

¶ 7 Summary judgment was appropriate because "there is no genuine issue as to any material fact and [both Defendants are] entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2021). The landscape easement was recorded in Hoke County on 21 November 2001. "In construing a conveyance executed after [1 January 1968], in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from *all* of the provisions of the instrument." N.C.G.S. § 39-1.1(a) (2021) (emphasis added).

> [S]o long as it does not prevent the application of the rule in Shelley's case, conveyances executed after 1 January 1968 in which there are inconsistent clauses shall be construed in accordance with [N.C.G.S. §] 39-1.1 so as to effectuate the intent of the parties as it appears from all the provisions in the instrument.

Whetsell v. Jernigan, 291 N.C. 128, 133, 229 S.E.2d 183, 187 (1976); *see also Robertson v. Hunsinger*, 132 N.C. App. 495, 499, 512 S.E.2d 480, 483 (1999) ("The intention of the parties is to be given effect whenever that

can be done consistently with rational construction."). When reviewing a general warranty deed de novo, we analyze the entire document to determine the grantor's intent as a matter of law. *See Elliott v. Cox*, 100 N.C. App. 536, 538, 397 S.E.2d 319, 320 (1990) ("A deed is to be construed to ascertain the intention of the grantor as expressed in the language used, construed from the four corners of the instrument."); *Mason v. Andersen*, 33 N.C. App. 568, 571, 235 S.E.2d 880, 882 (1977) ("A deed is to be construed by the court, and the meaning of its terms is a question of law, not of fact.").

¶ 8 In the instant case, both groups of lawyers note that the general warranty deed expressly excepted the landscape easement from the warranties. The general warranty deed includes the following language: "Together with and subject to covenants, easements and restrictions of record." While Neeley argues that this language excepting easements of record within the legal description of the general warranty deed must have appeared as a specifically outlined exception in the covenants clause of the deed to be effective, we use the entire document to determine what the grantor's intentions were instead of the piecemeal approach he suggests. *See Whetsell*, 291 N.C. at 133, 229 S.E.2d at 187. By previously defining the property to be granted as "[t]ogether with and subject to covenants, easements and restrictions of record[,]" the general warranty deed demonstrates, as a matter of law, that recorded easements were contemplated as an exception to the general warranty deed. The landscape easement at issue was an easement of record within the chain of title and was excepted from the general warranty deed as a matter of law. The Hoke County lawyers did not commit professional malpractice in drafting the general warranty deed.

¶ 9 Since the Hoke County lawyers did not commit professional malpractice in drafting the general warranty deed, it follows that the Cumberland County lawyers had no reason to add the Hoke County lawyers to the action of the buyer of the Parker Farm Land against Neeley. A claim against the Cumberland County lawyers does not exist without first showing that there would have been a case against the Hoke County lawyers had the Cumberland County lawyers filed in a timely manner:

> Where the plaintiff bringing suit for legal malpractice has lost another suit allegedly due to his attorney's negligence, to prove that but for the attorney's negligence plaintiff would not have suffered the loss, plaintiff must prove that:
>
> (1) The original claim was valid;

(2) It would have resulted in a judgment in his favor; and

(3) The judgment would have been collectible.

Rorrer v. Cooke, 313 N.C. 338, 361, 329 S.E.2d 355, 369 (1985). Neeley is unable to show that his original claim was valid or that judgment would have resulted in his favor. The Cumberland County lawyers did not commit professional malpractice by failing to sue the Hoke County lawyers as requested.

CONCLUSION

¶ 10 Even where all inferences of fact are drawn "against the movant and in favor of the party opposing the motion," *Caldwell*, 288 N.C. at 378, 218 S.E.2d at 381, "there is no genuine issue as to any material fact and [the Defendants were] entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2021). As the general warranty deed excluded recorded easements and the landscape easement was an easement of record within the chain of title at the time of drafting and recording, Defendants did not breach a duty to Neeley, and summary judgment for Defendants was proper.

AFFIRMED.

Judges DIETZ and WOOD concur.

STATE v. BOOTH

[286 N.C. App. 71, 2022-NCCOA-679]

STATE OF NORTH CAROLINA
v.
MICHAEL TERRELL BOOTH

No. COA21-620

Filed 18 October 2022

1. Evidence—hearsay—testimony read from search warrant and affidavit—same information from officer's personal knowledge—plain error analysis

In defendant's prosecution for drug charges, the trial court did not commit plain error by admitting a police officer's testimony concerning defendant's age and the controlled drug buys involving defendant where the officer read directly from the search warrant and affidavit during his testimony. Because the officer also gave extensive testimony based on his personal knowledge of those matters—including that he had known defendant ever since defendant was a young boy, that he believed defendant was in his thirties, and that he could recognize defendant's face and voice in the recordings of the drug buys—and because defendant had the opportunity to cross-examine the officer, any error in allowing the officer to read directly from the search warrant and affidavit was not prejudicial.

2. Drugs—possession with intent to sell or deliver—paraphernalia—sufficiency of evidence—officer's identification

In defendant's prosecution for possession with intent to sell or deliver marijuana within 1,000 feet of a school and possession of marijuana paraphernalia, the State presented sufficient evidence to survive defendant's motion to dismiss where an officer identified the substance as marijuana by sight and smell, defendant told the confidential informant that the price of an ounce of marijuana was $250 (which was consistent with the average price, according to the officer), and defendant stored and labeled the substance in a manner consistent with the sale of marijuana (including certain types of plastic bags, a label written "Blue Cookies," and a digital scale). Although defendant argued on appeal that, because the definition of marijuana changed with the legalization of hemp, the officer's identification of the substance as marijuana by sight and smell was insufficient to support his conviction, defendant did not object at trial or argue plain error on appeal; therefore, the appellate court considered that evidence in determining the sufficiency of the evidence.

STATE v. BOOTH

[286 N.C. App. 71, 2022-NCCOA-679]

Appeal by Defendant from judgment entered 3 December 2020 by Judge Joshua W. Willey Jr., in Beaufort County Superior Court. Heard in the Court of Appeals 9 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Zach Padget, for the State-Appellee.

Jarvis John Edgerton, IV, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals from judgment entered upon jury verdicts of guilty of possession with intent to sell or deliver marijuana within 1,000 feet of a school and possession of marijuana paraphernalia. Defendant argues that the trial court erred by admitting hearsay testimony into evidence and by denying his motion to dismiss for insufficient evidence. Because the admission of the challenged testimony was not plainly erroneous and there was sufficient evidence that the substance at issue was marijuana, Defendant received a fair trial, free from prejudicial error.

I. Procedural History and Factual Background

¶ 2 Defendant Michael Terrell Booth was indicted for possession of marijuana within 1,000 feet of a school with intent to sell or deliver and possession of drug paraphernalia. At trial, Lieutenant Russell Davenport testified that he and other members of the Beaufort County Sheriff's Office used a confidential informant to conduct controlled drug purchases at Booth's car wash, owned by Defendant's father, between February and March 2019. Booth's car wash is located 909 feet from John Cotton Tayloe Elementary School.

¶ 3 Davenport testified to the details of the controlled purchases. The first two purchases occurred on 15 and 28 February and involved a confidential informant purchasing marijuana at Booth's car wash, but not from Defendant. Officers conducted a third controlled buy on 1 March, during which the confidential informant wore an audio transmitter. During the buy, the confidential informant met with Defendant and Jermaine Moore, Defendant's friend, and Davenport heard Defendant and Moore discussing the price of marijuana and cocaine. The officers conducted a fourth controlled buy on 7 March, during which the confidential informant wore an audio transmitter and video camera. Davenport saw and heard Defendant discussing the prices of drugs with Moore before handing Moore the drugs to give to the confidential informant.

¶ 4 Davenport applied for and received a search warrant for Booth's car wash. After the warrant was signed, Davenport conducted a fifth controlled buy on 8 March, during which Davenport, through the confidential informant's audio transmitter and video camera, saw and heard Defendant speaking with the confidential informant.

¶ 5 The search warrant was executed shortly thereafter, and items were seized. From the back room of the car wash, Davenport seized a large plastic bag containing approximately 120 grams of a green leafy substance, nine small plastic bags containing a green leafy substance, a digital scale, and an ammunition box containing vacuum sealed bags with "marijuana odor and residue." From the white van, Davenport seized a glass jar, plastic bag with the corner removed, and a clear round container "containing marijuana residue[.]" From Defendant's person, Davenport seized $563 in U.S. currency, $200 of which was documented money provided to the confidential informant for the controlled buys. In an interview, Defendant confessed that the items seized belonged to him.

¶ 6 A chemical analysis of the green leafy substance indicated the presence of tetrahydrocannabinol (THC) but did not indicate the amount of THC present in the sample. Davenport testified at trial that due to his extensive training and experience on current drug trends and drug enforcement, he can smell the THC levels of cannabis plants and see the difference between hemp and marijuana.

¶ 7 Defendant was found guilty on both counts and given a consolidated sentence within the presumptive range of 42 to 63 months in prison. Defendant entered an oral notice of appeal in open court.

II. Discussion

A. Admission of Evidence

¶ 8 **[1]** Defendant first contends that the trial court committed plain error by admitting Davenport's testimony concerning the controlled buys and Defendant's age, and by admitting the search warrant and affidavit into evidence. Defendant mischaracterizes the nature of much of Davenport's testimony.

¶ 9 Defendant concedes he has failed to preserve for appeal his objection to the testimony and documentary evidence he now challenges, but specifically and distinctly argues plain error. *See* N.C. R. App. P. 10(a)(4); *see also State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018) ("An appellate court will apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases.").

¶ 10 Under plain error review, a defendant must show that a "fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). An error is deemed fundamental upon a showing of prejudice; in other words, a defendant must show that, "after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). Plain error should be used sparingly and only in exceptional cases where the error affects a substantial right that seriously affects the fairness, integrity, and reputation of judicial proceedings. *State v. Thompson*, 254 N.C. App. 220, 224, 801 S.E.2d 689, 693 (2017).

1. Testimony regarding the controlled buys

¶ 11 Defendant contends that the trial court committed plain error by admitting Davenport's testimony concerning the controlled buys because the testimony was read directly from the search warrant and affidavit and was thus hearsay.

¶ 12 Hearsay is an out-of-court statement offered for the truth of the matter asserted. N.C. Gen. Stat. § 8C-1, Rule 801(c) (2020). Hearsay is not admissible absent an exemption or exception. N.C. Gen. Stat. § 8C-1, Rule 802 (2020). Pursuant to Rule 602 of our rules of evidence,

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.

N.C. Gen. Stat. § 8C-1, Rule 602 (2020). "[P]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception." N.C. Gen. Stat. § 8C-1, Rule 602 official commentary; *see also State v. Harshaw*, 138 N.C. App. 657, 661, 532 S.E.2d 224, 227 (2000).

¶ 13 Without reading the search warrant, Davenport testified that he used to work with Defendant's father and that he remembered Defendant when he was a little boy. He acknowledged that he was familiar with the sound of Defendant's voice and could recognize it on an audio recording. Davenport also testified that he was familiar with Moore's voice, having arrested Moore "numerous times and met with him in person and talked to him in the streets, face-to-face encounters[,]" and that he could distinguish Defendant's voice from Moore's voice.

¶ 14 Davenport further testified without the aid of the search warrant that when he was listening to the audio transmitter worn by the confidential informant during the 1 March controlled buy, he heard Defendant, Moore, and the confidential informant discussing the price of marijuana. Defendant "said the price of an ounce of marijuana would be $250." Davenport watched Defendant, Moore, and the confidential informant get into Defendant's car. Davenport met with the confidential informant after the buy and retrieved an ounce of green leafy substance.

¶ 15 After this controlled buy, Davenport "kept monitoring the car wash." Davenport testified that during the 7 March controlled buy, the confidential informant was equipped with an audio transmitter and video camera. Davenport reviewed the video and observed Defendant discussing the prices of marijuana and cocaine and supplying Moore with the drugs to give to the confidential informant. Davenport testified that during the 8 March controlled buy, the confidential informant was equipped with a video camera, and Davenport reviewed the video. Davenport testified that he could "hear the exchange of marijuana and talking about the smell of the marijuana."

¶ 16 Davenport did read portions of the search warrant to himself and out loud. However, in light of Davenport's extensive testimony from personal knowledge, and Defendant's ability to cross-examine Davenport regarding the contents of the search warrant, any error in the admission of Davenport's testimony regarding the controlled buys was not prejudicial and thus, not plain error. *See State v. Ridgeway*, 137 N.C. App. 144, 147-48, 526 S.E.2d 682, 685 (2000) (holding that even if the officer's testimony was hearsay, its admission did not rise to plain error).

2. Testimony regarding Defendant's age

¶ 17 Defendant contends that the trial court committed plain error by admitting Davenport's testimony concerning Defendant's birth date because the testimony was read directly from the search warrant and affidavit and was thus hearsay.

¶ 18 An essential element of possession with intent to sell or deliver within 1,000 feet of a school is that the defendant is over 21 years of age. N.C. Gen. Stat. § 90-95(a)(1) (2019). The State is not required to offer the birth certificate of a defendant to establish the defendant's age; testimony is sufficient. *State v. Cortes-Serrano*, 195 N.C. App. 644, 652-53, 673 S.E.2d 756, 761 (2009). However, a witness may not testify to a matter unless there is evidence sufficient to support a finding that he

has personal knowledge of the matter. N.C. Gen. Stat. § 8C-1, Rule 602. A lay witness with adequate opportunity to observe a defendant may state their opinion regarding his age when "the fact that he was at the time in question over a certain age is one of the essential elements to be proved by the state." *State v. Gray*, 292 N.C. 270, 287, 233 S.E.2d 905, 916 (1977). The jury may rely on their in-court observations, supplemented by other direct or circumstantial evidence, in determining a defendant's age. *State v. Ackerman*, 144 N.C. App. 452, 461-62, 551 S.E.2d 139, 145-46 (2001). In addition, "[t]he credibility of the witnesses and the weight to be given their testimony is exclusively a matter for the jury." *State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988) (citation omitted).

¶ 19 On direct examination, Davenport testified, "I used to work with [Defendant's] daddy and also remember [Defendant] when he was a little boy, working and coming along and hanging out with his daddy." On cross-examination, Davenport acknowledged that he had known Defendant's father "for quite a while" because Defendant's father had been in business with Davenport's brother-in-law "approximately about 30 years ago," acknowledged that Davenport and Defendant's father "had a friendly relationship," and acknowledged that Davenport had known Defendant "since he was a little boy." When defense counsel asked Davenport whether it "would be fair to say you have known [Defendant] for over 30 years[,]" Davenport responded, "I was (sic) say, yes, roughly 30 years." When asked on re-direct how old Defendant was, Davenport testified, "I'm not sure. I'd say he was in his 30s."

¶ 20 Although Davenport read Defendant's birthdate out loud from the search warrant, Defendant had the opportunity to cross–examine Davenport regarding his testimony and the statements contained in the warrant, and there was ample other evidence in the record to establish that Defendant was over 21 years of age. Any error in the admission of the testimony regarding Defendant's birthdate was not prejudicial and thus, not plainly erroneous. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

3. Search Warrant

¶ 21 Defendant next contends that it was plain error to admit the search warrant into evidence because the document contained hearsay.

¶ 22 Generally, an affidavit for a search warrant and the search warrant itself are inadmissible at trial because they are hearsay statements and deprive the defendant the right of confrontation and cross-examination. *State v. Wilson*, 322 N.C. 117, 137, 367 S.E.2d 589, 601 (1988) (citations omitted).

¶ 23 Here, although the search warrant may have been erroneously admitted into evidence, Defendant had the opportunity to cross-examine Davenport about his testimony and the contents of the search warrant, and Davenport testified from personal knowledge about most of the contents of the search warrant. Thus, any error in admitting the affidavit and search warrant into evidence was not plain error. *See State v. Jackson*, 24 N.C. App. 394, 402-03, 210 S.E.2d 876, 882 (1975) (holding that there was no plain error where, although the arrest complaint and warrant were admitted into evidence, the State's witnesses were subject to cross-examination regarding the statements made in preparing the warrant).

B. Sufficient Evidence

¶ 24 **[2]** Defendant next contends that the trial court erred by denying his motion to dismiss because the State failed to introduce sufficient evidence that the green leafy substance seized from Booth's car wash was marijuana.

¶ 25 The standard of review for the denial of a motion to dismiss is de novo. *State v. Stroud*, 252 N.C. App. 200, 208, 797 S.E.2d 34, 41 (2017) (citation omitted). Under this standard, "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 omitted). This Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002).

¶ 26 To withstand a motion to dismiss, the State must present substantial evidence of the essential elements of the charged offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). Evidence is substantial if it is adequate to convince a reasonable mind to accept a conclusion. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002). Whether evidence is substantial is a question of law for the court, whereas what the evidence proves or fails to prove is a question of fact for the jury. *State v. Thompson*, 256 N.C. 593, 595-96, 124 S.E.2d 728, 730 (1962). Incompetent evidence that was admitted "must be considered as if it were competent." *State v. Vestal*, 278 N.C. 561, 567, 180 S.E.2d 755, 760 (1971).

¶ 27 A person over 21 years of age who manufactures, sells, or delivers marijuana, a Schedule IV controlled substance, within 1,000 feet of an elementary or secondary school shall be guilty of a class E felony. N.C. Gen. Stat. §§ 90-95(a)(1), 90-94(b)(1) (2019), 90-95(e)(8) (2019). Additionally, it is a class 3 misdemeanor "for any person to knowingly

use, or to possess with intent to use, drug paraphernalia to . . . package, repackage, store, contain, or conceal marijuana or to inject, ingest, inhale, or otherwise introduce marijuana into the body." N.C. Gen. Stat. § 90-113.22A (2019). At the time of Defendant's arrest, the General Assembly had statutorily redefined marijuana to exclude hemp. Hemp was defined as "the plant Cannabis sativa . . . with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis." N.C. Gen. Stat. § 90-87(13a) (2019). Marijuana was defined as "all parts of the plant of the genus Cannabis," but "does not include hemp or hemp products." *Id.* § 90-87(16) (2019). "The difference between the two substances is that industrial hemp contains very low levels of tetrahydrocannabinol . . . , which is the psychoactive ingredient in marijuana." *State v. Parker*, 27 N.C. App. 531, 2021-NCCOA-217, ¶ 27.

¶ 28 Prior to the legalization of industrial hemp, a law enforcement officer was permitted to identify marijuana by sight and smell, and the officer's testimony was sufficient to show that a substance was marijuana. *State v. Fletcher*, 92 N.C. App. 50, 57, 373 S.E.2d 681, 685-86 (1988) (citation omitted). Defendant argues that because the definition of marijuana has changed, Davenport's identification of the substance as marijuana by sight and/or smell was insufficient to support Defendant's convictions.

¶ 29 We first note that Defendant did not object at trial to the admission of Davenport's testimony and does not argue plain error on appeal. Furthermore,

> for purposes of examining the sufficiency of the evidence to support a criminal conviction, it simply does not matter whether some or all of the evidence contained in the record should not have been admitted; instead, when evaluating the sufficiency of the evidence, all of the evidence, regardless of its admissibility, must be considered in determining the validity of the conviction in question.

State v. Osborne, 372 N.C. 619, 630, 831 S.E.2d 328, 335 (2019) (citations omitted). Consistent with *Osborne*, we consider whether the evidence admitted by the trial court—including Davenport's testimony—constituted sufficient evidence that the substance was marijuana.

¶ 30 Davenport conducted controlled buys on 7 March and 8 March, which directly involved Defendant. During those buys, Davenport saw on video and heard on audio Defendant tell the confidential informant

that "the price of an ounce of marijuana was $250" before Moore handed the drugs to the informant. Davenport testified that the price of an ounce of marijuana was "[a]nywhere from 250 to 300[.]" Davenport testified that while searching Booth's car wash, "I found a white grocery bag that contained a larger bag of green leafy substance, which I know to be marijuana[,]" and inside that "larger bag of marijuana" were "multiple bags of marijuana." Davenport testified that the nine smaller plastic bags within the larger bag indicated "[t]he involvement of distribution and selling" because "they were packaged individually for sale."

¶ 31 Davenport further testified that the glass jar, plastic bag with the corner removed, and clear round container "contained marijuana residue and smelled the odor of marijuana." When asked of the significance of the plastic bag with the corner removed, Davenport responded that "people take sandwich bags and the corners of bags to put drugs in the bottom of the corner of the bags to hold it, and they normally would rip the bottom corner out, tie the package so it can be sold."

¶ 32 When asked about the ammunition box, Davenport testified that it had the "odor of marijuana" and the vacuum sealed bags inside had residue of a "green leafy substance that I'm familiar with to be marijuana–residue in the bottom of the bags as well as a name written on the side that I am familiar with. It is called Blue Cookies." When asked why that name was familiar to him, Davenport responded, "I have purchased other bags of marijuana that is supposed to be the name brand of Blue Cookies." Davenport testified that

> [p]eople involved in the distribution of drugs use vacuum sealed bags in an effort to disclose the smell, to hide the smell, the odor of whatever controlled substance is in the bag, in an effort to keep law enforcement from smelling it, and also sometimes in an effort to try to keep K9s from indicating the smell.

¶ 33 Defendant admitted in an interview that the items seized from the back room of the car wash, including the plastic bags and scale, belonged to him. Davenport also seized $563 in U.S. currency directly from Defendant, $200 of which was documented money provided to the confidential informant. From this evidence, a jury could reasonably infer that the substance seized was marijuana, and that the digital scale and various baggies and containers seized were marijuana paraphernalia.

¶ 34 Considering this evidence in the light most favorable to the State and giving the State the benefit of all reasonable inferences, there was sufficient evidence to support a finding that the substance seized was

marijuana and that the digital scales, baggies, and various containers found with the marijuana were marijuana paraphernalia. Accordingly, the trial court did not err by denying Defendant's motion to dismiss.

III. Conclusion

¶ 35 The trial court did not plainly err by admitting Davenport's testimony concerning the controlled buys and Defendant's age, or by admitting the search warrant and affidavit into evidence. Furthermore, the State presented sufficient evidence that the green leafy substance seized from Booth's car wash was marijuana and that the various items seized along with the marijuana were marijuana paraphernalia.

NO PLAIN ERROR; NO ERROR.

Chief Judge STROUD and Judge ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
JESSICA EAGLE, DEFENDANT

No. COA21-701

Filed 18 October 2022

Search and Seizure—seizure—police car blocking motorist's vehicle in driveway—blue lights activated

In a prosecution for driving while impaired, the trial court erred by denying defendant's motion to suppress based on its erroneous conclusion that defendant was not seized, for purposes of the Fourth Amendment and Art. I, sec. 20 of the North Carolina Constitution, at the point when a police officer—who had observed defendant's vehicle pulling into the driveway of a closed business in the middle of the night—pulled in behind defendant's car and activated the marked patrol car's blue lights. A reasonable person would not have concluded that they were free to leave, particularly where defendant was impeded from doing so by the placement of the officer's vehicle.

Appeal by Defendant from an order entered on 17 March 2021 and judgment entered on 10 May 2021 and from the denial of a Motion for Appropriate Relief on 13 October 2021; all heard by Judge R. Allen Baddour, Jr., in Orange County Superior Court. Heard in the Court of Appeals 10 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Liliana R. Lopez, for the State.

Coleman, Gledhill, Hargrave, Merritt, & Rainsford, P.C., by James Rainsford and Cyrus Griswold, for Defendant.

JACKSON, Judge.

¶ 1 The issue in this case is whether a driver is "seized" within the meaning of the Fourth Amendment when a police officer in a marked police cruiser drives slowly past a parked vehicle at night, backs up, pulls in behind the vehicle while activating the patrol car's blue lights, blocks the driver's exit, and then remains in the police cruiser while checking Defendant's license plate. Because we conclude that no reasonable person would believe she was free to drive off under such circumstances, we hold that Defendant was seized for purposes of the Fourth Amendment of the United States Constitution as well as Article I, § 20 of the North Carolina Constitution at the point in time when Deputy Belk pulled in behind Defendant while activating the patrol car's blue lights and blocked her exit. The trial court accordingly erred in denying Defendant's motion to suppress.

I. Factual and Procedural Background

¶ 2 On 14 November 2019, Deputy R. Belk of the Orange County Sheriff's Department was performing nightly business checks along Dairyland Road while driving her marked police cruiser. At 3:19 A.M., after Deputy Belk finished her check of the Maple View Farm Store, she observed a white sedan pull into the driveway of the nearby Maple View Agriculture Center. The business was not open at the time, and the entrance into the Maple View Agriculture Center was blocked by a locked gate. Deputy Belk drove slowly past the Maple View Agriculture Center driveway. Deputy Belk testified that at that point she was waiting to see if the vehicle was just turning around. The first thirty seconds of her dashboard camera reflects that Deputy Belk never completely went past the entrance. Instead, she put her car in reverse, slowly backed down Dairyland Road, and then activated her blue lights as she pulled into the driveway, coming to a stop at an angle the trial court found to be approximately 10 feet behind the white sedan. Deputy Belk further testified that she had observed no criminal violations prior to turning her blue lights on and pulling in behind Defendant's vehicle, thereby conceding the absence of reasonable suspicion.

¶ 3 Deputy Belk testified that because the road was dark and a portion of her police cruiser jetted into Dairyland Road, she turned on her blue lights for safety reasons, warning any approaching vehicles of her presence. Deputy Belk did not immediately exit her vehicle to check on the occupants as one might in a welfare check.[1] Instead, she calmly sat in her car and ran the plate. Both the driver and the passenger of the white sedan remained in the vehicle. Deputy Belk relayed the license plate information to communications and after approximately one minute, she exited her police cruiser and, with her firearm on her side, approached the driver's side door of the white sedan.

¶ 4 Once Deputy Belk approached, she introduced herself to Defendant who was seated in the driver's seat. She asked Defendant what she was doing and while doing so, noticed a strong odor of alcohol coming from inside the vehicle. She also observed that Defendant had red, glassy eyes and slurred speech. Deputy Belk asked Defendant and her passenger for their identification cards, which they produced. After they handed her their identification cards, Deputy Belk returned to her patrol vehicle with their cards. At the later suppression hearing, the trial court concluded that Defendant was not seized at any point up until Deputy Belk took the identification cards to the patrol vehicle.

¶ 5 After a district court bench trial on 30 July 2020, Defendant was found guilty of impaired driving and sentenced as a level five offender to 18 months of unsupervised probation in addition to a two-day suspended sentence. Defendant appealed the district court's judgment to Orange County Superior Court on 30 July 2020. On 15 February 2021, Defendant filed a motion to suppress with the required supporting affidavit in the superior court, challenging the stop of her vehicle as an unlawful seizure and detention. The motion included the following:

> 4. Deputy Belk observed that Defendant had pulled into the driveway so she slowly drove a few feet past the driveway. She then stopped, slowly backed up on the highway, turned on her blue lights, and then pulled in behind Defendant's vehicle.
>
> 5. She parked a few feet from Defendant's rear bumper. (Deputy Belk Dashcam video 0:00-0:30).

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1. We note that the State has never argued and the trial court appears not to have considered whether the community caretaker exception to the reasonable suspicion requirement applied to the case at bar. Therefore, we have not considered the impact of such an exception in our analysis. We have only analyzed at what point Deputy Belk seized Defendant for purposes of the Fourth Amendment.

6. Defendant's car was blocked in by Deputy Belk's patrol vehicle because there was also a locked gate directly in front of Defendant's car.

7. Deputy Belk remained in her vehicle with the blue lights on for approximately one minute before she got out of the car.

. . .

27. Because she stayed in the car, Defendant acquiesced to Deputy Belk's show of authority and therefore a seizure was effectuated, implicating Defendant's constitutional rights under the Fourth Amendment to the United States Constitution and Article 20 of the North Carolina Constitution.

28. In this case, Deputy Belk took the actions necessary to convey to a reasonable person that they were not free to leave. She not only blocked Defendant's path out of the driveway; but also she activated her blue lights as she was pulling in to block Defendant's path and remained parked behind Defendant with the blue lights on for over one minute before Officer Belk exited her marked patrol vehicle.

29. No reasonable person would feel free to leave. Blocked in by a marked patrol cruiser with its blue lights flashing, late at night with no other cars around. This is certainly a show of authority that restrained Defendant's liberty. At this point Defendant was illegally seized because Deputy Belk had no reasonable suspicion for her conduct.

. . .

31. Deputy Belk had no reasonable articulable suspicion that criminal activity was afoot and thus her actions violated Defendant's rights under the United States Constitution and the North Carolina Constitution.

¶ 6 The superior court heard arguments on Defendant's motion to suppress on 15 February 2021. Deputy Belk was the only witness who testified at the hearing. Dashboard camera footage and the officer's body camera footage of the interaction were admitted as Exhibits 1 and 2.

¶ 7 At the conclusion of the hearing, the trial court determined that the encounter between Defendant and Deputy Belk was not a traffic stop, but was a voluntary encounter up until the point where Deputy Belk took possession of Defendant's identification card. The trial court therefore denied Defendant's motion to suppress.

¶ 8 On 17 March 2021, the trial court entered a written order denying Defendant's motion to suppress that included the following pertinent Findings of Fact:

> 4. Deputy Belk observed a white sedan traveling on Dairyland Road and pull into the driveway of the Maple View Agriculture Center located at 3501 Dairyland Road at approximately 3:19am.
>
> 5. The Maple View Agriculture Center was not open at 3:19am and there was a closed gate locking all traffic from driving towards the building.
>
> 6. The white sedan stopped in the driveway at the closed gate.
>
> 7. Deputy Belk observed the vehicle pull into the driveway and waited to see if the white sedan would turn around.
>
> 8. The white sedan continued to sit parked in front of the closed gate.
>
> 9. Deputy Belk pulled behind the white sedan, stopping approximately ten feet behind the white sedan and activated the blue lights on her vehicle.
>
> . . .
>
> 14. Deputy Belk briefly touched the back of the white sedan with her hand before making contact with the driver, Ms. Eagle.

Based on these findings, the trial court concluded as a matter of law:

> 2. The Court concludes that Ms. Eagle was seized under the Fourth Amendment at the point Deputy Belk took Ms. Eagle's identification and returned to her law enforcement vehicle. Until that point, Ms. Eagle was not seized under the Fourth Amendment and the encounter was a voluntary encounter.

. . .

> 4. Here, the circumstances surrounding the incident indicate that a reasonable person would have believed that she was not free to leave when Deputy Belk took possession of Ms. Eagle's identification cards and returned to the vehicle. At this point is when a seizure occurred under the Fourth Amendment. Until that point, the encounter was a voluntary encounter.
>
> 5. The Court finds that a seizure did not occur when Deputy Belk pulled behind Ms. Eagle's vehicle and initiated the blue lights. Using the *Isenhour* factors, the Court finds the following: Deputy Belk was the only law enforcement officer present at this time and did not conduct herself in a manner that is considered threatening. Deputy Belk did not display a weapon during the interaction and only used a hand-held flashlight for light, given that it was 3:19am. Deputy Belk did not physically touch Ms. Eagle and Deputy Belk's momentarily touching of the back of Ms. Eagle's vehicle did not rise to a seizure. Deputy Belk used a calm tone throughout the conversation with Ms. Eagle. Deputy Belk did not raise her voice, yell, or give any commands to Ms. Eagle. Ms. Eagle was cooperative with Deputy Belk and answered all questions posed regarding Ms. Eagle being lost voluntarily.
>
> 6. Pursuant to *State v. Nunez*, 849 S.E.2d 573 (2020), the Court finds that the mere activation of Deputy Belk's blue lights did not constitute a seizure under the Fourth Amendment. For a defendant to be seized under the Fourth Amendment, he must submit, or yield, to an officer's activation of blue lights or siren[.]

¶ 9 Two months later, defense counsel filed a Notice of Intent to Plead Guilty and Reserve the Right to Appeal the Denial of the Motion to Suppress, which gave notice to the court of her intention to plead guilty and appeal the denial of her motion to suppress. Defendant subsequently pleaded no contest to driving while impaired. This time, the trial court found Defendant guilty as a level four offender and sentenced her to a

120-day sentence, suspended, and placed her on supervised probation for 12 months.

¶ 10 Defendant gave oral notice of appeal in open court and timely filed a written notice of appeal with this Court on 21 May 2021.

¶ 11 On 21 May 2021, Defendant filed a Motion for Appropriate Relief ("MAR"), requesting that the trial court reconsider its denial of her motion to suppress based upon the recent appellate decision of *State v. Steele*, 277 N.C. App. 124, 2021-NCCOA-148. The trial court received written briefs and arguments from Defendant and from the State. Judge Baddour denied the MAR on 13 October 2021, and Defendant again gave timely written notice of appeal.

II. Analysis

A. Standard of Review

¶ 12 On appeal of an order denying a motion to suppress, we conduct a two-part review: (1) to determine whether there is "competent evidence" to support the trial court's findings of fact, and (2) to determine 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). If the findings of fact are supported by substantial competent evidence, then they are binding on appeal. *State v. Gabriel*, 192 N.C. App. 517, 519, 665 S.E.2d 581, 584 (2008). However, the trial court's conclusions of law are reviewed de novo. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (2007). Because we reverse on the issue of the motion to suppress, we do not need to further address Defendant's MAR.

B. Findings of Fact

¶ 13 Defendant does not challenge any of the findings of fact contained in the trial court's order. "Unchallenged findings of fact, where no exceptions have been taken, are presumed to be supported by competent evidence and binding on appeal." *State v. McLeod*, 197 N.C. App. 707, 711, 682 S.E.2d 396, 398 (2009) (internal marks and citation omitted). With few and minor exceptions, the parties do not disagree with each other on the facts, no doubt due to the camera footage available from the interaction.

¶ 14 There is also no dispute that Deputy Belk had not observed a crime prior to her pulling behind the Defendant and activating her blue lights. In fact, Defendant and the State agree that Defendant was seized at some point during this encounter. The dispositive issue is at what point this encounter qualified as a seizure as opposed to a voluntary encounter, which would not implicate the Fourth Amendment.

C. Challenged Conclusions of Law—Motion to Suppress

¶ 15 Defendant argues that the trial court erred in denying her motion to suppress, contending that she was seized the moment that Deputy Belk pulled in behind her stopped vehicle and activated the blue lights. The State contends (and the trial court found) that up until the Deputy took Defendant's identification card that Defendant was free to drive off and was therefore not seized for purposes of the Fourth Amendment.

¶ 16 The trial court made the following conclusions of law in determining that Defendant was not seized by Deputy Belk under the Fourth Amendment up until she asked for her identification:

> 2. The Court concludes that Ms. Eagle was seized under the Fourth Amendment at the point Deputy Belk took Ms. Eagle's identification and returned to her law enforcement vehicle. Until that point, Ms. Eagle was not seized under the Fourth Amendment and the encounter was a voluntary encounter.
>
> . . .
>
> 4. Here, the circumstances surrounding the incident indicate that a reasonable person would have believed that she was not free to leave when Deputy Belk took possession of Ms. Eagle's identification cards and returned to the vehicle. At this point is when a seizure occurred under the Fourth Amendment. Until that point, the encounter was a voluntary encounter.
>
> 5. The Court finds that a seizure did not occur when Deputy Belk pulled behind Ms. Eagle's vehicle and initiated the blue lights. Using the *Isenhour* factors, the Court finds the following: Deputy Belk was the only law enforcement officer present at this time and did not conduct herself in a manner that is considered threatening. Deputy Belk did not display a weapon during the interaction and only used a hand-held flashlight for light, given that it was 3:19am. Deputy Belk did not physically touch Ms. Eagle and Deputy Belk's momentarily touching of the back of Ms. Eagle's vehicle did not rise to a seizure. Deputy Belk used a calm tone throughout the conversation with Ms. Eagle. Deputy Belk did not raise her

> voice, yell, or give any commands to Ms. Eagle. Ms. Eagle was cooperative with Deputy Belk and answered all questions posed regarding Ms. Eagle being lost voluntarily.
>
> 6. Pursuant to *State v. Nunez*, 849 S.E.2d 573 (2020), the Court finds that the mere activation of Deputy Belk's blue lights did not constitute a seizure under the Fourth Amendment. For a defendant to be seized under the Fourth Amendment, he must submit, or yield, to an officer's activation of blue lights or siren[.]

¶ 17 Ultimately, we agree with Defendant that the trial court erred in concluding that the encounter between herself and Deputy Belk was not a seizure under the Fourth Amendment at the point in time when Deputy Belk pulled in behind Defendant's vehicle while activating her blue lights and blocked Defendant's exit.

¶ 18 The Fourth Amendment of the United States Constitution protects "the right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend IV. Article I, § 20 of the North Carolina Constitution likewise "protect[s] against unreasonable searches and seizures." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012). "Fourth Amendment rights are enforced primarily through 'the exclusionary rule,' which provides that evidence derived from an unconstitutional search or seizure is generally inadmissible in a criminal prosecution of the individual subjected to the constitutional violation." *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006).

¶ 19 It is well-established that "a traffic stop is considered a 'seizure' within the meaning of" both the federal and state constitutions, and that a traffic stop is only constitutional if supported by reasonable suspicion. *Otto*, 366 N.C. at 136-37, 726 S.E.2d at 827. However, the issue in this case is not whether Deputy Belk had reasonable suspicion to stop Defendant (she admits she did not), rather, the issue is when, during the encounter between Defendant and Deputy Belk, Defendant was seized.

¶ 20 Not every interaction between citizens and law enforcement constitutes a seizure. The United States Supreme Court has "repeatedly held that mere police questioning does not constitute a seizure." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). *See also State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994) (internal marks and citation omitted) (explaining that "communication between the police and citizens involving no coercion or detention" does not constitute a seizure). Thus,

officers do not violate the Fourth Amendment "merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *State v. Isenhour*, 194 N.C. App. 539, 542, 670 S.E.2d 264, 267 (2008) (internal marks and citation omitted).

¶ 21 In contrast, a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen[.]" *Terry v. Ohio*, 392 U.S. 1, 20 n. 16 (1968). *See also State v. West*, 119 N.C. App. 562, 566, 459 S.E.2d 55, 58 (1995) ("A seizure does not occur until there is a physical application of force or submission to a show of authority."). A show of authority constitutes a seizure when "under the totality of the circumstances a reasonable person would feel that he was not free to decline the officers' request or otherwise terminate the encounter." *Brooks*, 337 N.C. at 142, 446 S.E.2d at 586. *See also Bostick*, 501 U.S. at 437 (a show of authority occurs when the officer's conduct "would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business") (internal marks and citation omitted). When a sufficient show of authority is made, it is possible for an officer to seize a person without ever laying hands on that person. *See California v. Hodari D.*, 499 U.S. 621, 626 (1991) (noting that when there is "an assertion of authority" by an officer, "no actual, physical touching is essential" for the encounter to qualify as a seizure) (internal marks and citation omitted).

¶ 22 In determining whether a show of authority has occurred, relevant circumstances include "the number of officers present, whether the officer displayed a weapon, the officer's words and tone of voice, any physical contact between the officer and the individual, whether the officer retained the individual's identification or property, the location of the encounter, and whether the officer blocked the individual's path." *State v. Icard*, 363 N.C. 303, 309, 677 S.E.2d 822, 827 (2009). What constitutes a seizure "will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). As the State correctly points out in its brief, the test is whether under the totality of circumstances, "a reasonable person would have believed that he was not free to leave." *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

¶ 23 Here, the trial court relied heavily on *State v. Nunez*, 274 N.C. App. 89, 849 S.E.2d 573 (2020), wherein an officer responded to a call of a disabled vehicle in the middle of a public vehicular area and not parked in a parking space. The Court held that this did not constitute a seizure, noting that (1) the act of turning on the blue lights behind a car

in the middle of a public vehicular area in and of itself is not enough to constitute a seizure; and (2) the officer took no action that caused the defendant's vehicle to stop moving nor did the officer otherwise impede the movement of the defendant's vehicle in any way. *Id.* at 93, 849 S.E.2d at 575-76.

¶ 24 The *Nunez* opinion cites *State v. Turnage*, 259 N.C. App. 719, 726, 817 S.E.2d 1, 6, *writ denied*, *temp. stay dissolved*, 371 N.C. 786, 821 S.E.2d 438 (2018), and its holding that "the mere activation of the vehicle's blue lights did not constitute a seizure as [the] [d]efendant did not yield to the show of authority." In both *Nunez* and *Turnage*, this Court also noted that neither of the defendants' movement was in any way impeded by the officers. It is on this basis that both *Nunez* and *Turnage* can be distinguished from this case as Deputy Belk pulled in close enough behind Defendant to block her available exit, thus impeding Defendant's movement.[2]

¶ 25 Oddly enough, the State and the trial court also base their arguments upon this Court's decision in *State v. Isenhour*, 194 N.C. App. 539, 670 S.E.2d 264 (2008). In that case, officers were patrolling an area known for having a lot of drug and prostitution activity when they observed a car with two passengers sitting still for a ten-minute period. *Id.* at 540, 670 S.E.2d at 266. The officers pulled up to the defendant's vehicle in their marked patrol car, parking approximately eight feet away. *Id.* They got out of their car and approached the defendant's vehicle. *Id.* The officers did not activate their blue lights. *Id.* at 544, 670 S.E.2d at 268.

¶ 26 The *Isenhour* Court found that based upon the totality of the circumstances, the defendant was not seized. *Id.* This Court specifically noted that "there [was] no suggestion in the record that Officer Ferguson's car physically blocked the defendant's car, thus preventing him from driving away." *Id.* This Court also highlighted the absence of any psychological barriers that may have discouraged the defendant from leaving such as turning on the blue cruiser lights. *Id.* In contrast to *Isenhour*, in the case at bar, Deputy Belk activated her blue lights as she pulled in behind Defendant and also positioned her cruiser in such a manner that it blocked Defendant's exit path.

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2. The restriction of movement factor in the seizure analysis is highlighted in *State v. Wilson*, 250 N.C. App. 781, 793 S.E.2d 737 (2016), *aff'd*, 370 N.C. 389 (2017). In *Wilson*, a police officer was standing on the side of a road and motioned for a passenger to stop. *Id.* at 782, 793 S.E.2d at 738. This Court determined that because the officer did not restrict the defendant's movement either with his person or with his police cruiser, and there was no other display of police authority with either the cruiser's lights or with his weapon, the defendant was not seized for purposes of the Fourth Amendment. *Id.* at 785-86, 793 S.E.2d at 741.

¶ 27 At a minimum, Deputy Belk impeded Defendant's movement as Defendant would have had to narrowly skirt around Deputy Belk's police cruiser while backing up in order to avoid either hitting the cruiser or running off the road. To impede is "to interfere with or slow the progress of" something—in other words, to hinder or obstruct movement. *Impede*, Merriam-Webster.com Dictionary, (last accessed 1 September 2022). Based on the trial court's findings and the video evidence, there is no dispute that Defendant was stopped facing and close to a locked gate, meaning there was only one way out of the driveway. Additionally, the trial court found that Deputy Belk stopped approximately ten feet behind Defendant and the video shows Deputy Belk did so at an angle. The result of this positioning meant that Defendant's ability to utilize her only available exit was hindered and any attempt to exit, whether backing up slowly or attempting a multi-point turn between the gate and the cruiser, was slowed. "We agree that when an officer blocks a defendant's car from leaving the scene, particularly when, as here, the officer has followed the car, the officer demonstrates a greater show of authority than does an officer who just happens to be on the scene and engages a citizen in conversation." *United States v. Jones*, 678 F.3d 293, 302 (4th Cir. 2012); *see also United States v. Green*, 111 F.3d 515, 520 n.1 (7th Cir. 1997) (concluding that when "the officers pulled their car in behind the [defendant's car], blocking the car's exit . . . a reasonable person would not feel that he was free to leave").

¶ 28 Moreover, a reasonable motorist would surely feel less at liberty to "ignore the police presence and go about his business" when a police officer in a marked police cruiser pulls in behind her while activating the blue lights and blocks her exit. *Bostick*, 501 U.S. at 437. In fact, in such a situation most people would feel compelled to remain in their car and wait to speak with the officer, knowing that attempting to leave would only end in trouble and/or danger. This pressure to comply becomes especially apparent when examining the criminal consequences that might follow if a person ignores an officer's blue lights.

¶ 29 For example, N.C. Gen. Stat. § 14-223 makes it unlawful to "willfully and unlawfully resist, delay, or obstruct a public officer in discharging or attempting to discharge a duty of his office." N.C. Gen. Stat. § 14-223(a) (2021). A violation of this section can result in a Class 2 misdemeanor charge. We have previously upheld a conviction under this statute when officers approached a defendant who was asleep with his car stopped in the middle of the road, but the defendant would not roll down his window, refused to speak with them, and acted uncooperatively. *See State v. Hoque*, 269 N.C. App. 347, 349-50, 837 S.E.2d 464, 468-69 (2020).

¶ 30 Although the State attempts to distinguish this case from the facts in *State v. Steele*, it misses the point.

> [A] person in Defendant's situation finds [herself] caught in a Catch-22—comply with the officer's show of authority and relinquish her Fourth Amendment rights; or ignore the officer's show of authority and be arrested for resisting a public officer [or potentially worse outcomes if the officer feels the noncompliance is threatening]. This cannot be consistent with the guarantees in the Fourth Amendment and Article I, § 20 of the North Carolina Constitution.

Steele, 277 N.C. App. at 136, 2021-NCCOA-148, ¶ 36. As we stated in *Steele*, "when a person would likely face criminal charges for failing to comply with an officer's 'request,' then that person has been seized within the meaning of the Fourth Amendment and Article I, § 20 of our state Constitution." *Id*. Furthermore, we do not want to suggest to the public that when an officer pulls behind them at night while activating their blue lights, stays in car for a minute, and then begins to exit the vehicle that they are free to attempt to back out of the situation as long as they do not make contact with the officer or drive in their direction (which could be considered attempted assault). Such actions run the risk of escalating the situation, causing an officer to understandably feel threatened and potentially resulting in a car chase or the use of deadly force. There is inherent danger any time a driver tries to exit a situation in which a police officer has indicated via activation of their blue lights or some other show of authority that they intend to speak with the driver. *See Torres v. Madrid*, 141 S. Ct. 989 (2021) (where officers, after approaching in tactical vests marked with police identification and holding guns, fired 13 rounds at a woman who drove away even though evidence indicated the officers were not standing in the path of the vehicle).

¶ 31 "The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Michigan v. Summers*, 452 U.S. 692, 702-703 (1981). That is what we should all want from interactions between the police and the public in order to prevent escalation. The State implicitly argues that this Defendant was free to try and back her car out from where she was stopped, either while Deputy Belk sat in her car running Defendant's license plate or even while the Deputy walked up to Defendant's window. Given that this incident took place late at night in a rural area with no lighting, we do not know what would have happened if Defendant had reversed her car toward Deputy Belk or the patrol vehicle in an attempt

to leave the scene. Perhaps Defendant might have hit Deputy Belk's patrol vehicle. Or worse, Defendant might have accidentally struck Deputy Belk when she was approaching Defendant's car door. Perhaps any attempt by Defendant to leave would have made Deputy Belk feel threatened, leading her to fire her sidearm. Either way, what started as a simple traffic stop could have escalated to something much worse. Defendant made the only safe and reasonable choice available by remaining in her car at the scene. The State's argument is not only illogical, but it is also potentially dangerous.

¶ 32 In addition to erroneously ignoring the inherently coercive nature of an officer pulling in behind a vehicle, blocking its exit, and activating blue lights while in a marked patrol car, the trial court's analysis failed to adequately account for the time and location of this encounter. *See Icard*, 363 N.C. at 309, 677 S.E.2d at 827 (holding that the location and physical circumstances of the encounter are relevant seizure factors). Here, Deputy Belk first spotted Defendant's vehicle on an otherwise empty street at a little after three o'clock in the morning. She watched Defendant pull into a path with a locked gate. She then slowly drove behind Defendant, reversing her car in the road, driving backwards, pulling behind Defendant and activating her blue lights. A reasonable person would find such an empty, isolated location at such a late time of night, with a gate blocking her forward direction of travel and the Deputy's patrol car with flashing blue lights impeding her backwards direction of travel, to be intimidating and would also be more susceptible to police pressure, which she otherwise might have felt free to ignore in a sunlit, crowded location.

¶ 33 In sum, when one examines all the attendant circumstances surrounding this encounter, the only reasonable conclusion is that Defendant was seized by Deputy Belk—especially when one examines this encounter from the perspective of a reasonable person in Defendant's position. Around 3:19 A.M. on 14 November 2019, Defendant was lost and pulled into a short driveway that was gated and locked. The street was completely empty aside from Defendant and Deputy Belk, and it was dark due to the absence of street lights on a rural road. Deputy Belk drove slowly past the driveway, only partway past Defendant's car, put her patrol vehicle in reverse, and slowly backed back down the road. Deputy Belk pulled partially into the driveway—activating her lights as she did so—and stopped behind Defendant's car, impeding Defendant's ability to back out of the driveway.

¶ 34 We are not expressing the view that Deputy Belk did anything wrong and it may be true that she did not believe this was a stop. However,

when analyzed from the view of a reasonable person in Defendant's position, even at this early point in the encounter, any reasonable person would have realized that they were the target of police suspicion and were likewise not free to drive off. To hold otherwise could instigate the escalation of encounters between the police and drivers in North Carolina and lead to far worse results for those involved.

II. Conclusion

¶ 35 Thus, after examining all the attendant facts and circumstances, we conclude that no reasonable person in Defendant's position would have felt free to ignore Deputy Belk's show of authority. Accordingly, we hold that Defendant was seized within the meaning of the Fourth Amendment and Article I, § 20 of the North Carolina Constitution at the point that Deputy Belk pulled in behind Defendant's car while activating her blue lights and blocked Defendant's available exit. Therefore, the trial court erred in denying Defendant's motion to suppress. We reverse the trial court's order denying the motion to suppress and remand this matter back to the trial court for further disposition.

REVERSED AND REMANDED.

Judges MURPHY and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
THOMAS EARL GRIFFIN, DEFENDANT

No. COA17-386-3

Filed 18 October 2022

Satellite-Based Monitoring—period of 30 years—reasonableness—balancing test—changes to SBM statutes

The trial court's order imposing satellite-based monitoring (SBM) on defendant, who was neither a recidivist nor an aggravated offender, for a term of thirty years was reasonable under the Fourth Amendment in light of recent caselaw and changes to the SBM statutes. The State had a legitimate, demonstrated interest in protecting the public and especially children from future sex crimes; defendant's privacy interests were appreciably diminished due to his sexual abuse of a minor; and, because of recent changes to the SBM

statutes, the tempered intrusion and inconvenience of defendant's SBM was effectively capped at ten years.

Appeal by Defendant from order entered 1 September 2016 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 19 September 2017 and opinion filed 7 August 2018. Remanded to this Court by order of the North Carolina Supreme Court for further consideration in light of *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019). Heard in this Court on remand on 8 January 2020 and opinion filed 18 February 2020. Remanded to this Court by order of the North Carolina Supreme Court on 14 December 2021 for reconsideration in light of *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, *State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, and 2021 N.C. Sess. Laws. ch. 138, § 18. Heard in the Court of Appeals on remand.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant-Appellant.

INMAN, Judge.

¶ 1 In this decision, we address, for the third time, whether the imposition of satellite-based monitoring ("SBM") for a term of thirty years violates Defendant Thomas Earl Griffin's rights under the Fourth Amendment to the United States Constitution. After careful review, and in light of *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, *State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, and the North Carolina General Assembly's revisions to the SBM program, 2021 N.C. Sess. Laws ch. 138, § 18, we affirm the trial court's SBM order.

I. FACTUAL AND PROCEDURAL HISTORY

A. Defendant's Conviction, SBM Order, and Initial Appeal

¶ 2 This Court summarized the pertinent underlying facts in our earlier decisions, *State v. Griffin*, 260 N.C. App. 629, 629-33, 818 S.E.2d 336, 337-39 (2018) ("*Griffin I*"), and *State v. Griffin*, 270 N.C. App. 98, 99-101, 840 S.E.2d 267, 269-70 (2020) ("*Griffin II*"). Per our recitation of the facts in those opinions:

> In 2004, Defendant entered an *Alford* plea to one count of first-degree sex offense with a child. *Griffin I*,

260 N.C. App. at 629–33, 818 S.E.2d at 337. At sentencing, Defendant admitted to the digital and penile penetration of his girlfriend's minor daughter over the course of three years. *Id.* at 630–31, 818 S.E.2d at 338. The trial court sentenced Defendant to imprisonment for 144 to 182 months and recommended the completion of SOAR, a sex offender treatment program. *Id.*

Eleven years after his conviction, in 2015, Defendant was released from prison on a five-year term of post-release supervision. *Id.* Three months later, the State sought SBM of Defendant under N.C. Gen. Stat. § 14-208.40(a)(2), as he had been sentenced for a reportable sex offense as defined by N.C. Gen. Stat. § 14-208.6(4) and therefore could be subject to SBM if ordered by a court. *Id.*

Defendant appeared before the trial court at a "bring-back" hearing in August 2016, where a "Revised STATIC-99 Coding Form" ("Static-99"), prepared by the Division of Adult Correction and Juvenile Justice and designed to estimate the probability of recidivism, was entered into evidence. *Id.* According to the Static-99, Defendant presented a "moderate-low" risk, the second lowest of four possible categories. *Id.*

The State called Defendant's parole officer as a witness, who testified that Defendant failed to complete the SOAR program but had not violated any terms of his post-release supervision. *Id.* The officer also described the physical characteristics and operation of the SBM device. *Id.* The State did not introduce any evidence regarding how it would use the SBM data or whether SBM would be effective in protecting the public from potential recidivism by Defendant. *Id.*

After taking the matter under advisement, the trial court entered a written order imposing SBM on Defendant for thirty years. *Id.* at 630–33, 818 S.E.2d at 338-39. That order included the following findings of fact and conclusion of law:

> 1. The defendant failed to participate in and[/]or complete the SOAR program.

> 2. The defendant took advantage of the victim's young age and vulnerability: the victim was 11 years old [while] the defendant was 29 years old.
>
> 3. The defendant took advantage of a position of trust; the defendant was the live-in boyfriend of the victim's mother. The family had resided together for at least four years and [defendant] had a child with the victim's mother.
>
> 4. Sexual abuse occurred over a three year period of time.
>
> The court has weighed the Fourth Amendment right of the defendant to be free from unreasonable searches and seizures with the publics [sic] right to be protected from sex offenders and the court concludes that the publics [sic] right of protection outweighs the "de minimis" intrusion upon the defendant's Fourth Amendment rights.

Id. at 631–32, 818 S.E.2d at 339.

Griffin II, 270 N.C. App. at 99-101, 840 S.E.2d at 269-70.

¶ 3 The above facts, coupled with this Court's then-binding decision in *State v. Grady*, 259 N.C. App. 664, 817 S.E.2d 18 (2018) ("*Grady II*"), led us to reverse the SBM order in *Griffin I* "because the State failed to present any evidence that SBM is effective to protect the public from sex offenders." 260 N.C. App. at 637, 818 S.E.2d at 342.

B. *Grady III* and *Griffin II*

¶ 4 The State appealed our decision in *Griffin I* and, while that appeal was pending, our Supreme Court modified and affirmed *Grady II* in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"). *Grady III* applied a three-factor totality of the circumstances test to determine the reasonableness of lifetime SBM and held that lifetime SBM under the statutes then in effect was unconstitutional as to all offenders who were not subject to probation and were enrolled in SBM solely on the basis of recidivism. 372 N.C. at 511, 831 S.E.2d at 546-47. The State's appeal of *Griffin I* was subsequently dismissed, and our Supreme Court remanded the matter to this Court for reconsideration in light of *Grady III*. *State v. Griffin*, 372 N.C. 723, 839 S.E.2d 841 (2019).

¶ 5 On remand, we recognized that because Defendant did not receive lifetime SBM as a result of any recidivist status, "*Grady III* does not compel the result we must reach in this case, [but] its reasonableness

analysis does provide us with a roadmap to get there." *Griffin II*, 270 N.C. App. at 106, 840 S.E.2d at 273. Our application of *Grady III*'s Fourth Amendment analysis to the particular facts of Defendant's case led us to again hold that the SBM order failed to pass constitutional muster under the totality of the circumstances. *Id.* at 110, 840 S.E.2d at 276.

C. *Hilton*, *Strudwick*, and Legislative Changes to SBM

¶ 6 The State appealed our decision once more, and, as in the appeal of *Griffin I*, the SBM landscape shifted while the matter was pending before the Supreme Court. First came *Hilton*, in which our Supreme Court declined to extend *Grady III* to other categories of defendants and held that the imposition of lifetime SBM on aggravated offenders was constitutional. *Hilton*, ¶ 36; *see also State v. Carter*, 2022-NCCOA-262, ¶ 18 (recognizing that "our Supreme Court narrowly construed *Grady III*'s holding" in *Hilton*). Then our Supreme Court decided *Strudwick*, which reaffirmed the narrow application of *Grady III* to hold that, under the three-step reasonableness inquiry "enunciated in *Grady III* [ ] and further developed in *Hilton*," *Strudwick*, ¶ 20, lifetime SBM was constitutional for another aggravated offender, *id.* ¶ 28.

¶ 7 As elsewhere recognized by this Court, *Strudwick* also announced two other important points of law:

> First, the Supreme Court clarified the reasonableness determination takes place in the present, not the future.
>
> . . . .
>
> The second relevant additional aspect of *Strudwick* is its discussion on how to reevaluate SBM orders as time moves forward and circumstances change. *Strudwick*, ¶¶ 15–17. *Strudwick* indicates a defendant could file a petition under Rule 60 of the North Carolina Rules of Civil Procedure on the grounds "it is no longer equitable that the judgment should have prospective application" or "[a]ny other reason justifying relief from the operation of the judgment." *Id.*, ¶ 16 (quoting N.C. Gen. Stat. § 1-1A, Rule 60(b)(5)–(6) (2019)); *see also id.*, ¶ 17 (further explaining how sub-sections (5) and (6) could provide paths to relief). The Supreme Court also noted a defendant could file a petition under North Carolina General Statute § 14-208.43 (2019). *Strudwick*, ¶ 15.

State v. Anthony, 2022-NCCOA-414, ¶¶ 17-18.

¶ 8 The General Assembly also made substantial revisions to our SBM statutes while the State's appeal of *Griffin II* was pending. Under the statutes now in effect, "[a]n offender who was ordered prior to December 1, 2021, to enroll in [SBM] for a period longer than 10 years may file a petition for termination or modification of the monitoring requirement with the superior court in the county where the conviction occurred." N.C. Gen. Stat. § 14-208.46(a) (2021). Then, "[i]f the petitioner has not been enrolled in the [SBM] program for at least 10 years, the court shall order the petitioner to remain enrolled in the [SBM] program for a total of 10 years." *Id.* § 14-208.46(d). Alternatively, "[i]f the petitioner has been enrolled in the [SBM] program for more than 10 years, the court shall order the petitioner's requirement to enroll in the [SBM] program be terminated." *Id.* § 14-208.46(e). In short, "[c]ombined with a change setting a ten-year maximum on new SBM enrollments, the statutory system now limits SBM to ten years for all offenders." *Anthony*, ¶ 19 (citations omitted).

¶ 9 On 14 December 2021, our Supreme Court again declined to take the State's appeal of *Griffin II* on the merits and, instead, remanded the matter to this Court for reconsideration in light of *Hilton*, *Strudwick*, and the General Assembly's changes to the SBM statutes. *State v. Griffin*, 379 N.C. 671, 865 S.E.2d 849.

II. ANALYSIS

¶ 10 Consistent with the Supreme Court's order, we now consider Defendant's challenge to the constitutionality of the trial court's order imposing SBM for a term of thirty years in light of *Hilton*, *Strudwick*, and the revised SBM statutes. We also have the benefit of this Court's recent decisions in *Carter* and *Anthony*, which undertook the same effort in the context of aggravated offenders subject to lifetime SBM. Recognizing that Defendant is neither a recidivist nor an aggravated offender and is subject to SBM for a term of years rather than life, we nonetheless hold that, in light of the foregoing legal developments, including binding precedent, the SBM order imposed by the trial court is constitutionally reasonable under the totality of the circumstances.

A. Standards of Review

¶ 11 The standards of review to be applied in this case are well-settled: "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. We review a trial court's determination that SBM is reasonable *de novo*." *Carter*, ¶ 14 (quotation marks and citation omitted); *see also Griffin I*, 260 N.C. App. at 633, 818 S.E.2d at 339-40. Unchallenged findings of fact are binding on appeal. *Strudwick*, ¶ 24.

B. Reasonableness under the Totality of the Circumstances

¶ 12 Whether the trial court's SBM order is constitutional hinges on the same three-part reasonableness analysis employed in *Grady III*, "further developed in *Hilton*," and applied in *Strudwick*. *Id.* ¶ 20. Under that test, we consider: "(1) the legitimacy of the State's interest; (2) the scope of Defendant's privacy interests; and (3) the intrusion imposed by SBM." *Anthony*, ¶ 33 (citing *Hilton*, ¶¶ 19, 29, 32). We then weigh those factors under the totality of the circumstances to discern whether the SBM order imposed by the trial court is reasonable under the Fourth Amendment. *Id.*

1. State's Interests

¶ 13 Our precedents have recognized numerous state interests served by SBM, including "preventing and prosecuting future crimes committed by sex offenders." *Strudwick*, ¶ 26. The legitimacy of those interests is beyond dispute. *See Grady III*, 372 N.C. at 543, 831 S.E.2d at 568 ("[T]he State's asserted interests here are without question legitimate."); *Hilton*, ¶ 29 ("[T]he SBM program serves a legitimate government interest."); *Strudwick*, ¶ 23 ("The purposes of the SBM program—to assist the State in both preventing and solving crime—are universally recognized as legitimate and compelling." (citations omitted)).

¶ 14 We recognized these legitimate interests in G*riffin II* but held that, consistent with *Grady III*, those interests did not weigh in favor of SBM because the State "failed to carry its burden to produce evidence that the thirty-year term of SBM imposed in this case is effective to serve [those] legitimate interests." 270 N.C. App. at 109, 840 S.E.2d at 275. We now diverge from that holding in part because our Supreme Court made clear in *Hilton* and *Strudwick* that *Grady III*'s evidentiary analysis, like its ultimate holding, is strictly limited to the category of offenders addressed by that decision. *See Hilton*, ¶ 23 n.5 ("[O]ur analysis in [*Grady III*] has no bearing on cases where lifetime SBM is imposed on sexually violent offenders, aggravated offenders, or adult-child offenders."); *id.* ¶ 28 ("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."); *Strudwick*, ¶ 20 (holding that because the defendant received SBM for an aggravated offense, "the holding of *Grady III* concerning the unconstitutionality of North Carolina's lifetime SBM scheme as it applies to recidivists, including *Grady III*'s discussion concerning the State's burden of proof as to the effect of lifetime SBM on reducing recidivism, is wholly inapplicable to the instant case."). As the most recent

precedents from our Supreme Court concerning the constitutionality of SBM, we are bound to follow *Hilton*'s and *Strudwick*'s unambiguous limitation of *Grady III*'s efficacy analysis to recidivists alone.

¶ 15 Notwithstanding the absence of direct efficacy evidence presented to the trial court in this case, SBM's ability to deter and assist in solving crimes is otherwise established by: (1) legislative enactment, *see Strudwick*, ¶ 26 (discussing legislative findings in support of SBM's efficacy); (2) the fact that "location information from the monitor could be used to implicate the participant as a suspect if he was in the area of [a reported] sexual assault, or to eliminate him as a suspect if he was not in the area," *Hilton*, ¶ 26; and (3) "by empirical data," *id.* ¶ 28.

¶ 16 We further note that Defendant was convicted of sexually abusing a minor, and *Hilton* held that the State need not demonstrate efficacy before the trial court in part because "the General Assembly has clearly stated the purpose of North Carolina's 'Sex Offender and Public Protection Registration Programs' is to proactively protect *children* and others from dangerous sex offenders." *Hilton*, ¶ 22 (quoting N.C. Gen. Stat. § 14-208.5 (2019) (emphasis added)). Indeed, the Supreme Court in *Hilton* acknowledged that the General Assembly "enacted the SBM program . . . to further its paramount interest in protecting the public—especially children . . . . 'The General Assembly also recognized . . . that the protection of sexually abused children is of great governmental interest.' " *Id.* ¶ 19 (quoting N.C. Gen. Stat. § 14-208.5 (2019) (cleaned up)). It also pointed out that this state interest was served by imposing SBM on "narrowly defined categories of sex offenders who present a significant enough threat of reoffending to 'require[] the highest possible level of supervision and monitoring.' " *Id.* ¶ 23 (quoting N.C. Gen. Stat. § 14-208.40(a) (2019)). Here, Defendant was convicted of a sex crime against an 11-year-old and was found by the trial court to "require[] the highest possible level of supervision and monitoring."

¶ 17 We are unconvinced by Defendant's arguments that the record before us affirmatively disproves SBM's efficacy. Defendant first contends that because his STATIC-99 showed he was a "Moderate-Low" risk to reoffend, any recidivist concerns are absent here. However, as the State points out, Defendant did not complete the SOAR program designed to reduce recidivism. The State further notes that the defendant in *Strudwick* fell into the same STATIC-99 risk category as Defendant,[1] and our Supreme Court held that the State's interest in preventing recidivism

1. We take judicial notice of the Court of Appeals and Supreme Court records in *Strudwick* for purposes of comparing Defendant's STATIC-99 to the updated STATIC-99

was served by lifetime SBM in that case. *Strudwick*, ¶¶ 7, 26-28. We reject Defendant's first argument for these reasons.

¶ 18 Defendant's second argument against a favorable weighing of the State's interest—that the particulars of his crime are unlikely to be repeated—fares no better than his first. We rejected an identical contention in *Anthony*:

> Defendant misconstrues the nature of the State's interest. Defendant assumes the State's interest is in preventing or prosecuting the crime which triggered SBM (or a repeat of the same scenario), but the State's interest is broader. It encompasses all potential future sex crimes. *See*, *e.g.*, *Hilton*, ¶ 21 (defining interest as "protecting children and others from sexual attacks" without limitation) (quotations, citation, and alterations omitted). Thus, as long as SBM could prevent or solve a future sex crime, regardless of the exact facts of that scenario, the State's interest is served.

Anthony, ¶ 38. Consistent with *Anthony*, and because Defendant's arguments fail to undercut the State's demonstrated and legitimate interest in preventing future sex crimes, we hold that those interests weigh in favor of SBM.

2. Defendant's Privacy Interests

¶ 19 The second reasonableness factor requires us to examine "the scope of Defendant's privacy interest." *Id.* ¶ 39. In *Grady III*, our Supreme Court held that recidivists enjoy "restored" privacy rights and liberty interests with exceptions for gun possession and the "provi[sion] [of] certain specific information and materials to the sex offender registry."

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form reviewed in *Strudwick*. *See Hilton*, ¶ 26 (taking judicial notice of a finding of fact in *Strudwick* for purposes of its SBM analysis as another record of the Court); *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981) (taking judicial notice of facts in a Court of Appeals decision because both courts "constitute the appellate division of the General Court of Justice" and the judicially noted facts were "capable of demonstration by readily accessible sources of indisputable accuracy" and "important" to resolution of the appeal). Here, Defendant scored a "2," in the "Moderate-Low" risk category, on his STATIC-99. The defendant in *Strudwick* scored a "3," or "Average Risk," on an updated STATIC-99. Under the older form, scores of 2 and 3 are deemed "Moderate-Low" risk, while the newer form in *Strudwick* groups scores of 1, 2, and 3 into the "Average Risk" category. The updated form in *Strudwick* did not alter the underlying formula for calculating risk scores. Thus, Defendant and the defendant in *Strudwick* fall into the same recidivism risk category regardless of which STATIC-99 form is used.

372 N.C. at 534, 831 S.E.2d at 561. We followed that observation—as the most recent SBM analysis from our Supreme Court—in *Griffin II* to hold that Defendant's privacy rights would be similarly restored after his term of post-release supervision. 270 N.C. App. at 107, 840 S.E.2d at 274.

¶ 20 However, *Hilton* and *Strudwick* have since signaled that such restoration is more limited for offenders who fall outside the recidivist category. *See Strudwick*, ¶ 21 ("[D]efendant's expectation of privacy is duly diminished by virtue of his status as a convicted felon generally and as a convicted sex offender specifically." (citing *Hilton*, ¶ 30)). Under these more recent precedents:

> [I]t is constitutionally permissible for the State to treat a sex offender differently than a member of the general population as a result of the offender's felony conviction for a sex offense. *Hilton*, 2021-NCSC-115, ¶ 30. Concomitantly, a sex offender such as defendant possesses a constitutionally permissible reduction in the offender's expectation of privacy in matters such as the imposition of lifetime SBM.

Id. ¶ 22. These decisions further reasoned that: (1) "individuals convicted of sex offenses may be permanently barred from certain occupations," *Hilton*, ¶ 30; (2) sex offender registration extends beyond the term of post-release supervision; and (3) such registration imposes additional "limitations on [sex offenders'] movements and residency restrictions," *id.* ¶ 31.[2]

¶ 21 To be sure, Defendant is not an aggravated offender and thus is not squarely within the category addressed by *Hilton* and *Strudwick*. But the particular facts of Defendant's crime—involving an adult perpetrator and child victim—further suggest that he has a measurably diminished expectation of privacy more akin to aggravated offenders than not. For example, *Hilton* stated that *Grady III*'s analysis "has no bearing on cases where lifetime SBM is imposed on . . . adult-child offenders," ¶ 23 n.5, and placed particular emphasis on the geographic restrictions imposed by the sex offender registration program, *id.* ¶ 31. Many of those restrictions cited by *Hilton* are particularly focused on children. *See* N.C. Gen. Stat. §§ 14-208.18(a)(1)-(2) (2021) (prohibiting registered sex offenders

2. Defendant, unlike the aggravated offenders addressed in *Strudwick* and *Hilton*, is not subject lifetime sex offender registration; instead, he must register for thirty years with an opportunity to petition for removal after ten years. N.C. Gen. Stat. § 14-208.6A (2021). However, because this registration period neatly mirrors the current terms of Defendant's enrollment in SBM for thirty years (with an ability to reduce the term to ten years by petitioning the trial court), this is ultimately a distinction without a difference.

from "the premises of any place primarily for the use, care, or supervision of minors" and 300 feet of same if located on premises "not intended primarily" for that use); *id.* §§ 14-208.16(a)(1)-(2) (prohibiting a sex offender registrant from knowingly residing at any location or structure "within 1,000 feet of any property line of a property on which any public or nonpublic school or child care center is located"). Given that (1) Defendant's liberty and privacy interests are limited for the protection of children particularly, and (2) Defendant was convicted of sexually abusing a minor, we hold that his privacy rights are appreciably diminished for purposes of analyzing SBM's reasonableness. *Cf. Hilton*, ¶ 19 (noting that the State's SBM program was enacted to "protect[] the public—especially children").

3. Intrusiveness of SBM

¶ 22 The third and final factor we must consider is the degree of SBM's intrusion into Defendant's privacy interests. *Id.* ¶ 32. As with the other factors, our holding in *Griffin II* looked almost exclusively to *Grady III* in weighing this factor against a conclusion of reasonableness. 270 N.C. App. at 108, 840 S.E.2d at 274-75. Now, with the benefit of *Hilton*'s and *Strudwick*'s latest analyses of this issue and the General Assembly's amendments to the SBM regime, we hold that Defendant's thirty-year term of SBM works a relatively lesser intrusion than previously discussed in *Griffin II*.

¶ 23 *Hilton* and *Strudwick* are the most recent precedents describing the intrusiveness of SBM and, as Defendant acknowledges, they "appear[] far less concerned than the *Grady III* Court with the intrusiveness of SBM." *Hilton* emphasized the distinction between SBM and other, more intrusive penalties available to the State. *Hilton*, ¶¶ 33-35. It further deemed the practical limitations of SBM—like the weight, size, and charging requirements of the monitoring device—"more inconvenient than intrusive." *Id.* ¶ 32. *Strudwick*, for its part, emphasized the limited purposes for which the location data collected may be used, *Strudwick*, ¶ 23, and observed that there are several procedural mechanisms, including those contained in the General Assembly's recent revisions to the SBM statutes, that allow for judicial review after SBM is imposed, *id.* ¶ 24. *See also Hilton*, ¶ 34. Thus, in both *Hilton* and *Strudwick*, our Supreme Court determined that SBM "constitutes a pervasive but tempered intrusion." *Strudwick*, ¶ 25 (citing *Hilton*, ¶ 35).[3]

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3. Defendant argues that neither *Hilton* nor *Strudwick* should guide our analysis on the basis that they purportedly failed to consider the scope of locational data captured

¶ 24 The record evidence in this case demonstrates that the physical device Defendant must wear under the SBM order is physically similar to that analyzed in *Hilton* and *Strudwick*; thus, it is "more inconvenient than intrusive" from a practical perspective. *Hilton*, ¶ 32. As for the nature of the data collected, it is the same as that held to be "pervasive but tempered" in *Strudwick*. *Strudwick*, ¶ 25. Defendant also has the new benefit of the legislative changes to SBM that post-date *Grady III* and *Griffin II*; Defendant may petition the trial court to modify or terminate his enrollment, N.C. Gen. Stat. § 14-208.46(a), and the trial court must cap his term of SBM at ten years. *Anthony*, ¶ 19. These considerations, together with the mitigating fact that Defendant's unmodified SBM enrollment is for a term of years rather than life, *Griffin II*, 270 N.C. App. at 108, 840 S.E.2d at 275, leads us to hold that the intrusion into Defendant's diminished privacy interests is not so severe as to render it constitutionally unreasonable.

4. SBM's Reasonableness under the Totality of the Circumstances

¶ 25 The State has legitimate and demonstrated interests in protecting the public and children by preventing future sex crimes and solving those that do occur. *Strudwick*, ¶ 26; *Hilton*, ¶ 25. That interest is not outweighed in this case by SBM's intrusion into Defendant's diminished privacy expectations as an adult-child offender. As such, under the totality of the circumstances, we hold that the SBM order entered by the trial court is reasonable for purposes of the Fourth Amendment.

III. CONCLUSION

¶ 26 Following our Supreme Court's most recent precedents in *Hilton* and *Strudwick* and based on recent legislative amendments effectively shortening Defendant's participation in SBM to ten years, we cannot agree with Defendant's argument that, considering the totality of the circumstances, his constitutional rights have been violated. We affirm the trial court's SBM order as a result.

AFFIRMED.

Judges CARPENTER and GORE concur.

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and the intrusion into Defendant's home. We rejected this same argument in *Anthony*, concluding that *Hilton* and *Strudwick* fully considered those facts in analyzing the privacy interests at stake. *Anthony*, ¶¶ 41-44. We decline to adopt Defendant's reading of *Hilton* and *Strudwick* in light of our analysis in *Anthony*.

STATE OF NORTH CAROLINA
v.
CHARLES VIRGAL GUICE, DEFENDANT

No. COA22-163

Filed 18 October 2022

1. Threats—communicating threats—true threat—subjective intent—criminal pleading—sufficiency

A criminal pleading charging defendant with communicating threats under N.C.G.S. § 14-277.1 was not fatally defective where it tracked the exact language of the statute and therefore adequately alleged the subjective intent element of a "true threat" by alleging that defendant "willfully" threatened to physically injure another person.

2. Threats—communicating threats—specific intent—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of communicating threats (under N.C.G.S. § 14-277.1) where the State presented substantial evidence that defendant possessed the specific intent required to make a "true threat." The evidence showed that when a security guard for an apartment complex—who was responding to a disturbance call—knocked on an apartment door, defendant answered the door in a "very aggressive and angry" manner, "got in [the security guard's] face," and told the security guard he would beat him up; additionally, the security guard testified that he called 911 because he understood defendant's statement as a threat and felt that defendant would carry out that threat.

3. Threats—communicating threats—true threat—specific intent—jury instruction

In a prosecution for communicating threats under N.C.G.S. § 14-277.1, the trial court properly instructed the jury on the specific intent element of a "true threat" (also referred to as the "subjective component" of a true threat) by saying that the State must prove "that the defendant willfully threatened to physically injure" another person and that "[a] threat is made willfully if it is made intentionally or knowingly."

Appeal by Defendant from judgment entered 14 April 2021 by Judge Jesse B. Caldwell, III, in Buncombe County Superior Court. Heard in the Court of Appeals 24 August 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Francisco Benzoni, for the State.

Sigler Law PLLC, by Kerri L. Sigler, for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Charles Virgal Guice appeals from a judgment entered upon a jury's verdict finding him guilty of communicating threats. Defendant argues that the trial court erred by denying his motion to dismiss because the charging document and the State's evidence failed to show that Defendant's words constituted a true threat. Defendant also contends the trial court erred in denying Defendant's written request for a jury instruction on true threats. We find no error.

I. Factual and Procedural Background

¶ 2 On 28 May 2020, an Asheville Terrace Apartments resident called security after she heard arguing as well as "a slap and . . . crying[]" in a neighboring apartment. After security guard Christopher Lewis knocked on the neighboring apartment door, "[D]efendant came to the door and asked him what the F does he want." Lewis testified that when Defendant opened the door "[h]e was very aggressive and angry because he got up in my face and everything." After Lewis told Defendant he needed to leave the building, Defendant "got in [Lewis's] face aggressively and [] said that he would beat [Lewis's] little ass."

¶ 3 Lewis testified that Defendant is approximately "6 foot something," Lewis is "like 5'8"," and that Lewis had to look up to see Defendant's eyes. Lewis further testified that he took Defendant's statement as a threat and felt like Defendant was going to carry out that threat based on "[h]is anger and his body language and the way he was coming towards me like, because he adjusted his pants and everything and then his like body language gave off like he would actually try to fight me." Lewis called 911 while he was in the hallway trying to talk to Defendant. Eventually, Defendant left the property without any further issues.

¶ 4 On 28 May 2020, Defendant was charged with communicating threats. On 10 March 2021, the district court found Defendant guilty of communicating threats, and Defendant appealed to the superior court. During the superior court trial, Defendant moved to dismiss the communicating threats charge at the close of the State's evidence and at the close of all evidence. The superior court denied Defendant's motions to dismiss on both occasions.

¶ 5 Thereafter, Defendant requested an additional jury instruction that purportedly "track[ed] the State v. Taylor case by adding a couple of the elements that need to be prove[n]" for the communicating threats charge. The trial court judge denied Defendant's requested instruction stating that "the language that [Defendant] advances is somewhat redundant or surplusage or repetitious." The jury subsequently found Defendant guilty of communicating threats. Defendant timely appeals.

II. Analysis

¶ 6 When First Amendment issues are raised, "an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *State v. Taylor*, 379 N.C. 589, 2021-NCSC-164, ¶ 44 (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)). "This obligation supplements rather than supplants the analysis we typically utilize when reviewing a trial court's decision[,]" but "does not empower an appellate court to ignore a trial court's factual determinations." *Id.* ¶¶ 44–45. Defendant asserts "the trial court erred by denying [Defendant's] motion to dismiss under *State v. Taylor* because the charging document and the State's evidence failed to present facts showing that [Defendant's] words were a 'true threat.' " Additionally, Defendant contends that "the trial court erred in denying defense counsel's written request for a jury instruction containing the element of 'true threat.' " We address each argument.

A. Charging Document

¶ 7 **[1]** "When a criminal defendant challenges the sufficiency of [a criminal pleading] lodged against him, that challenge presents this Court with a question of law which we review de novo." *State v. Oldroyd*, 380 N.C. 613, 2022-NCSC-27, ¶ 8 (citation omitted). Criminal pleadings function to "identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981) (citation omitted). North Carolina law dictates that "[a] criminal pleading must contain . . . [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense . . . ." N.C. Gen. Stat. § 15A-924(a)(5) (2021).

¶ 8 Defendant argues that "[t]he charging document failed to allege facts supporting the subjective intent component of the essential element of 'true threat' and was therefore fatally defective and should have

been dismissed." True threats are a form of speech unprotected by the First Amendment. *See Watts v. United States*, 394 U.S. 705, 708 (1969); *see also Taylor*, ¶ 35. "When an individual communicates a true threat, the First Amendment allows the State to punish the individual because a true threat is not the 'type of speech [which is] indispensable to decision making in a democracy.' " *Taylor*, ¶ 35 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)). The Supreme Court of the United States has defined true threats as:

> [T]hose 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 protect[s] 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) (citations and internal quotation marks omitted).

¶ 9 Defendant relies heavily on this Court's decision in *State v. Taylor*, 270 N.C. App. 514, 841 S.E.2d 776 (2020), and the portion of that decision affirmed by our Supreme Court in *State v. Taylor*, 379 N.C. 589, 2021-NCSC-164, to support his main argument on appeal: that the subjective component of true threats was absent at various stages throughout his trial. In *Taylor*, the defendant was convicted of "knowingly and willfully threatening to kill a court officer" under N.C. Gen. Stat. § 14-16.7(a), after the defendant "posted a string of angry comments" on Facebook that "contained troubling language" directed toward the local district attorney. *Taylor*, ¶¶ 1–3.

¶ 10 On appeal, this Court reversed the trial court's ruling and vacated the defendant's conviction, concluding that "his conviction violated the First Amendment" because the State was required, but failed, to prove both the subjective and objective element of a true threat. *Id.* ¶¶ 3, 14. Our Court held that "[t]he State needed to establish the objective component that [the] defendant's statements would be understood by people hearing or reading it in context as a serious expression of an intent to

kill or injure" and that the defendant "intended that the statement be understood as a threat in order to satisfy the subjective component." *Id.* ¶¶ 3, 14 (quoting *Taylor*, 270 N.C. App. at 557, 841 S.E.2d at 813) (internal quotation marks omitted).

¶ 11 Our Supreme Court agreed with that portion of the decision, holding that the State was constitutionally required to prove the objective and subjective elements to convict the defendant under the anti-threat statute. *Id.* ¶ 42. However, our Supreme Court remanded the case for a new trial with a properly instructed jury because it found that the State's evidence was sufficient to allow a reasonable jury to conclude that the defendant had made a true threat. *Id.* ¶¶ 53–54.

¶ 12 In this case, Defendant was charged with communicating threats under N.C. Gen. Stat. § 14-277.1, which states that:

> (a) A person is guilty of a Class 1 misdemeanor if without lawful authority:
>
> (1) He *willfully* threatens to physically injure the person or that person's child, sibling, spouse, or dependent or willfully threatens to damage the property of another;
>
> (2) The threat is communicated to the other person, orally, in writing, or by any other means;
>
> (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
>
> (4) The person threatened believes that the threat will be carried out.

N.C. Gen. Stat. § 14-277.1 (2021) (emphasis added). In comparing this statute with N.C. Gen. Stat. § 14-16.7(a), the anti-threat statute at issue in *Taylor*, it is noteworthy that both statutes require the threat to be made "willfully." *See* N.C. Gen. Stat. § 14-16.7(a) (2021) ("Any person who knowingly and willfully makes any threat . . . ."). In *Taylor*, this Court acknowledged the use of this language pointing out that:

> The "knowingly and willfully" language in [N.C. Gen. Stat.] § 14-16.7(a) imposes an element of intent, but in this case the State and the trial court interpreted "knowingly and willfully" as meaning Defendant understood the words he wrote and intentionally communicated them by posting them on Facebook;

> and that Defendant knew [the district attorney] was a court officer. Defendant did not object on the basis that the statute itself should be read as requiring that Defendant intended his Facebook posts to threaten anyone.

Taylor, 270 N.C. App. at 544, 841 S.E.2d at 805, n.9.

¶ 13 However, as the State correctly points out in the case before us, there is no evidence to suggest that the trial court here interpreted the meaning of "willfully threaten" in N.C. Gen. Stat. § 14-277.1, as the trial court in *Taylor* did for N.C. Gen. Stat. § 14-16.7(a), to mean anything other than Defendant had the specific intent to threaten to physically injure Christopher Lewis. Additionally, the trial court's jury instruction supports the argument that the trial court's interpretation of the phrase "willfully threaten" did provide for the subjective component of a true threat: "First, the state must prove beyond a reasonable doubt that defendant willfully threatened to physically injure . . . Christopher Lewis. A threat is any expression of an intent or a determination to physically injure another person. A threat is made willfully if it is made intentionally or knowingly."

¶ 14 The magistrate's order tracked the exact language of N.C. Gen. Stat. § 14-277.1, alleging that:

> [O]n or about the date of offense shown and in the county named above the [D]efendant named above unlawfully and willfully did threaten to physically injure the person of SECURITY OFFICER CHRIS LEWIS. The threat was communicated to OFFICER LEWIS by [] ORALLY SPREAKING TO LEWIS, "I'M GUNNA STOMP YOUR LITTLE ASS", WHILE OFFICER LEWIS WAS ATTEMPTING TO DO HIS JOB and the threat was made in a manner and under circumstances which would cause a reasonable person to believe that the threat was likely to be carried out and the person threatened believed that the threat would be carried out.

¶ 15 Since the language of the charging document tracks the language of N.C. Gen. Stat. § 14-277.1, which includes the subjective component of true threats, we hold that the State sufficiently "assert[ed] facts supporting every element of [the] criminal offense . . . ." N.C. Gen. Stat. § 15A-924(a)(5) (2021).

B. Insufficient Evidence

¶ 16 **[2]** We review the denial of a motion to dismiss for insufficient evidence de novo. *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018) (citations omitted). A trial court's ruling on a motion to dismiss is determined by "whether there is substantial evidence of each essential element of the crime and [whether] the defendant is the perpetrator." *State v. Dover*, 381 N.C. 535, 2022-NCSC-76, ¶ 28 (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, 265 S.E.2d 164, 169 (1980). "In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *State v. Blagg*, 377 N.C. 482, 2021-NCSC-66, ¶ 10 (citation omitted). "The trial court's function is to determine whether the evidence allows a reasonable inference to be drawn as to the defendant's guilt of the crimes charged." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (citation and internal quotation marks omitted). "In so doing the trial court should only be concerned that the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *Id.* (citation omitted).

¶ 17 Defendant only challenges that the State failed to present sufficient evidence that he possessed the specific intent constitutionally required to have made a true threat. We disagree.

¶ 18 Here, Lewis testified that Defendant was "a foot or two" away from him when Defendant "got in [Lewis's] face aggressively and he said that would beat [Lewis's] little ass." Lewis further testified that he took Defendant's statement as a threat and felt like Defendant was going to carry out that threat, such that Lewis felt the need to call 911. Additionally, a witness who lived in a neighboring apartment testified that Defendant answered the door by asking Lewis "what the F" he wanted and that when Lewis arrived, Defendant was "fussing and cussing." Viewing this evidence in the light most favorable to the State, we conclude that this evidence "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that Defendant possessed the specific intent in making the threat against Lewis. *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. Thus, the trial court properly denied Defendant's motion to dismiss.

C. Jury Instructions

¶ 19 **[3]** Finally, Defendant argues that "the trial court erred in denying defense counsel's written request for a jury instruction containing the element of 'true threat.' " We disagree.

¶ 20 This Court reviews challenges to a trial court's jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citing *State v. Ligon*, 332 N.C. 224, 241–42, 420 S.E.2d 136, 146–47 (1992); *State v. Levan*, 326 N.C. 155, 164–65, 388 S.E.2d 429, 434 (1990)). Requested jury instructions should be given when "(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *State v. Guerrero*, 279 N.C. App. 236, 2021-NCCOA-457, ¶ 9 (citations and internal quotation marks omitted). The trial court is not required to follow any strict format when instructing the jury "as long as the instruction adequately explains each essential element of the offense." *State v. Walston*, 367 N.C. 721, 731, 766 S.E.2d 312, 319 (2014) (citation and internal quotation marks omitted).

¶ 21 The trial court instructed the jury on the following, regarding Defendant's specific intent: "[S]tate must prove beyond a reasonable doubt that the defendant *willfully* threatened to physically injure . . . Christopher Lewis. A threat is any expression of an intent or a determination to physically injure another person. *A threat is made willfully if it is made intentionally or knowingly*." (Emphasis added). Defendant's additional proposed instructions concerning the subjective component of true threats was "that [Defendant] himself specifically intended the statement to be understood as a real threat expressing his intention to carry out the actions threatened."

¶ 22 Comparing the trial court's instruction with Defendant's proposed instruction, we agree with the trial court judge that the court's instruction contained the essential elements of a true threat, namely the subjective component. Adding Defendant's language would have been redundant. The subjective component, or specific intent, of true threats is covered by defining the phrase of willfully threaten as "intentionally or knowingly" "expressi[ng] . . . an intent or a determination to physically injure another person." We therefore hold that the trial court properly instructed the jury regarding the communicating threats charge, which included the specific intent element of a true threat.

III. Conclusion

¶ 23 Based on the foregoing reasons, we hold Defendant received a fair trial, free from error.

NO ERROR.

Judges TYSON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
BRANDON KEITH HUNTER

No. COA22-126

Filed 18 October 2022

Search and Seizure—traffic stop—shining flashlight inside vehicle—contraband in plain view—not a search

In a prosecution for possession of a schedule II controlled substance and related charges, the trial court properly denied defendant's motion to suppress evidence from his arrest because the arresting officer did not conduct a "search" within the meaning of the Fourth Amendment when he approached defendant's car during a lawful traffic stop, looked inside the car by shining a flashlight, and observed a plastic baggie in plain view that contained a cocaine-like substance. Further, the officer's subjective motive for conducting the traffic stop had no bearing on the Fourth Amendment analysis.

Appeal by Defendant from order entered 12 August 2021 by Judge F. Donald Bridges in Gaston County Superior Court. Heard in the Court of Appeals 7 September 2022.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Brandon Keith Hunter appeals from the trial court's order denying Defendant's motion to suppress and judgment entered upon Defendant's plea of no contest to possession of a schedule II controlled substance, possession of non-marijuana drug paraphernalia, and failure to stop at a stop sign. Defendant contends that the trial court erred by denying his motion to suppress because there was no probable cause to search and seize items from Defendant's car. Because Officer Stanley did not conduct a search within the meaning of the Fourth Amendment when he shined a flashlight into Defendant's vehicle and because it was immediately apparent that the plastic baggie in plain view was contraband, we affirm the trial court's order and judgment.

I. Procedural History and Factual Background

¶ 2 On the evening of 19 October 2020, Officers Steven Hoyle and Heath Stanley were patrolling near Glenn Street in Gaston County when they observed a car, driven by Defendant, roll through a stop sign. The officers activated their emergency lights and sirens, and the car continued to roll for approximately 200 feet before coming to a stop. Stanley approached the passenger side of the car, initiated conversation with Defendant, and shined his flashlight around "[Defendant]'s area, the center console area, passenger area and behind [Defendant]'s seat" to look for weapons or contraband. While Stanley was doing so, Hoyle returned to the police car "to do a warrant check of the vehicle and do a warrant check of the vehicle and Mr. Hunter's license."

¶ 3 Stanley continued speaking with Defendant and shining the flashlight through the car windows for a "couple of minutes" before seeing a plastic baggie between Defendant's seat and the door. Officer Stanley suspected the plastic baggie contained "illegal narcotics and crack-cocaine" because it had a "white rock substance inside" and had the "tie ripped off." Defendant was detained, and the plastic baggie retrieved. The officers suspected the contents of the baggie was crack-cocaine, and the contents "later field tested positive."

¶ 4 Defendant was indicted for possession of a schedule II controlled substance, possession of non-marijuana drug paraphernalia, and failure to stop at a stop sign. Defendant filed a motion to suppress, arguing that Defendant had done nothing other than run a stop sign; that Officer Stanley deliberately extended contact with Defendant to continue a warrantless search of Defendant's car; and that even if Officer Stanley observed the plastic baggie in plain view, it did not give rise to probable cause to search the vehicle. The trial court denied the motion.

¶ 5 Defendant entered a plea of no contest to possession of a schedule II controlled substance, possession of non-marijuana drug paraphernalia, and failure to stop at a stop sign, reserving his right to appeal the denial of his motion to suppress. The trial court sentenced Defendant to 6 to 17 months' imprisonment, suspended for 24 months of supervised probation. Defendant timely appealed.

II. Discussion

¶ 6 Defendant contends that the trial court erred by denying his motion to suppress because Stanley lacked probable cause to search the car, and the stop was inappropriately pretextual.

¶ 7 "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." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (citations omitted). "The trial court's findings of fact regarding a motion to suppress are conclusive and binding on appeal if supported by competent evidence." *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (2007) (citations omitted). "Unchallenged findings of fact are binding on appeal." *State v. Fizovic*, 240 N.C. App. 448, 451, 770 S.E.2d 717, 720 (2015) (citation omitted). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Sutton*, 259 N.C. App. 891, 893, 817 S.E.2d 211, 213 (2018) (citation omitted).

A. Probable Cause

¶ 8 Defendant first contends that Stanley lacked probable cause to search the vehicle and seize the plastic baggie of contraband.

¶ 9 The Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures. *State v. Pasour*, 223 N.C. App. 175, 176, 741 S.E.2d 323, 324 (2012) (citation omitted); *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984) (citation omitted). "[W]hat the Constitution forbids is not all searches and seizures, but *unreasonable* searches and seizures . . . . A search occurs when the government invades reasonable expectations of privacy to obtain information." *State v. Ladd*, 246 N.C. App. 295, 301, 782 S.E.2d 397, 401 (2016) (citations omitted). "Officers who lawfully approach a car and look inside with a flashlight do not conduct a 'search' within the meaning of the Fourth Amendment." *State v. Brooks*, 337 N.C. 132, 144, 446 S.E.2d 579, 587 (1994) (citing *Texas v. Brown*, 460 U.S. 730 (1983) (holding that an officer's initial stop of defendant's vehicle was valid, and shining his flashlight into the car and

changing his position to see what was inside, did not violate any Fourth Amendment rights); *State v. Whitley*, 33 N.C. App. 753, 236 S.E.2d 720 (1977). Moreover, "[v]iewing an article that is already in plain view does not involve an invasion of privacy and, consequently, does not constitute a search implicating the Fourth Amendment." *State v. Alexander*, 233 N.C. App. 50, 55, 755 S.E.2d 82, 87 (2014) (citations omitted).

¶ 10 "When an officer's presence at the scene is lawful, . . . he may, without a warrant, seize evidence which is in plain sight and which he reasonably believes to be connected with the commission of a crime." *State v. Crews*, 286 N.C. 41, 45, 209 S.E.2d 462, 465 (1974) (citations omitted). Under the plain view doctrine, a warrantless seizure is lawful if

> (1) the officer was in a place where he had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) it was immediately apparent to the police that the items observed were evidence of a crime or contraband.

State v. Newborn, 279 N.C. App. 42, 2021-NCCOA-426, ¶ 37 (emphasis and citation omitted). "Our courts have defined the term immediately apparent as being satisfied where the police have probable cause to believe that what they have come upon is evidence of criminal conduct." *State v. Green*, 146 N.C. App. 702, 706, 554 S.E.2d 834, 836 (2001) (ellipses, quotation marks, and citation omitted).

¶ 11 Here, the trial court made the following relevant and unchallenged findings of fact:

> 4. As Officers Hoyle (driving) and Stanley (passenger) were on Glenn Street, they got behind a blue Chevrolet PT Cruiser being driven by the defendant.
>
> 5. The Chevrolet PT Cruiser rolled through a duly erected (sic) providing reasonable suspicion to stop the vehicle.
>
> 6. The officers activated their blue lights and siren.
>
> 7. The PT Cruiser continued to roll forward for 200 feet . . . where he stopped.
>
> 8. Officers approached the vehicle: Officer Hoyle on the driver side and Officer Stanley on the passenger side.

> 9. Officers got the Defendant's ID, and the Defendant provided a bill of sale on the vehicle and engaged the defendant about the sale of the vehicle.
>
> 10. During the conversation, Officer Stanley continually shined his flashlight inside the vehicle.
>
> 11. Officer Hoyle went back to the vehicle to do a record check/license check on the Defendant.
>
> 12. Officer Stanley remained engaged and talking to the defendant and continued to shine the flashlight inside the vehicle.
>
> 13. On the third pass through with the flashlight into the back seat of the vehicle, Officer Stanley caught a glimpse of what appeared to be a white plastic bag he deduced to be possibly a controlled substance, either crack or powder cocaine.
>
> 14. Stanley communicated to Officer Hoyle what he saw in the vehicle.
>
> 15. Stanley went to the driver side of the car and removed, searched and detained the Defendant.
>
> 16. Officer Stanley then opened the back driver-side door, reached down to the floorboard and extracted a plastic bag that upon closer examination appeared to contain powder or rocklike substance and deduced that the substance was cocaine and field tested the substance whereupon it tested positive.

Upon these facts, the trial court concluded as follows:

> 1. Even if there was a purposeful interior (sic) of the vehicle with the use of a flashlight and even though the item found was not obviously apparent, nevertheless it was discovered by Officer Stanley with the naked eye, with the use of a flashlight without opening the door or going inside the vehicle.
>
> 2. Officer Stanley was immediately able to recognize that the plastic baggie and rock-like substance was contraband.
>
> 3. Although there was some lapse of time between the time of the initial stop and when the defendant was

> extricated from the vehicle, it does not appear that the officers prolonged the stop in order to do a search not related to the stop of the vehicle.
>
> 4. Thus, the search was not unreasonable.
>
> 5. That the purpose of the stop, even if it was pretextual, was lawful because it was conducted after a violation of a traffic law.
>
> 6. Thus, there was no violation of State or Federal law and the [s]top on the defendant was Constitutional and valid.

¶ 12 The trial court's findings show that Hoyle and Stanley watched Defendant roll through a duly erected stop sign, supporting the conclusion that the traffic stop was lawful. The facts further show that after Defendant stopped, Stanley approached Defendant's car and engaged Defendant in conversation while shining a flashlight into the interior of Defendant's car. While doing so, Stanley spotted a white plastic baggie. Stanley did not conduct a "search" within the meaning of the Fourth Amendment when he lawfully approached Defendant's car and looked inside with a flashlight. *See Brooks*, 337 N.C. at 144, 446 S.E.2d at 587. Furthermore, Stanley did not conduct a "search" within the meaning of the Fourth Amendment when he observed the plastic baggie in plain view. The findings of fact support the trial court's conclusion that "the search was not unreasonable."

¶ 13 Moreover, the trial court found that upon observing the plastic baggie, Stanley "deduced [it] to be possibly a controlled substance, either crack or powder cocaine." This finding supports the trial court's conclusion that Stanley was "immediately able to recognize that the plastic baggie and rock-like substance was contraband." *See Crews*, 286 N.C. at 45, 209 S.E.2d at 465. Because Stanley was in a place where he had a right to be when the baggie was discovered, the baggie was discovered inadvertently, and Stanley had probable cause to believe that the baggie and its contents were contraband, Stanley was authorized to seize the baggie without a warrant. *See Newborn*, 2021-NCCOA-426 at ¶ 37. Accordingly, the findings of fact support the trial court's conclusion that "there was no violation of State or Federal law . . . ."

B. Pretextual Stop

¶ 14 Defendant contends "[f]or preservation purposes" that the traffic stop of Defendant's vehicle was inappropriately pretextual.

¶ 15 As Defendant concedes, both the United States Supreme Court and our North Carolina Supreme Court have ruled that an officer's subjective motive for a stop has no bearing on the Fourth Amendment analysis. *See Whren v. United States*, 517 U.S. 806, 813 (1996); *State v. McClendon*, 350 N.C. 630, 635-36, 517 S.E.2d 128, 131-32 (1999).

> In analyzing federal constitutional questions, we look to decisions of the United States Supreme Court[,] . . . [and] decisions of the North Carolina Supreme Court construing federal constitutional . . . provisions, and we are bound by those interpretations. We are also bound by prior decisions of this Court construing those provisions, which are not inconsistent with the holdings of the United States Supreme Court and the North Carolina Supreme Court.

Johnston v. State, 224 N.C. App. 282, 288, 735 S.E.2d 859, 865 (2012) (citing *State v. Elliott*, 360 N.C. 400, 421, 628 S.E.2d 735, 749 (2006), and *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989)).

III. Conclusion

¶ 16 The trial court's denial of Defendant's motion to suppress is affirmed.

AFFIRMED.

Judges DIETZ and CARPENTER concur.

STATE v. MASON

[286 N.C. App. 121, 2022-NCCOA-684]

STATE OF NORTH CAROLINA
v.
DEDRIC MICHELLE MASON

No. COA22-216

Filed 18 October 2022

1. Evidence—expert opinion—reasonableness of deadly force—no more qualified than jury—exclusion proper

In a prosecution for second-degree murder in which defendant claimed that she fatally shot a man because she believed he was going to kill her friend during a physical altercation, the trial court did not abuse its discretion by excluding the opinion testimony of defendant's expert witness regarding the use of force and self-defense, which did not meet the requirements of relevance and qualification pursuant to Evidence Rule 702. The determination of the reasonableness of defendant's actions did not require specialized knowledge, the witness was not in a better position than the jury to make that determination based on the same evidence (including a video recording and eyewitness accounts), and defendant failed to establish that the witness's testimony was the product of reliable principles and methods.

2. Evidence—lay opinion—threat assessment—reasonableness of deadly force—prejudice analysis

In a prosecution for second-degree murder in which defendant claimed that she fatally shot a man because she believed he was going to kill her friend during a physical altercation, the admission of a lay witness's opinion that no one's life was in danger on the night in question, even if erroneously admitted, was not prejudicial because the opinion was based on the witness's observations as a participant in the conflict and because substantially similar evidence was admitted without objection from other eyewitnesses regarding their perception of the threat level.

Appeal by defendant from judgment entered 23 September 2021 by Judge Lori I. Hamilton in Rowan County Superior Court. Heard in the Court of Appeals 23 August 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly N. Callahan, for the State.

Marilyn G. Ozer for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Dedric Michelle Mason appeals from a judgment entered upon a jury's verdict finding her guilty of second-degree murder. On appeal, Defendant challenges the exclusion of her expert's testimony and the admission of the lay opinion testimony of a State's witness. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error.

Background

¶ 2 Defendant and James Davis were acquaintances, and although Defendant knew Mr. Davis's longtime girlfriend, Cheviss Bennett, she had not interacted with her much prior to the early morning hours of 21 April 2018. However, Defendant's friend, Andrea Dillard, had a more complicated history with Mr. Davis and Ms. Bennett. Sometime before 21 April 2018, Ms. Bennett saw Mr. Davis walking Ms. Dillard to her car outside of FishZilla Arcade in Salisbury, North Carolina. Ms. Bennett immediately confronted Mr. Davis in the parking lot; Mr. Davis, Ms. Bennett, and Ms. Dillard then began "exchanging words" regarding the nature of Mr. Davis's interactions with Ms. Dillard. Mr. Davis ended his relationship with Ms. Bennett.

¶ 3 At approximately 1:00 a.m. on 21 April 2018, Defendant and Ms. Dillard arrived at FishZilla. Mr. Davis and Ms. Bennett were already present at the arcade; having reconciled following their argument with Ms. Dillard, they were playing together at one of the gaming tables when Defendant and Ms. Dillard arrived. Despite Ms. Dillard and Ms. Bennett's acrimonious relationship, Defendant and Ms. Dillard opted to sit at the same gaming table as Mr. Davis and Ms. Bennett, because sitting at a table "that's been paid into" by active players would allow Defendant and Ms. Dillard "to get money quicker[.]"

¶ 4 After a few minutes, an argument ensued. Ms. Bennett refused to play with Defendant and Ms. Dillard, and she repeatedly asked Mr. Davis if he was ready to leave. Defendant and Ms. Dillard exchanged insults with Ms. Bennett, and the conflict escalated, with all three women shouting loudly. Curtis Quick, II, a FishZilla employee, and Robert Livengood, the security guard, approached the table and directed the group to quiet down or to leave. Ms. Bennett and Mr. Davis decided to leave in order to avoid Defendant and Ms. Dillard; Defendant and Ms. Dillard also decided to leave at the same time. Consequently, the four wound up standing

together at the front counter, waiting to "cash out." The arguing continued and began to intensify. At one point, Mr. Davis placed his cell phone on the counter, and Defendant threw it across the room.

¶ 5 The argument between Defendant and Mr. Davis then became physical. Despite video recordings from multiple angles inside the arcade, as well as interviews of numerous eyewitnesses, the identity of the initial aggressor remains unclear, although Defendant and Ms. Dillard both claimed that Mr. Davis was the aggressor. Mr. Quick observed "some intense shoving" and "punches" between Defendant and Mr. Davis. Mr. Livengood witnessed Defendant "make a strike toward . . . [or] raise her hand toward" Mr. Davis and saw Mr. Davis push Defendant into the ATM near the front counter. Ms. Bennett saw Mr. Davis put his arm out near Defendant to push her back. After some shoving between Defendant and Mr. Davis, Defendant was knocked into the ATM, hit her head, and landed on the floor.

¶ 6 At trial, Ms. Dillard and Defendant testified that Mr. Davis began to attack Ms. Dillard after she told him to stop punching Defendant while Defendant was on the floor. However, Ms. Bennett and Mr. Livengood testified that it was Ms. Dillard who initiated an assault upon Mr. Davis while he was still engaged in the conflict with Defendant.

¶ 7 As Mr. Davis and Ms. Dillard were fighting, they tripped over a chair and fell to the floor. Mr. Davis then put his hands around Ms. Dillard's throat. Ms. Dillard testified at trial that in that moment, she believed that her life was in danger: "I really thought he was going to take my life. He continued to attack me, and as he was choking me, I'm beginning to black out and I really thought my life was about to be over."

¶ 8 Although Defendant yelled for help, no one in FishZilla responded. Accordingly, once Defendant was able to stand, she walked over to where Ms. Dillard and Mr. Davis were fighting on the floor, pulled out her handgun, and fired. Defendant shot Mr. Davis twice while he was on top of Ms. Dillard, once in the back and once in the chest. Mr. Davis later died from these injuries.

¶ 9 Defendant testified that she initially shot Mr. Davis because she believed that he was going to kill Ms. Dillard. She testified that she fired a second shot because "he hadn't reacted to the first shot at all"; after the first shot, Mr. Davis "was still on top of [Ms. Dillard] and didn't really move or stop[.]" Defendant also stated that she fired twice because she was trained in her concealed carry class "to shoot until there's no longer a threat."

¶ 10 On 14 May 2018, a Rowan County grand jury returned a true bill of indictment charging Defendant with second-degree murder. The matter came on for trial in Rowan County Superior Court on 14 September 2021. Defendant maintained throughout the trial that she had acted in self-defense and defense of others.

¶ 11 On 23 September 2021, the jury returned its verdict finding Defendant guilty of second-degree murder. The trial court entered judgment upon the jury's verdict and sentenced Defendant to a term of 150 to 192 months in the custody of the North Carolina Division of Adult Correction. Defendant gave notice of appeal in open court.

Discussion

¶ 12 On appeal, Defendant argues that the trial court abused its discretion by (1) "precluding [her] from putting on expert testimony" concerning the principles of self-defense and use of force, and (2) admitting Ms. Bennett's lay opinion testimony as to whether she believed that anyone was in danger prior to the shooting that evening.

I. Standard of Review

¶ 13 A trial court's decision regarding whether proffered expert testimony meets the requirements of Rule 702(a) of the North Carolina Rules of Evidence "will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citation omitted). "[A] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* (citation omitted). This standard of review applies "whether the trial court has admitted or excluded the testimony[.]" *Id.*

¶ 14 Similarly, "[w]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Dove*, 274 N.C. App. 417, 422, 852 S.E.2d 681, 685 (2020) (citation omitted), *disc. review denied*, 376 N.C. 666, 853 S.E.2d 151 (2021).

II. Expert Opinion

¶ 15 **[1]** Defendant first argues that the trial court abused its discretion by excluding her expert's testimony because the principles of self-defense and use of force "are not common knowledge[.]" Defendant contends that she was prejudiced by the exclusion of this testimony, in that it violated her "federal and state constitutional rights to put on witnesses in [her] defense, to have a fair trial and due process." We disagree.

A. Defendant's Proffer of Expert Testimony

¶ 16 In a pretrial hearing on 10 September 2021, Defendant proffered the testimony of three retired Rowan County law enforcement officers—Investigator Samuel Henline, Sheriff George Wilhelm, and Sergeant Carl Dangerfield. During voir dire, the trial court determined that it would reserve its ruling on the admissibility of the expert testimony until "the time that . . . Defendant seeks to introduce that testimony" at trial.

¶ 17 Defendant called Investigator Henline and Sheriff Wilhelm as witnesses at trial, but did not call Sergeant Dangerfield. Sheriff Wilhelm briefly testified regarding his experience as a concealed carry instructor. Defendant then proffered Investigator Henline's testimony. During his second voir dire, Investigator Henline first testified as to his qualifications and background. He had over 35 years of experience in law enforcement and was "a certified general law enforcement instructor[,]" but his specialty was arson and explosives investigations.

¶ 18 Investigator Henline clarified that his training on the use of deadly force differed from Defendant's because he received his training as a law enforcement officer; as such, he did not testify to the instructions regarding the use of deadly force that Defendant received in her civilian concealed carry class. Investigator Henline explained that when he trains law enforcement officers regarding the use of deadly force, he instructs that "there is not a specified number" of shots to fire in response to a threat, but rather, they should "shoot until the threat stops." He noted, however, that two shots would typically suffice for this purpose. Investigator Henline opined that civilians are justified in using deadly force "to protect themselves or a third party from imminent death or bodily -- serious bodily injury."

¶ 19 Investigator Henline next explained that he typically uses "the scientific method with a systematic approach" to formulate his opinions, pursuant to which he collects evidence, conducts interviews, and submits his findings to peer review. In preparing for Defendant's case, he reviewed the State's discovery, watched the video recording of the shooting "[s]everal" times, and interviewed Defendant and Ms. Dillard regarding the shooting. Based on this investigatory work, Investigator Henline formed the opinion that it was reasonable for Defendant "to believe that she was being threatened . . . at the time she fired her pistol[.]"

¶ 20 After Investigator Henline's second voir dire, the trial court concluded:

> To allow a witness to testify in the form of an opinion on the issues of reasonableness of the belief that force was necessary on the part of the Defendant or an opinion regarding whether or not the force used was excessive, that opinion being drawn from the observation of the witness of the same exact evidence or less than the jury has seen and heard this past seven days would be in the Court's opinion an invitation to the jury to substitute the expert's judgment of the meaning of the facts of the case for its own.
>
> I have heard no testimony regarding what kind of scientific method or systematic approach was used, and in the Court's opinion the proffered evidence is intended to cast a sheen of technical and scientific methodology onto a concept of which a lay person, and specifically in this case a jury member, would probably already be aware or would be able to discern from the jury member's observation of the evidence in the case, that this proffered testimony does not provide insight beyond the conclusions that jurors can readily draw from their ordinary experience and/or from their observations of the evidence presented.

¶ 21 Thus, the court excluded Defendant's proffered expert testimony pertaining to the principles of self-defense and use of deadly force, as well as Investigator Henline's opinion as to the reasonableness of Defendant's actions. The trial court permitted Investigator Henline to testify regarding the mechanics of the firearm and ammunition used by Defendant.

B. Analysis

¶ 22 "Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to" N.C. Gen. Stat. § 8C-1, Rule 104(a) (2021). *McGrady*, 368 N.C. at 892, 787 S.E.2d at 10. "To the extent that factual findings are necessary to answer this question, the trial judge acts as the trier of fact. The court must find these facts by the greater weight of the evidence. . . . [T]hese findings will be binding on appeal unless there is no evidence to support them." *Id.* at 892–93, 787 S.E.2d at 10–11 (citations omitted). From its findings of fact, the trial court must then determine "whether the proffered expert testimony meets Rule 702(a)'s requirements of qualification, relevance, and reliability." *Id.* at 893, 787 S.E.2d at 11.

¶ 23 Rule 702(a) establishes the criteria by which a court determines the admissibility of proffered expert testimony:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a).

¶ 24 As noted above, "Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible." *McGrady*, 368 N.C. at 889, 787 S.E.2d at 8. First, the witness must be "qualified as an expert[,]" such that the witness is "in a better position than the trier of fact to have an opinion on the subject[.]" *Id.* at 889, 787 S.E.2d at 9 (citation omitted). "Expertise can come from practical experience as much as from academic training." *Id.* "As is true with respect to other aspects of Rule 702(a), the trial court has the discretion to determine whether the witness is sufficiently qualified to testify in that field." *Id.* at 890, 787 S.E.2d at 9.

¶ 25 Second, the expert testimony must be relevant; that is, it must "assist the trier of fact to understand the evidence[.]" *Id.* at 889, 787 S.E.2d at 8 (citation omitted). "In order to 'assist the trier of fact,' expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience." *Id.* (citation omitted). Further, the expert "testimony must do more than invite the jury to substitute the expert's judgment of the meaning of the facts of the case for its own." *Id.* (citation and internal quotation marks omitted).

¶ 26 Our Supreme Court addressed the issue of relevance in *McGrady*, in which it concluded that the proffered expert testimony in the science of "use of force" was not relevant to support the defendant's assertion of self-defense. *Id.* at 895, 787 S.E.2d at 12. The Court agreed with the trial court's determination that the expert's testimony concerning pre-attack

cues, use-of-force variables, and reaction times "would not assist the jury because these matters were within the jurors' common knowledge." *Id.* Thus, the exclusion of the expert's testimony did not constitute an abuse of discretion because it would not have assisted the jury in deciding whether the defendant acted in self-defense: "The factors that [the expert] cited and relied on to conclude that [the] defendant reasonably responded to an imminent, deadly threat are the same kinds of things that lay jurors would be aware of, and would naturally consider, as they drew their own conclusions." *Id.*

¶ 27 Third, "the trial court must assess the reliability of the testimony to ensure that it complies with the three-pronged test in Rule 702(a)(1) to (a)(3)." *Id.* at 892, 787 S.E.2d at 10. As detailed above, Rule 702(a) provides: "(1) The testimony [must be] based upon sufficient facts or data. (2) The testimony [must be] the product of reliable principles and methods. (3) The witness [must have] applied the principles and methods reliably to the facts of the case." N.C. Gen. Stat. § 8C-1, Rule 702(a)(1)–(3). "The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate . . . ." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (citations and internal quotation marks omitted). "However, conclusions and methodology are not entirely distinct from one another, and . . . the court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Id.* (citation and internal quotation marks omitted).

¶ 28 On appeal, Defendant asserts that the trial court should have permitted Investigator Henline to testify to his opinion regarding the reasonableness of Defendant's use of deadly force because the "proffered testimony met the *McGrady* standards." She further argues that Investigator Henline was properly qualified as an expert, and that his expertise was necessary to help the jury assess "when a second shot is excessive force[,]" a concept that Defendant contends "is not common knowledge[.]" This assertion is unpersuasive.

¶ 29 In the instant case, the trial court excluded Investigator Henline's testimony regarding self-defense and deadly force because his testimony "d[id] not provide insight beyond the conclusions that jurors can readily draw from their ordinary experience and/or from their observations of the evidence presented." In that Investigator Henline's proffered testimony did not satisfy the requirements of Rule 702(a) as articulated in *McGrady*, we conclude that the trial court did not abuse its discretion by excluding it.

¶ 30 Although Investigator Henline was unquestionably qualified to testify concerning the use-of-force training of *law enforcement officers*, he was not sufficiently familiar with the use-of-force training of *civilians* to testify as an expert on the subject. As Investigator Henline readily admitted during voir dire, he "fell under a different category on concealed carry permit" as a law enforcement officer and "didn't have to take [the] concealed carry" class taught to civilians. Consequently, he could not testify to what civilians learn in their concealed carry classes. By contrast, Defendant testified as to what she learned about the use of deadly force in her concealed carry class. And as the trial court noted, "probably close to half of [the] jurors ha[d] a concealed carry permit and ha[d] taken the class presumably in order to get it." Therefore, Investigator Henline did not "have enough expertise to be in a better position than the trier of fact to have an opinion on the subject" of civilians' use-of-force training. *Id.* at 889, 787 S.E.2d at 9. As such, he was not sufficiently qualified to provide an expert opinion as to the reasonableness of Defendant's actions in the present case. *See id.*

¶ 31 Furthermore, Investigator Henline's proffered expert testimony did not satisfy Rule 702(a)'s relevance requirement because no specialized knowledge was required to determine the reasonableness of Defendant's actions. As he testified during the pretrial voir dire, Investigator Henline formed his opinion on this issue after he reviewed the State's discovery, interviewed Defendant and Ms. Dillard, and watched the video recording multiple times. The jury, likewise, had the ability and opportunity to consider the same materials: the State presented its evidence during its case-in-chief; Defendant and Ms. Dillard testified about the night of the shooting; and both the State and Defendant played the video recording multiple times for the jury. The jury also had the opportunity to hear directly from Defendant regarding her concealed carry training, which many of the jurors had also received.

¶ 32 Accordingly, the testimony of Investigator Henline would not have "assist[ed] the trier of fact to understand the evidence or to determine a fact in issue," N.C. Gen. Stat. § 8C-1, Rule 702(a), and therefore, was not relevant. Indeed, Investigator Henline's proffered expert testimony regarding the use of deadly force and the reasonableness of Defendant's actions would have impermissibly "invite[d] the jury to substitute [his] judgment of the meaning of the facts of the case for its own." *McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 (citation and internal quotation marks omitted).

¶ 33 Moreover, Defendant has failed to establish that Investigator Henline's opinion was "the product of reliable principles and methods."

N.C. Gen. Stat. § 8C-1, Rule 702(a)(2). The trial court found that Investigator Henline's testimony regarding his methods of investigation "cast a sheen of technical and scientific methodology onto a concept of which a lay person, and specifically in this case a jury member, would probably already be aware or would be able to discern from the jury member's observation of the evidence in the case[.]" A review of the record supports this finding. Investigator Henline testified to using "the scientific method with a systematic approach[,]" by which he collects evidence, conducts interviews, and submits his finding to peer review. However, as described above, the jury necessarily performed a similar review of the evidence in determining whether Defendant acted reasonably. Accordingly, because the proffered opinion testimony was "connected to existing data only by [Investigator Henline's] *ipse dixit*[,]" *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (citation omitted), we conclude that the trial court's determination "that this testimony would simply be an effort to cast a sheen of technical and scientific methodology onto a concept into which a lay person, particularly a jury member, would probably already be aware" was not "manifestly unsupported by reason[,]" *id.* at 893, 787 S.E.2d at 11 (citation omitted).

¶ 34 In sum, Investigator Henline lacked sufficient "expertise to be in a better position than the trier of fact to have an opinion on the subject" of the appropriate use of force by civilians. *Id.* at 889, 787 S.E.2d at 9. Further, "[t]he factors that [he] cited and relied on to conclude that [D]efendant reasonably responded to an imminent, deadly threat are the same kinds of things that lay jurors would be aware of, and would naturally consider, as they drew their own conclusions." *Id.* at 895, 787 S.E.2d at 12. In addition, "the court [wa]s not required to admit [the] opinion evidence," as it was "connected to existing data only by the *ipse dixit* of the expert." *Id.* at 890, 787 S.E.2d at 9 (citation and internal quotation marks omitted). Therefore, the trial court did not abuse its discretion by excluding Investigator Henline's opinion testimony. *Id.* at 893, 787 S.E.2d at 11.

¶ 35 Defendant next asserts that Investigator Henline's testimony was necessary for her defense because "the jury did not have 'the same exact' knowledge of the video" as Investigator Henline. Specifically, she contends that because the jurors viewed the low-resolution video from a distance due to COVID-19 protocols, Investigator Henline's testimony would have been "very helpful" to the jury to explain what was happening; hence, Defendant argues, the trial court abused its discretion by excluding it. This argument lacks merit.

¶ 36 A careful review of the record reveals that the trial court went to great lengths to ensure that the jurors could view the video recording while remaining socially distanced due to the COVID-19 pandemic. Before the trial began, the court instructed the jurors to "[r]aise [their] hand[s]" or "[s]ay something" if they could not properly see the evidence. The trial court also informed the jury that the court "will do whatever [it] can to make sure that you are able to see and hear and observe all of the evidence[.]" Additionally, a television was placed in front of the jurors in lieu of the television mounted to the courtroom wall to allow for better visibility. Upon publishing the video recording of the shooting to the jury for the first time, the trial court instructed the State to move the television as close to the jury as possible, and it reiterated its prior instructions regarding jurors' view of the television: "If you cannot see and see clearly, folks, raise your hand. We'll stop it. We'll make adjustments. You folks adjust if you need to move." None of the jurors expressed any difficulty seeing the video while the recording played. Moreover, the court granted the jury's request during deliberations to view the recording again, playing the video once at half-speed and again at full speed.

¶ 37 The trial court's astute actions precluded the need for Investigator Henline to narrate the events of the video to the jury; his narration would not have further "assist[ed] the trier of fact to understand the evidence[.]" N.C. Gen. Stat. § 8C-1, Rule 702(a). The court's decision to exclude such testimony, therefore, did not constitute an abuse of discretion. *McGrady*, 368 N.C. at 893, 787 S.E.2d at 11.

III. Lay Opinion

¶ 38 **[2]** Defendant next asserts that the trial court abused its discretion and committed prejudicial error by allowing Ms. Bennett to testify, over Defendant's objection, to her opinion as to the level of danger to the persons present at FishZilla that evening prior to the shooting. Again, we disagree.

¶ 39 Rule 701 of the North Carolina Rules of Evidence permits a lay witness to offer "opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701. Our Supreme Court has interpreted this Rule as permitting a lay witness to testify to an opinion that is "a shorthand statement of fact, or, in other words, the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time[.]" *State v. Roache*, 358

N.C. 243, 294, 595 S.E.2d 381, 414 (2004) (citations and internal quotation marks omitted).

¶ 40 Relatedly, Rule 704 provides that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. Gen. Stat. § 8C-1, Rule 704. The Rule thus allows for "admission of lay opinion evidence on ultimate issues, but to qualify for admission the opinion must be helpful to the jury." *State v. Elkins*, 210 N.C. App. 110, 124, 707 S.E.2d 744, 754 (2011) (citation omitted). Furthermore, "while opinion testimony may embrace an ultimate issue, the opinion *may not* be phrased using a legal term of art carrying a specific legal meaning not readily apparent to the witness." *State v. Najewicz*, 112 N.C. App. 280, 293, 436 S.E.2d 132, 140 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994).

¶ 41 "However, even if the trial court erred by allowing such testimony, the defendant must show that the error was prejudicial." *Dove*, 274 N.C. App. at 422, 852 S.E.2d at 685; *see* N.C. Gen. Stat. § 15A-1443(a). "In determining whether a criminal defendant is prejudiced by the erroneous admission of evidence, the question is whether there is a reasonable possibility that, had the evidence not been admitted, the jury would have reached a different verdict." *State v. Malone-Bullock*, 278 N.C. App. 736, 2021-NCCOA-406, ¶ 17 (citation omitted), *disc. review denied*, 379 N.C. 682, 865 S.E.2d 863 (2021). "Further, if certain evidence is admitted without objection, the admission of subsequent evidence of similar a character cannot be objectionable." *State v. Delau*, 381 N.C. 226, 2022-NCSC-61, ¶ 32 (concluding that the defendant could not demonstrate prejudice from the admission of lay opinion testimony because other admitted evidence included substantially similar information). Constitutional errors are generally prejudicial "unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b).

¶ 42 In the instant case, Defendant's challenge to Ms. Bennett's opinion testimony concerns the following exchange:

> [THE STATE:] Ms. Bennett, based on your observation of the events unfolding that night and now I'm specifically referring to the early morning hours of April 21, 2018, did you feel that anyone's life was in danger?
>
> [MS. BENNETT:] No.
>
> [THE STATE:] Did you feel that anyone's life or anyone was in imminent danger of serious bodily harm?

. . . .

[MS. BENNETT:] No.

¶ 43 Defendant first argues that the trial court should have excluded Ms. Bennett's opinion as to whether anyone at FishZilla was in danger on the evening in question because her opinion on this issue impermissibly "invade[d] the province of the jury[.]" According to Defendant, "[t]he jurors had more information concerning the danger Ms. Dillard was in than Ms. Bennett because they had heard Ms. Dillard's testimony that she was blacking out and believed Mr. Davis was killing her." Defendant also contends that the challenged portion of Ms. Bennett's testimony was tantamount to an opinion as to whether Defendant's use of deadly force was reasonable, which she contends was an element of the crime with which Defendant was charged.

¶ 44 In fact, whether Defendant's use of deadly force was reasonable was an ultimate issue at trial in light of Defendant's self-defense claim. Opinion testimony, however, "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Id.* § 8C-1, Rule 704. Nor did Ms. Bennett's testimony impermissibly invade the province of the jury, as she did not phrase her opinion "using a legal term of art carrying a specific legal meaning not readily apparent to" her. *Najewicz*, 112 N.C. App. at 293, 436 S.E.2d at 140. Rather, she appropriately provided one-word answers to the prosecutor's carefully crafted questions. Further, Ms. Bennett's opinion was "helpful to the jury": as a participant in the conflict, Ms. Bennett was uniquely qualified to speak to the overall level of danger at FishZilla in the moments leading up to the shooting. *Elkins*, 210 N.C. App. at 124, 707 S.E.2d at 754 (citation omitted).

¶ 45 Nevertheless, assuming, *arguendo*, that the trial court erroneously admitted Ms. Bennett's opinion testimony, Defendant cannot demonstrate prejudice. Although Defendant correctly notes that a "violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt[,]" N.C. Gen. Stat. § 15A-1443(b), she fails to articulate how the admission of Ms. Bennett's opinion testimony amounted to a constitutional violation. Citing no case law or statutory authority, Defendant simply contends that "[a]llowing lay opinion evidence concerning an element of the crime violated [her] constitutional right to a fair trial and due process." As such, we have no legal basis upon which to review this alleged error. *See* N.C. R. App. P. 28(b)(6). In that "[i]t is not the role of this Court to craft [D]efendant's arguments for h[er,]" *State v. Earls*, 234 N.C. App. 186, 192, 758 S.E.2d 654, 658, *disc. review denied*,

367 N.C. 791, 766 S.E.2d 643 (2014), Defendant's prejudice argument pursuant to N.C. Gen. Stat. § 15A-1443(b) fails.

¶ 46 Defendant next argues that because "[t]he jurors in this case would have been sympathetic toward a woman whose common law husband and father of her children had been shot in her presence[,]" there was a reasonable possibility that the jury would have acquitted Defendant if the trial court had not admitted Ms. Bennett's opinion testimony. The argument is also unavailing.

¶ 47 As the State articulates in its appellate brief, the trial court admitted without objection substantially similar evidence regarding the level of danger at FishZilla that evening. Mr. Quick stated at trial that he did not believe that it was necessary to call 9-1-1 prior to the shooting, given that the altercation had lasted for less than a minute at that point. Mr. Livengood testified that although he had a firearm on his person that evening, he never brandished his weapon; when asked whether he believed that either Defendant or Ms. Dillard "was in danger of serious, imminent harm" that night, Mr. Livengood replied, "No." Because "other admitted evidence included substantially similar information" as Ms. Bennett's challenged lay opinion, *Delau*, 381 N.C. 226, 2022-NCSC-61, ¶ 33, Defendant cannot demonstrate that "there is a reasonable possibility that, had the evidence not been admitted, the jury would have reached a different verdict[,]" *Malone-Bullock*, 278 N.C. App. 736, 2021-NCCOA-406, ¶ 17 (citation omitted). Accordingly, her argument is overruled.

¶ 48 Finally, Defendant argues that the trial court abused its discretion in admitting Ms. Bennett's lay opinion because her opinion "was based on inadmissible character evidence[,]" as described in Rule 404 of the North Carolina Rules of Evidence. However, careful review of the transcript reveals that Defendant did not raise this argument before the trial court. Therefore, this issue was not preserved for appellate review. *See* N.C. R. App. P. 10(a)(1) (requiring a party to present to the trial court a timely objection "stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context" and "to obtain a ruling upon the party's . . . objection" to preserve an issue for appellate review).

¶ 49 "Where a defendant objects to the admission of evidence before the trial court and states a specific ground as the basis for that objection, but raises a different ground as the basis for his argument on appeal, the issue is not preserved." *State v. Gettleman*, 275 N.C. App. 260, 272, 853 S.E.2d 447, 455 (2020) (concluding that the defendant had not preserved for appellate review his argument that the challenged evidence

was inadmissible as speculative lay-opinion testimony under Rule 701 where the defendant argued hearsay and confrontation grounds below), *disc. review denied*, 377 N.C. 557, 858 S.E.2d 286, 290 (2021).

¶ 50 Here, Defendant's counsel explicitly asked that his objection to Ms. Bennett's opinion "be noted under the Sixth and Fourteenth Amendment[s]." Defense counsel also argued that Ms. Bennett's opinion was not "relevant to the issue of self-defense or defense of others from her perspective." After hearing arguments from the parties, the trial court overruled Defendant's objection on both of the asserted grounds.

¶ 51 Our appellate courts have "long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citation and internal quotation marks omitted). Accordingly, Defendant may not present her new argument for appellate review.

Conclusion

¶ 52 The trial court did not abuse its discretion by excluding Defendant's expert's testimony regarding the use of force and self-defense, and Defendant has failed to demonstrate that she was prejudiced by the admission of the lay opinion testimony of a witness for the State. Thus, we conclude that Defendant received a fair trial, free from prejudicial error.

NO PREJUDICIAL ERROR.

Chief Judge STROUD and Judge DIETZ concur.

STATE OF NORTH CAROLINA
v.
HENRY JOSEPH STEELE

No. COA22-115

Filed 18 October 2022

Evidence—inmate phone call—admission of recording—discretion of trial court

In a bench trial for intimidating or interfering with witnesses, the trial court did not abuse its discretion by admitting the State's exhibit of a disk containing an inmate phone call recording from an automated phone recording system at a county detention center. The exhibit was introduced during the testimony of an officer who worked at the detention center and who had made the recording, and she duly authenticated the exhibit by identifying the contents of the disk.

Judge TYSON concurring by separate opinion.

Appeal by defendant from judgment entered 25 August 2021 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 24 August 2022.

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

Epstein Law Firm, by Drew Nelson, for defendant.

ARROWOOD, Judge.

¶ 1 Henry Joseph Steele ("defendant") appeals from judgment following guilty verdicts for intimidating or interfering with witnesses and obtaining habitual felon status. On appeal, defendant argues the trial court erred in admitting into evidence a disk containing a phone call recording. For the following reasons, we conclude that defendant received a fair trial free from error.

I. Background

¶ 2 On 17 May 2021, a grand jury in Forsyth County indicted defendant on one count of intimidating or interfering with witnesses, alleging that defendant "unlawfully, willfully and feloniously did by threats, menaces,

or in any other manner prevent or deter, or attempt to prevent or deter, Lisa Flowers" ("Flowers") "from attending court by telling her not to come to court even if subpoenaed." "Flowers was acting as a victim or witness in" another case against defendant, filed under numbers "20CR01959, 20CR053603, and 20CR053604, in Forsyth County District Court." Defendant was also indicted on the same day for obtaining habitual felon status.

¶ 3 The matter came on for trial on 24 August 2021 in Forsyth County Superior Court, Judge Bray presiding. On the charge of intimidating or interfering with witnesses, for which the defendant waived his right to a jury trial, the State provided testimony from Sergeant Sabrina Robinson ("Sergeant Robinson"), Officer E.L. Klein ("Officer Klein"), and Officer J.M. Reyes ("Officer Reyes"). Flowers was not present at trial.

¶ 4 Sergeant Robinson testified that she had been working at the Forsyth County Detention Center as a "classification supervisor and gate detail adjust [sic] officer" for 21 years. As part of her responsibilities, Sergeant Robinson also acted as a "PayTel administrator[ ]"; PayTel, she described, "is a computerized phone system which allows inmates to make outside calls from the facility and also allows security to monitor those calls." Sergeant Robinson specifically "monitor[ed] the system for any type of problems or issues[,]" provided "or restrict[ed] user accessibility, and . . . listen[ed] and download[ed] phone calls as needed."

¶ 5 Sergeant Robinson explained that, when inmates use PayTel, "the system" prompts them to type in the phone number they are calling, payment information, and their own "ID number[.]" Inmates receive a unique ID number "[t]he first time Winston-Salem PD or Forsyth County Sheriff's Office come into contact" with them. Thereafter, "each inmate is required to enter that ID number prior to actually making a phone call." PayTel automatically records and maintains records of every phone call made by inmates, and Sergeant Robinson had access to these records.

¶ 6 The State showed Sergeant Robinson its first exhibit ("Exhibit 1"), which she identified as "a spreadsheet that's generated when you download the phone calls." Generally, Sergeant Robinson provided, when a phone call is downloaded, it is accompanied by "a spreadsheet printout of each and every phone call, . . . the station that the phone call was made from, the date that it was made, the billing process, . . . the time of the call, the number that it was called [sic], . . . the length of the call[,]" the inmate's ID number, and the inmate's name associated with that ID number. All of this information is "automatically recorded each time an inmate makes a phone call[.]"

¶ 7 Sergeant Robinson was acquainted with "these types of documents[,]" as they were "made in the regular course of business" at the Forsyth County Detention Center. After the trial court admitted Exhibit 1, the State asked Sergeant Robinson to read it. Exhibit 1 revealed that a phone call was made from Forsyth County Detention Center on 22 December 2020 at 11:24:55 a.m., associated with defendant's first name, last name, and unique ID number.

¶ 8 Next, the State handed Sergeant Robinson its second exhibit ("Exhibit 2"), which she recognized as a disk onto which she had downloaded, upon the State's request, a recording of defendant's 22 December 2020 phone call. After the trial court admitted Exhibit 2 into evidence, the State published it to the bench. In this recording, a man can be heard speaking to a woman, stating, in pertinent part: "[E]ven when they give you a little subpoena thing at your door, they can't do s*** to you, do not come down here, do not come to this courtroom because they're trying to hang me."

¶ 9 Officer Klein, who was employed with the Winston-Salem Police Department, testified that, on 8 April 2020, he was "dispatched to an assault call" at Forsyth Hospital. There, he met Flowers in the Emergency Department; after having a conversation with her, Officer Klein "responded to the magistrate's office" and "swore out charges for assault by strangulation, assault inflicting serious bodily injury, assault on a female, and false imprisonment" in Forsyth County. The trial court then admitted into evidence the State's third and fourth exhibits, featuring pictures that Officer Klein had taken of Flowers at the hospital.

¶ 10 The State questioned Officer Klein about Exhibit 2; Officer Klein confirmed that he had recognized both voices contained in the recording when the State published Exhibit 2 in open court. The State then proceeded to play a portion of the recording, and Officer Klein stated that he recognized the voice captured therein as that of defendant. The State played another portion of the recording, and Officer Klein recognized the voice captured therein as that of Flowers.

¶ 11 Officer Klein explained that, when he met Flowers at the hospital on 8 April 2020, he spoke with her for "[a]pproximately an hour[,]" and had thus "become familiar" with her voice. Officer Klein testified that he had also heard defendant's voice by virtue of being present at trial. The defense objected, arguing that, because defendant had not testified under oath during these proceedings, but had merely responded to the trial court's inquiry, under defendant's Fifth Amendment right to remain silent, "any statements" defendant may have made "cannot be

considered by [Officer Klein] as familiarity with . . . defendant's voice." The trial court sustained the objection.

¶ 12 Officer Reyes, who worked for the Winston-Salem Police Department, testified that, on 17 February 2020, he was "dispatched to an assault on a female" call at Baptist Hospital. There, he met Flowers and observed "injuries to her [sic] right side of her face." The trial court then admitted the State's fifth and sixth exhibits, featuring pictures Officer Reyes had taken of Flowers on 17 February 2020.

¶ 13 Officer Reyes testified that he spoke with Flowers for "approximately at least 40 minutes" on 17 February 2020. Based upon that conversation, Officer Reyes filed charges for "[a]ssault on a female" in Forsyth County. Because Flowers had also called Officer Reyes during the course of his investigation, he had had the opportunity to hear her voice both over the phone and in-person. Officer Reyes testified that he also spoke with defendant for "15 to 20 minutes."

¶ 14 The State questioned Officer Reyes about Exhibit 2. After Officer Reyes confirmed that he had recognized the two voices depicted in the recording when the State published Exhibit 2 to the bench, the State played a portion of the recording. Officer Reyes recognized defendant's voice, to which the defense made a general objection and was overruled. Then, the State played another portion of the recording, and Officer Reyes recognized Flowers's voice.

¶ 15 As to his ability to identify defendant's voice, Officer Reyes testified that, on 17 February 2020, he was given what he had been told was defendant's phone number. Officer Reyes called the number, which was initially answered by a woman. Then, "[t]he number called back," and Officer Reyes spoke with a man who identified himself as defendant; this individual did not otherwise provide any other personally identifying information. Officer Reyes testified that this individual stated he knew Flowers and spoke with Officer Reyes about the alleged assault involving Flowers.

¶ 16 When the State asked Officer Reyes whether this individual "was familiar with the facts that [Officer Reyes] [was] going over with him" during the phone call, the defense objected, arguing that the individual's purported self-identification as defendant and the contents of the phone call constituted hearsay. The State, in turn, argued that "it would be a statement by a party opponent." The trial court overruled the defense's objection. Officer Reyes then testified that the individual on the phone identified Flowers as his girlfriend, stated that "nothing [had] happened that night[,]" stated that he "wanted nothing to do with" Flowers, denied

assaulting Flowers, and expressed his belief that "[i]t was probably one of the other guys she talks to" who had committed the alleged assault.

¶ 17 After Officer Reyes's testimony, the State introduced into evidence its seventh exhibit, "a release paper on Case No. 20 CR 51959" for defendant, and rested its case. The defense moved to dismiss the case based on insufficient evidence, and the trial court denied the motion. Then, the defense elected not to present evidence and renewed its motion to dismiss, which was again denied.

¶ 18 The trial court entered a verdict of guilty of intimidating or interfering with witnesses. Then, the State proceeded with its charge of obtaining habitual felon status, and defendant once again waived his right to a jury trial. At this stage of the proceedings, the State introduced three more exhibits, which constituted various past judgments against defendant. At the close of all evidence, the trial court found defendant guilty of obtaining habitual felon status, sentencing him in the mitigated range of 100-to-132 months imprisonment, crediting time served. Defendant gave notice of appeal in open court.

II. Discussion

¶ 19 Defendant argues that the trial court erred in admitting the State's Exhibit 2 because Officer Reyes's testimony was insufficient to identify defendant as the alleged speaker in the recording contained therein.

¶ 20 Defendant also states that the standard of review "when assessing whether evidence has been properly authenticated" is *de novo*. This is, however, a mischaracterization of the issue on appeal. "On appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion." *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006) (citation omitted). "An abuse of discretion will be found only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation and quotation marks omitted). "In addition, Rule 901 of our Rules of Evidence requires that as a condition precedent to admissibility evidence must be authenticated or identified sufficient to support a finding that the matter in question is what its proponent claims." *Id.* (citation and quotation marks omitted).

¶ 21 Accordingly, although an appellate court's review of whether a trial court properly admitted evidence entails an authentication element, because defendant's argument here is that the trial court erred by *admitting* Exhibit 2, we must review this appeal for abuse of discretion. *See id.*

¶ 22 Here, Exhibit 2 was introduced by the State mid-way through Sergeant Robinson's testimony. Sergeant Robinson testified that she recognized Exhibit 2 as the disk onto which she had downloaded defendant's recorded phone call dated 22 December 2020. Accordingly, Sergeant Robinson properly authenticated Exhibit 2 before the trial court admitted it into evidence. *See id.* ("Authentication under Rule 901 may be satisfied through the testimony of a witness who has knowledge of the matter, and who can testify that a matter is what it is claimed to be." (citations and quotation marks omitted)).

¶ 23 After Sergeant Robinson's testimony, Officer Klein testified, followed by Officer Reyes. It is at this point that defendant takes issue with the trial court's admission of Exhibit 2. Specifically, defendant contends "the [S]tate relied solely on the testimony of Office Reyes to identify the voice heard" even though "Officer Reyes's alleged interaction with [defendant] was limited," in that "it was based on a single phone call, conducted under suspicious circumstances, in which a male speaker professed to be [defendant] and demonstrated a vague, general familiarity with an alleged past assault involving . . . Flowers." According to defendant, "[t]he lack of information confirming the speaker's identity and the lack of detail in the conversation render this phone call insufficient to connect the voice heard in Exhibit 2 with [defendant]" and, thus, "*the trial court erred by admitting Exhibit 2 as evidence.*" (Emphasis added.)

¶ 24 This argument has no merit for multiple reasons. First, the record indicates that the trial court did not rely solely on Officer Reyes's testimony to identify defendant as the caller on 22 December 2020. Rather, this finding was supported by Sergeant Robinson's testimony and the contents of Exhibit 1, the latter of which contained unaltered information automatically provided by the PayTel system and which unequivocally indicated that defendant had made the phone call in question.

¶ 25 Additionally, defendant's argument is chronologically confused. As illustrated above, the trial court admitted Exhibit 2 into evidence prior to Officer Reyes's taking the witness stand. Indeed, Exhibit 2 was introduced during the testimony of Sergeant Robinson, the State's first witness at trial, who duly authenticated the exhibit. Even assuming *arguendo* that Officer Reyes was not sufficiently equipped to identify defendant's voice in the recording contained in Exhibit 2, this issue has no bearing whatsoever on whether the trial court should have admitted Exhibit 2, because it had already properly done so well before Officer Reyes testified.

¶ 26 Accordingly, the trial court did not abuse its discretion when it admitted Exhibit 2 into evidence.

III. Conclusion

¶ 27 For the foregoing reasons, we conclude defendant received a fair trial free from error.

NO ERROR.

Judge GRIFFIN concurs.

Judge TYSON concurs by separate opinion.

TYSON, Judge, concurring in the result to affirm the trial court's judgment.

¶ 28 Defendant has not shown any basis or prejudice to reverse the trial court's judgment. The trial court's judgment entered herein without a jury trial and after a bench trial is properly affirmed. *See State v. Rutledge*, 267 N.C. App. 91, 832 S.E.2d 745 (2019) (Affirmed); *State v. Porter*, 281 N.C. App. 722, 2022-NCCOA-112, 867 S.E.2d 768 (2022) (Affirmed) (unpublished); *State v. Alexander*, 380 N.C. 572, 2022-NCSC-26, 869 S.E.2d 215 (2022) (Affirmed); *State v. French*, 280 N.C. App. 300, 2021-NCCOA-606, 864 S.E.2d 544 (2021) (Affirmed) (unpublished); *State v. Cranford*, 279 N.C. App. 512, 2021-NCCOA-511, 862 S.E.2d 435 (2021) (Affirmed) (unpublished); *State v. Hamer*, 377 N.C. 502, 2021-NCSC-67, 858 S.E.2d 777 (2021) (Affirmed); *State v. Cheeks*, 377 N.C. 528, 2021-NCSC-69, 858 S.E.2d 566 (2021) (Affirmed).

STATE v. WATSON

[286 N.C. App. 143, 2022-NCCOA-687]

STATE OF NORTH CAROLINA
v.
LEQUIRE WATSON

No. COA21-761

Filed 18 October 2022

1. Evidence—toxicology report—admissibility—basis for expert opinion—not admitted as substantive evidence

In a prosecution for driving while impaired, there was no error in the admission of a toxicology report that had been prepared by a non-testifying analyst, because the report was not admitted as substantive evidence but, rather, was properly admitted pursuant to Evidence Rule 703 as the basis for the testimony of an expert in forensic toxicology regarding defendant's blood alcohol concentration. Further, there was no violation of the Confrontation Clause where the expert was available for cross-examination.

2. Evidence—expert testimony—HGN testing—specific blood alcohol level—prejudice analysis

In a prosecution for driving while impaired, although there was error in the admission of the arresting officer's opinion regarding defendant's specific blood alcohol concentration level based on the results of a horizontal gaze and nystagmus (HGN) test, defendant could not prove prejudice where there was overwhelming evidence of defendant's impairment, including the results of a chemical analysis of defendant's blood alcohol concentration and the officer's observations that defendant slurred his speech; had red, glassy eyes; could not locate the glasses that were sitting on top of his head; and tested positive for alcohol on two portable breath tests.

Appeal by Defendant from judgment entered 20 May 2021[1] by Judge James G. Bell in Robeson County Superior Court. Heard in the Court of Appeals 24 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert T. Broughton, for the State-Appellee.

Stam Law Firm, by R. Daniel Gibson, for Defendant-Appellant.

1. The judgment is dated 18 May 2021, and Defendant's notice of appeal refers to the judgment as dated 18 May 2021. However, the judgment was file stamped on 20 May 2021.

COLLINS, Judge.

¶ 1 Defendant Lequire Watson appeals from judgment entered upon a jury verdict of guilty of driving while impaired. Defendant argues he is entitled to a new trial because the trial court erroneously admitted a toxicology report without proper authentication, and because the trial court erroneously allowed the arresting officer to testify to Defendant's specific blood alcohol concentration. Defendant is not entitled to a new trial because the toxicology report was properly admitted as the basis of the testifying expert's opinion, and the admission of the officer's testimony was harmless error.

I. Procedural History

¶ 2 Defendant was arrested and charged with driving while impaired on 27 September 2018. Prior to trial, Defendant filed a "notice of objection to the introduction during trial of any affidavits and written statements" regarding the chemical analysis of Defendant's blood. The State subsequently gave notice of its intent to introduce a toxicology report containing the results of a chemical analysis of a blood sample obtained from Defendant on the night of his arrest. Also before trial, the analyst who performed the chemical analysis and prepared the toxicology report separated from the State Bureau of Investigation ("SBI"), and the State filed a notice to substitute the agent who conducted the administrative and technical review of Defendant's case as its forensic toxicology expert. Defendant objected to introducing the toxicology report without the original analyst's testimony.

¶ 3 After a trial, the jury found Defendant guilty of driving while impaired and the trial court sentenced Defendant to 12 months' imprisonment, suspended for 12 months' supervised probation and a split sentence of 15 days in jail. Defendant timely appealed.

II. Factual Background

¶ 4 On the evening of 27 September 2018, Officer Steven Jacobs stopped Defendant because portions of Defendant's license plate were covered by the license plate frame, in violation of N.C. Gen. Stat. § 20-63.[2] During the stop, Jacobs noted that Defendant's speech was slurred, his eyes were red and glassy, and his pants were wet around the crotch area, leading Jacobs to suspect that Defendant was impaired. Defendant also appeared to have trouble finding his glasses, which were located on top of his head.

2. N.C. Gen. Stat. § 20-63(g) proscribes covering the State name on a license plate.

¶ 5 Jacobs had Defendant to step out of the car. Jacobs administered a horizontal gaze and nystagmus ("HGN") test. When asked about the HGN test at trial, Jacobs stated that he administers the test looking for six clues that indicate impairment, and that Defendant displayed all six. When asked about the significance of observing all six clues, Jacobs stated, over Defendant's objection, "[t]here's a probability that he's going to be a .08 or higher, 80% according to the test that was done." Jacobs also administered a portable breath test to Defendant, which indicated the presence of alcohol on Defendant's breath. Jacobs did not administer other standard roadside field sobriety tests because Defendant said he had nerve damage in his knees. Based on his observations of Defendant and the roadside field sobriety test results, Jacobs arrested Defendant for driving while impaired.

¶ 6 After Defendant was arrested, he was taken to an intoxilyzer room where Jacobs offered him a breathalyzer test; Defendant refused the test. Jacobs obtained and executed a warrant to collect Defendant's blood. The blood sample was collected by an emergency medical services supervisor and sent to the SBI's crime lab in Raleigh for chemical analysis. On 28 January 2020, Agent Kathleen Barra analyzed Defendant's blood sample using a headspace gas chromatograph, determined that the blood alcohol concentration of the sample was 0.27 grams per 100 milliliters, and prepared a report containing those results. Agent Megan Simms conducted an administrative and technical review of Barra's work.

¶ 7 At trial, Simms was admitted as an expert witness in the field of forensic toxicology. Simms testified that, after reviewing Barra's report, Simms formed an independent opinion that the sample's blood alcohol concentration was 0.27 grams of alcohol per hundred milliliters. Barra's report was introduced into evidence over Defendant's objection.

III. Discussion

A. Standard of Review

¶ 8 Defendant's issues on appeal involve the trial court's alleged misinterpretation or misapplication of the rules of evidence governing expert testimony which we review de novo. *State v. Younts*, 254 N.C. App. 581, 585, 803 S.E.2d 641, 645 (2017).

B. Admissibility of the Toxicology Report

¶ 9 **[1]** Defendant first argues that "because no expert with knowledge of how the toxicology tests were performed testified, the trial court erred in admitting the toxicology reports." (capitalization omitted).

¶ 10 Pursuant to North Carolina Rule of evidence 703, which governs expert testimony,

> [t]he 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, Rule 703 (2021). "An expert may properly base his or her opinion on tests performed by another person, if the tests are of the type reasonably relied upon by experts in the field." *State v. Fair*, 354 N.C. 131, 162, 557 S.E.2d 500, 522 (2001). Such tests are "admissible to show the basis for an expert's opinion, even if the information [contained in the tests] would otherwise be inadmissible hearsay." *State v. Daughtry*, 340 N.C. 488, 511, 459 S.E.2d 747, 758 (1995). "Allowing disclosure of the bases of an expert's opinion 'is essential to the factfinder's assessment of the credibility and weight to be given to it.' " *State v. Golphin*, 352 N.C. 364, 467, 533 S.E.2d 168, 235 (2000) (quoting *State v. Jones*, 322 N.C. 406, 412, 368 S.E.2d 844, 847 (1988)).

¶ 11 At trial, Simms was tendered and admitted as an expert in the field of forensic toxicology.[3] Simms testified that she was the administrative and technical reviewer for Defendant's case, and that part of her responsibilities included analyzing the data presented in Barra's report. Simms described in detail the scientific method used to analyze blood samples, testified that the method was the "gold standard of toxicology," and testified that the described method was properly applied to the facts in this case to generate the test results. Simms testified that she reviewed Barra's report and formed an independent opinion that the blood alcohol concentration of Defendant's blood sample was 0.27 grams of alcohol per hundred milliliters. Under Rule 703, Barra's toxicology report was admissible at trial to show the basis of Simms' opinion. *See State v. Jones*, 322 N.C. 406, 411, 368 S.E.2d 844, 847 (1988) ("[U]nder Rule 703 . . . a testifying expert can reasonably rely on the opinion of an out of court expert and can testify to the content of that opinion.").

¶ 12 We note that, because the evidence was admissible as the basis of Simms' opinion, but not as substantive evidence, Defendant was entitled

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3. Defendant objected to Simms' testimony on the ground that she was not the analyst who performed the original blood analysis. Defendant did not object to Simms' qualification as a forensic toxicology expert.

upon request to an instruction limiting its consideration to its proper scope. N.C. Gen. Stat. § 8C-1, Rule 105 (2021). However, Defendant made only a general objection and did not request a limiting instruction. "The admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by the defendant for limiting instructions." *Jones*, 322 N.C.at 414, 368 S.E.2d at 848; *State v. Maccia*, 311 N.C. 222, 228-29, 316 S.E. 2d 241, 245 (1984).

¶ 13 Further, we note there was no Confrontation Clause violation here as Simms was available for cross-examination. *See State v. Delaney*, 171 N.C. App. 141, 141, 613 S.E.2d 699, 700 (2005) ("The admission into evidence of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination." (citation omitted)). Defendant had ample opportunity to, and did, cross-examine Simms about the basis of her expert opinion testimony. As a result, any credibility issues regarding the basis of Simms' expert opinion testimony were thoroughly explored before the jury.

¶ 14 Defendant argues that N.C. Gen. Stat. § 20-139.1(c1) required Barra to testify to the results of her chemical analysis for her report to be admissible. Defendant specifically argues that because he objected to the State's notice of intent to introduce Barra's report into evidence, Barra was required to testify. Defendant misapprehends the law.

¶ 15 Pursuant to N.C. Gen. Stat. § 20-139.1(c1), "[t]he results of a chemical analysis of blood or urine reported by the North Carolina State Crime Laboratory . . . are admissible as evidence . . . in any court, without further authentication and without the testimony of the analyst." N.C. Gen. Stat. § 20-139.1(c1) (2021). The provisions of this subsection can only be utilized in cases tried in superior court if (1) the State gives the defendant proper notice of its intention to introduce the report into evidence, and (2) the defendant fails to properly object. *See Id.* § 20-139.1(c1)(1),(2). However, "[u]pon filing a timely objection, the admissibility of the report shall be determined and governed by the appropriate rules of evidence." *Id.* § 20-139.1(c1).

¶ 16 Here, the State properly notified Defendant of its intent to introduce Barra's report into evidence, and Defendant timely objected. Thus, under the statute, the rules of evidence govern the report's admissibility. As analyzed above, under Rule of Evidence 703, the report was admissible as the basis of Simms' expert opinion. Defendant's argument lacks merit.

C. Officer Jacobs' Testimony

¶ 17 **[2]** Defendant next argues that the trial court erred by allowing Jacobs to testify to his opinion of Defendant's blood alcohol concentration level based on the results of an HGN test.

¶ 18 Rule of Evidence 702 provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2021). An officer trained to administer HGN tests may give expert testimony on the results of an HGN test but may testify "solely on the issue of impairment and not on the issue of specific alcohol concentration level." *Id.* § 8C-1, Rule 702(a1).

¶ 19 At trial, Jacobs testified that he had successfully completed training in administering HGN tests, and that he had administered an HGN test to Defendant. When asked the significance of the HGN test results, Jacobs testified, over Defendant's objection, "[t]here's a probability that he's going to be a .08 or higher, 80% according to the test that was done." Jacobs' testimony as to Defendant's specific alcohol concentration level relating to the HGN test violated 702(a1) and was erroneously admitted into evidence. *See State v. Torrence*, 247 N.C. App. 232, 237, 786 S.E.2d 40, 43 (2016).

¶ 20 Although the testimony was erroneously admitted, Defendant has failed to show that "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) (2021).

¶ 21 Pursuant to N.C. Gen. Stat. § 20-138.1, a person is driving while impaired

> 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(a) (2018). Driving while under the influence of an impairing substance under subsection (a)(1) and 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 jury may convict a person of driving while impaired for driving while under the influence of an impairing substance without proof of the person's blood alcohol concentration. N.C. Gen. Stat. § 20-138.1(a)(1). The jury may independently convict a person of driving while impaired for driving with an alcohol concentration of 0.08 or more if the State proves that the person's blood alcohol concentration was 0.08 or more. *Id.* § 20-138.1(a)(2). In this case, there was overwhelming evidence to convict Defendant under either prong, even absent Jacobs' erroneously admitted testimony.

1. Driving while under the influence of an impairing substance

¶ 22 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) (2018). Alcohol is an "impairing substance." *Id.* § 20-4.01(14a) (2018). "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). Additionally, a defendant's refusal to submit to chemical analysis, such as a breathalyzer, is admissible as substantive evidence of impairment. *State v. McGaha*, 274 N.C. App. 232, 236, 851 S.E.2d 659, 662 (2020) (citing N.C. Gen. Stat. § 20-139.1(f)).

¶ 23 At trial, the State presented the following evidence that Defendant was under the influence of an impairing substance:

¶ 24 Jacobs testified that, during the stop Defendant "had slurred speech," and that "most people that have been consuming alcohol their speech seemed to get slurred after the more that they consumed." Jacobs also testified that Defendant had "red, glassy eyes," which is "common in most people that's been drinking or consuming alcohol." Jacobs testified that Defendant had a wet spot on his pants "as if he urinated himself already," and that Defendant "was looking for his glasses, but his glasses was on top of his head while he – the whole time he was looking

for them." Additionally, Jacobs administered two portable breath tests that indicated the presence of alcohol in Defendant's breath. Finally, Defendant refused to submit to a breathalyzer after his arrest.

¶ 25 Defendant testified that he disagreed with Jacobs' opinion that his speech was slurred and that his eyes were red and glassy, stating "I mean [Jacobs] might have thought [my speech] was slurred, but yes, I would disagree. I mean it might be a little slurred now, but it's not due to anything other than my dentures," and "[my eyes are] just as white as they've ever been. . . . I don't think there's any difference right now today from that time. I don't know what you would call glassy or what-have-you. But there's no redness, but you might call them glassy." Defendant also testified that the wet spot on his pants was possibly water or Gatorade, stating that "[i]t had to be the only thing. I've never peed myself in the last 50 years." Even crediting these explanations, as the jury may have done, the remaining uncontroverted evidence of Defendant's impairment is overwhelming.

2. Driving with an alcohol concentration of 0.08 or more

¶ 26 The results of a chemical analysis are sufficient to prove a person's blood alcohol concentration. N.C. Gen. Stat. § 20-138.1(a)(2). Simms testified that, in her expert opinion, based on the results of a chemical analysis, Defendant's blood contained 0.27 grams of alcohol per 100 milliliters. Additionally, because Defendant did not request a limiting instruction regarding Barra's report, the report was substantive evidence that Defendant's blood contained 0.27 grams of alcohol per 100 milliliters. The validity of this evidence was uncontested and is sufficient to prove that Defendant's blood alcohol concentration was 0.08 or more. The State thus presented overwhelming evidence that Defendant's blood alcohol concentration was 0.08 or more.

¶ 27 Considering the evidence properly before the jury, there is no reasonable possibility that the jury would have reached a different result had it not heard Jacobs' testimony to Defendant's specific alcohol concentration level relating to the HGN test.

IV. Conclusion

¶ 28 Because Barra's toxicology report was properly admitted as the basis of Simms' expert opinion, and because Jacobs' improper testimony was not prejudicial, Defendant received a fair trial free from prejudicial error.

NO ERROR; NO PREJUDICIAL ERROR.

Judges HAMPSON and JACKSON concur.

WATERS v. PUMPHREY

[286 N.C. App. 151, 2022-NCCOA-688]

SCOTT WATERS, PLAINTIFF
v.
WILLIAM PUMPHREY, DEFENDANT

No. COA20-816

Filed 18 October 2022

Landlord and Tenant—summary ejectment—oral week-to-week lease—retaliatory eviction defense

The trial court did not err by allowing the summary ejectment of defendant tenant from plaintiff landlord's property where there had been an oral agreement for defendant's week-to-week lease of a room on the property and plaintiff provided proper notice of termination of the lease. Defendant's retaliatory eviction defense under N.C.G.S. § 42-37.1 failed because he had no option to renew the lease and nonetheless held over after the expiration of the lease.

Appeal by Defendant from order entered 2 December 2019 by Judge Michael Stading in Mecklenburg County District Court. Heard in the Court of Appeals 25 August 2021.

Essex Richards, P.A., by John C. Woodman and David DiMatteo, for Plaintiff-Appellee.

Legal Aid of North Carolina, Inc., by Isaac W. Sturgill, Jonathan Perry, Andrew Eichen, and Celia Pistolis, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Defendant seeks review of the trial court's grant of Plaintiff's Motion for Summary Judgment, entered on 2 December 2019, allowing the summary ejectment of Defendant. After careful review, we affirm.

I. Factual and Procedural Background

A. Establishment of Periodic Tenancy

¶ 2 In July 2015, William Pumphrey ("Defendant") entered into an oral agreement with Scott Waters ("Plaintiff") to lease a room in Plaintiff's property located in Charlotte, North Carolina (the "Property").[1] The

1. The Court did not consider any statements in Plaintiff's brief which lacked objective support in the Record on Appeal. *See* N.C. R. App. P. 28(b).

terms of the lease agreement obligated Defendant to pay $125.00 per week to Plaintiff, due each Friday. Plaintiff collected $500.00 for four weeks of rent from Defendant's Social Security benefit checks each month.

B. First Summary Ejectment Action

¶ 3 In the winter of 2017, Defendant notified Plaintiff of maintenance issues with the Property, such as a non-functional heating system, decaying floors, a lack of smoke or carbon monoxide detectors, and pests. Defendant and another tenant ultimately contacted the City of Charlotte Code Enforcement Division ("Code Enforcement") to report housing code violations concerning the Property. On 6 March 2018, Code Enforcement officials inspected the Property, and on 12 March 2018, they sent a notice of thirty-three alleged Charlotte Housing Code violations to Plaintiff. Three violations, including lack of operable heating equipment, lack of carbon monoxide detectors, and lack of smoke detectors, rendered the Property "imminently dangerous" under Section 11-45(e) of the Charlotte Housing Code.

¶ 4 On 7 December 2018, Plaintiff initiated his first[2] Complaint in Summary Ejectment against Defendant, stating Defendant's lease terminated on 30 November 2018, Defendant owed $125.00 in past due rent, and the Property was damaged by "graffiti [and] excessive junk accumulation . . . ." Defendant, through counsel, filed an answer to Plaintiff's complaint and asserted he had not received proper notice to vacate pursuant to N.C. Gen. Stat. § 42-14. Additionally, Defendant filed counterclaims alleging: (1) Breach of Implied Warranty of Habitability pursuant to N.C. Gen. Stat. § 42-42 (2019); (2) Unfair and Deceptive Trade Practices pursuant to N.C. Gen. Stat. § 75-1.1 (2019); and (3) Unfair Debt Collection pursuant to N.C. Gen. Stat. § 75-54(4) (2019).

¶ 5 On 14 January 2019, Defendant testified during trial. The magistrate found in favor of Defendant for Breach of Implied Warranty of Habitability and Unfair and Deceptive Trade Practices, awarding him $5,000.00 in damages and counsel fees. Conversely, Plaintiff's claim was dismissed, and Plaintiff filed notice of appeal to district court. On 24 July 2019, Plaintiff withdrew his appeal.

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2. Plaintiff evidently initiated one prior *pro se* summary ejectment action in the fall of 2018, which did not proceed to hearing. Our analysis focuses on the summary ejectment proceedings which were tried to conclusion.

C. Second Summary Ejectment Action

¶ 6 Also on 24 July 2019, Plaintiff, through counsel, notified Defendant and his attorney by certified mail that Defendant's lease was terminated effective 8 August 2019. Despite adequate notice to quit, Defendant did not vacate the Property, and Plaintiff filed his second Complaint in Summary Ejectment against Defendant on 14 August 2019. On 27 August 2019, the magistrate found for Plaintiff in this action, and on 30 August 2019, Defendant appealed for a *de novo* hearing in district court. Pending Defendant's appeal to district court, a stay of summary ejectment was granted on 3 September 2019.

¶ 7 On 8 October 2019, Plaintiff filed a Motion for Summary Judgment. In his 28 October 2019 affidavit, Defendant asserted his belief that the current eviction lawsuit was filed "in substantial response to [him] standing up for [his] rights in court and testifying against [Plaintiff] on January 14, 2019." The district court granted Plaintiff's Motion for Summary Judgment on 2 December 2019, finding the protected act covered under the retaliatory eviction statute was "the complaint and notice from the City of Charlotte Code Enforcement dated 12 March 2018." Since the protected act occurred more than twelve months before the second summary ejectment action, the judge reasoned the retaliatory eviction statute "does not provide for tolling of this period of time pending subsequent litigation or dismissal of an appeal." Further, the trial court found no genuine issue of material fact, as both Plaintiff's and Defendant's affidavits "acknowledge the oral lease, the same rent amount, as well as the lease termination letter sent on July 24, 2019." Defendant filed a notice of appeal with this Court on 30 December 2019.

II. Jurisdiction

¶ 8 The trial court's order granting summary judgment is a final judgment, and jurisdiction therefore lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Issues

¶ 9 The issues on appeal are whether the trial court erred in determining: (1) there was no genuine issue of material fact with respect to Defendant's retaliatory eviction defense, thus entitling Plaintiff to summary judgment; and (2) the sole protected act covered by the retaliatory eviction statute was the complaint and notice of hearing from Code Enforcement dated 12 March 2018.

IV. Standard of Review

¶ 10 "We review the trial court's summary judgment order *de novo*." *Moore v. Jordan*, 259 N.C. App. 590, 593, 816 S.E.2d 218, 221 (2018). " '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) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

¶ 11 Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 56(c) (2021). For an adverse party to overcome a motion for summary judgment, they "may not rest upon the mere allegations or denials of [their] pleading, but [their] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 56(c); *see Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 204, 271 S.E.2d 54, 57–58 (1980) (recognizing that the nonmovant "must come forward with facts, not mere allegations," in order to survive summary judgment).

¶ 12 "A genuine issue of material fact has been defined as one in which the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action . . . ." *Smith v. Smith*, 65 N.C. App. 139, 142, 308 S.E.2d 504, 506 (1983). "[A]n issue is genuine if it is supported by substantial evidence, which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion[,]" and requires "more than a scintilla or a permissible inference." *Williamson v. Long Leaf Pine, LLC*, 218 N.C. App. 173, 176, 720 S.E.2d 875, 877 (2012) (citations and internal quotations omitted). "Summary judgment is appropriate when the non-movant fails to forecast substantial evidence demonstrating that a genuine issue of material fact exists, requiring determination by the fact-finding body." *In re Will of Allen*, 371 N.C. 665, 668, 821 S.E.2d 396, 400 (2018).

¶ 13 "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Strickland v. Hedrick*, 194 N.C. App. 1, 9, 669 S.E.2d 61, 67 (2008). While summary judgment may be inappropriate for some determinations of subjective intent, analysis is required on

a case-by-case basis. *See Little by Davis v. Nat'l Servs. Indus., Inc.*, 79 N.C. App. 688, 695, 340 S.E.2d 510, 514–15 (1986).

V. Analysis

¶ 14 We first examine the parties' oral lease agreement in order to contextualize the issues on appeal for our *de novo* summary judgment review. *See Moore*, 259 N.C. App. at 593, 816 S.E.2d at 221.

A. Periodic Tenancy

¶ 15 A valid lease contains four essential elements: (1) identity of landlord and tenant, (2) description of land to be leased, (3) a statement of the term of the lease, and (4) rental or other consideration to be paid. *Purchase Nursery, Inc. v. Edgerton*, 153 N.C. App. 156, 161, 568 S.E.2d 904, 907 (2002) (citation omitted). Oral leases for periodic tenancies renew "indefinitely until . . . terminated at the end of one of the periods by a proper notice by either the lessor or the lessee in accordance with the law." *See Goler Metro. Apartments, Inc. v. Williams*, 43 N.C. App. 648, 652, 260 S.E.2d 146, 149–50 (1979).

¶ 16 When a party to a periodic tenancy seeks to terminate the lease, a minimum term of advance notice is required by statute based on the duration of the tenancy. *See* N.C. Gen. Stat. § 42-14 (2019) (requiring seven days' notice to terminate a month-to-month lease, and two days' notice to terminate a week-to-week lease). "Any tenant or lessee of any house or land . . . who holds over and continues in the possession of the demised premises . . . without the permission of the landlord, and after demand made for its surrender, may be removed from such premises [by summary ejectment]." N.C. Gen. Stat. § 42-26 (2019). Absent an agreement between landlord and tenant, a tenant has neither a legal nor an equitable right to renewal of a lease, *Barnes v. Saleeby*, 177 N.C. 256, 98 S.E. 708, 710 (1919), unless otherwise provided by law.

¶ 17 Here, the record supports and the parties do not dispute the existence of the oral lease or its essential terms. Defendant's property interest under the oral lease consisted of weeklong periods, which renewed each week that proper notice of termination was not provided by either party. On 24 July 2019, when Plaintiff provided Defendant notice to vacate the premises on or before 8 August 2019, the lease was "terminated at the end of one of the periods by a proper notice by . . . the lessor . . . in accordance with the law[,]" and Defendant had no right to renew. *See Goler Metro. Apartments*, 43 N.C. App. at 652, 260 S.E.2d at 149–50; *see also* N.C. Gen. Stat. § 42-14. In fact, Plaintiff provided two weeks' advance notice to Defendant, when only two days was required by statute. *See* N.C. Gen. Stat. § 42-14.

¶ 18 As Plaintiff served proper notice of termination and demand for possession, Defendant's interest in the Property expired on 8 August 2019, at which point he became a holdover tenant, subject to summary ejectment proceedings by Plaintiff. *See* N.C. Gen. Stat. § 42-14; *see also* N.C. Gen. Stat. § 42-26.

B. Propriety of Summary Judgment.

¶ 19 Defendant asserts he pled a *prima facie* retaliatory eviction defense and thus, the trial court erred in entering summary judgment. Plaintiff, on the other hand, argues Defendant's affidavit failed to forecast sufficient evidence of retaliation to survive a motion for summary judgment. Furthermore, even if Defendant pled a *prima facie* retaliatory eviction defense, Plaintiff maintains he is nevertheless entitled to summary judgment under N.C. Gen. Stat. § 42-37.1(c) (2019). We agree with Plaintiff.

¶ 20 Summary judgment allows the Court to jettison disputes with "a fatal weakness in [their] claim or defense" to their legally inevitable conclusion. *Gray v. Hager*, 69 N.C. App. 331, 333, 317 S.E.2d 59, 61 (1984). Only "specific facts showing that there is a genuine issue for trial" are sufficient for a non-movant to prevail on summary judgment, meaning statements of opinion which fail to "express[ ] certainty about a thing" are inadequate under this standard. N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 56(e); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 183, 135 S. Ct. 1318, 1325 (2015).

¶ 21 Defendant's assertion of retaliatory eviction fails. The retaliatory eviction statute provides several exclusions to its application, even where a *prima facie* case of retaliatory eviction is successfully pled. *See* N.C. Gen. Stat. § 42-37.1(c). The exclusion relevant to the instant analysis provides, "[a] landlord may prevail in an action for summary ejectment if: In a case of a tenancy for a definite period of time where the tenant has no option to renew the lease, the tenant holds over after the expiration of the term." N.C. Gen. Stat. § 42-37.1(c)(2). It is therefore apparent that the retaliatory eviction statute does not permit the affirmative defense's shield to be used as a sword by holdover tenants to unilaterally extend lease terms beyond the bargained-for period. In other words, the plain language of subsection (c)(2) conditions the availability of a remedy for a residential retaliatory eviction upon the tenant's possession of an otherwise valid property interest under the lease in question. *See id.*

¶ 22 Based on our analysis of the parties' oral lease, Defendant's tenancy for a definite period of time—one week—expired on 8 August 2019. Defendant could not, therefore, prevail on a retaliatory eviction defense

where he had no option to renew the lease, and he held over after the expiration of the term. *See id.* As the material facts pertaining to the terms of the lease and notice to vacate are not in dispute, the trial court's entry of summary judgment was proper. *See In re Will of Allen*, 371 N.C. at 668, 821 S.E.2d at 400.

¶ 23 Finally, we need not determine whether the sole protected act covered by the retaliatory eviction statute was the complaint and notice of hearing from Code Enforcement dated 12 March 2018. Based on our determination that Defendant was a holdover tenant, had no option to renew the lease, and thus could not prevail under the retaliatory eviction statute, *see* N.C. Gen. Stat. § 42-37.1, there were no facts alleged constituting a legal defense which would affect the result of the instant action. *See Smith*, 65 N.C. App. at 142, 308 S.E.2d at 506. Having concluded Defendant's affirmative defense suffers from "a fatal weakness" based on the facts before us, we affirm the trial court's grant of summary judgment to Plaintiff. *See Gray v. Hager*, 69 N.C. App. at 333, 317 S.E.2d at 61.

VI. Conclusion

¶ 24 Viewing all evidence in the light most favorable to Defendant, we conclude Plaintiff was entitled to summary judgment on his second summary ejectment action, as no genuine issue of material fact was shown with respect to Defendant's retaliatory eviction defense. We therefore affirm the trial court's order.

AFFIRMED.

Judges TYSON and GRIFFIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 OCTOBER 2022)

CORRY v. N.C. DIV. OF HEALTH & HUM. SERVS. 2022-NCCOA-689 No. 22-47	Gaston (20CVS3021)	Affirmed
CULBRETH v. MANNING 2022-NCCOA-690 No. 22-57	Cumberland (10CVS2964) (17CVS6272)	Affirmed
EL-HATTO v. EL-HATTO 2022-NCCOA-691 No. 21-770	Cumberland (19CVS2212)	Affirmed
GRANDFATHER CTR. SHOPPES, LLC v. BEECH CREEK REST., LLC 2022-NCCOA-692 No. 21-250	Watauga (20CVS390)	Dismissed
HOSCH v. HOSCH-CARROLL 2022-NCCOA-693 No. 21-800	Rowan (21CVD679)	Vacated
IN RE A.M.L. 2022-NCCOA-694 No. 22-249	Ashe (18JA18)	Affirmed
IN RE M.A.C. 2022-NCCOA-695 No. 22-134	Wilkes (20JA105) (20JA106) (20JA107)	Affirmed.
MANGUM v. WRAL-5 NEWS 2022-NCCOA-696 No. 22-199	Wake (21CVS308)	Dismissed
PIEDMONT NAT. GAS CO., INC. v. MALLARD CREEK ASSOCS. #1, LLC 2022-NCCOA-697 No. 22-192	Mecklenburg (20SP1749)	Affirmed
STATE v. BARRETT 2022-NCCOA-698 No. 22-252	Montgomery (19CRS50308) (20CRS1050-51)	Affirmed

STATE v. DUNCAN 2022-NCCOA-699 No. 20-843	Randolph (17CRS54146-47) (17CRS54183)	No Error
STATE v. HARRISON 2022-NCCOA-700 No. 21-788	Surry (18CRS50394) (18CRS50395) (18CRS50401)	No Error
STATE v. KILLETTE 2022-NCCOA-701 No. 18-26-3	Johnston (14CRS55188) (15CRS53276)	Dismissed
STATE v. MULLIS 2022-NCCOA-702 No. 22-183	Wilson (18CRS51881) (18CRS53732) (18CRS53733)	No Plain Error in Part; Dismissed in Part
VELMONT ENTERS., INC. v. PATCH OF LAND LENDING, LLC 2022-NCCOA-703 No. 22-40	Mecklenburg (20CVS16075)	Affirmed
WALKER v. FOLEY 2022-NCCOA-704 No. 22-27	Craven (17CVS374)	Affirmed

STATE OF NORTH CAROLINA
v.
JOSEPH EDWARDS TEAGUE, III

No. COA21-10

Filed 1 November 2022

1. Search and Seizure—removal of package at mailing facility—brief retention for drug dog sniff—Fourth Amendment rights not implicated

In a prosecution for various charges relating to the illegal sale of marijuana, the trial court properly denied defendant's motion to suppress evidence discovered after law enforcement removed and briefly retained a suspicious package (later linked to defendant) from a conveyor belt at a FedEx facility for the purpose of having a dog conduct a drug sniff. The five- to ten-minute retention of the package and the subsequent drug dog sniff did not constitute a "seizure" and a "search" (respectively) for Fourth Amendment purposes; rather, those acts merely provided support for law enforcement's determination that probable cause existed to obtain search warrants for the package and for other locations, including defendant's residence and the self-storage unit where the package was headed. Further, defendant waived appellate review of his Fourth Amendment arguments where he did not object at trial to evidence concerning the package's initial removal from the conveyor belt.

2. Indictment and Information—possession with intent to sell or deliver THC—concentration of THC—irrelevant

An indictment charging defendant with possession with intent to sell or deliver THC was not facially defective where it tracked the statutory language defining the crime while also identifying THC as a controlled substance. Although North Carolina's passage of the Industrial Hemp Act legalized industrial hemp, which contains a smaller concentration of THC than illegal marijuana does, the concentration of THC is not an element of the offense defendant was charged with, and therefore the indictment did not need to allege that defendant possessed an "unlawful quantity" of THC.

3. Drugs—possession with intent to sell or deliver THC—evidence of THC concentration—unnecessary

The trial court did not err by denying defendant's motion to dismiss a charge of possession with intent to sell or deliver THC, where defendant argued that the State presented insufficient evidence that

the brown material (identified as "shatter," or cooked-down marijuana) seized from his self-storage unit contained an illegal concentration of THC. Although North Carolina's passage of the Industrial Hemp Act legalized industrial hemp, which contains a smaller concentration of THC than illegal marijuana does, the brown material at issue did not qualify as "industrial hemp" under the Act, and therefore the State was not required to prove that the brown material contained an illegal concentration of THC under the Act.

4. Evidence—opinion testimony—identification of marijuana and THC—prejudice analysis

In a prosecution for various charges relating to the illegal sale of marijuana, defendant failed to show that he was prejudiced where the trial court allowed several witnesses to testify that the substances seized from various locations linked to defendant constituted marijuana, marijuana wax, marijuana "shatter," and "highly concentrated THC." The State not only conducted scientifically valid chemical analyses confirming that the seized items contained THC, but it also presented other overwhelming evidence of defendant's guilt such that any erroneously admitted testimony could not have affected the jury's verdict.

5. Conspiracy—to traffic marijuana by transportation—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of conspiracy to traffic marijuana by transportation where the State's evidence showed that a sender shipped a package addressed to defendant containing approximately $153,000.00 worth of marijuana and a GPS tracker, and that the sender took several steps to track the passage, thereby indicating a mutual concern between the sender and defendant for the package's delivery. Further, a recording of a police officer's phone call with the sender pointed to the existence of a conspiracy where the sender admitted to sending the package, confirmed defendant as the intended recipient, and made a profane exclamation upon learning that he was speaking with law enforcement.

6. Evidence—hearsay—exception—statement by co-conspirator—conspiracy to traffic marijuana

In a prosecution for conspiracy to traffic marijuana by transportation, where law enforcement intercepted a package addressed to defendant that contained thousands of dollars' worth of marijuana, the trial court properly admitted a recording of a police officer's

phone call to the package's sender because the sender's statements fell under the hearsay exception for statements made by a co-conspirator. In the light most favorable to the State, the sender's statements during the call showed that an active conspiracy existed at that time, and these statements did not have to be made between the co-conspirators in order to fall under the applicable hearsay exception.

Appeal by defendant from judgments entered 31 January 2020 by Judge Thomas H. Lock in Wake County Superior Court. Heard in the Court of Appeals 1 December 2021.

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

Hynson Law, PLLC, by Warren D. Hynson, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Joseph Edwards Teague, III, appeals from judgments entered upon a jury's verdicts finding him guilty of conspiracy to traffic marijuana by transportation, possession with intent to sell or deliver marijuana, felony possession of marijuana, felony keeping or maintaining a storage unit for keeping or selling controlled substances, felony keeping or maintaining a dwelling for keeping or selling controlled substances, and possession with intent to sell or deliver delta-9-tetrahydrocannabinol ("THC"). After careful review, we affirm the trial court's denial of Defendant's motion to suppress, and conclude that Defendant received a trial free from prejudicial error.

I. Background

¶ 2 On 21 March 2018, Investigator Selburn Menzie of the Wake County Sheriff's Office High-Intensity Drug Trafficking Areas ("HIDTA") Task Force was working at a FedEx facility as part of his routine parcel interdiction duty. On the conveyor belt, he observed a package (the "target package") with "all the seams . . . taped," which he later testified was "one of many indicators" that a parcel may contain illegal drugs. The target package named "Marcus Rawls" as its sender and "Joe Teague" as its intended recipient. The shipping label indicated that the target package had been shipped from California and listed "(888) 888 8888" as the telephone number for the addressee, "Joe Teague" in Raleigh, North Carolina. In his experience and training as a member of the HIDTA Task

Force, Investigator Menzie recognized these as additional indicators of possible drug smuggling.

¶ 3 Investigator Menzie removed the target package from the belt and ran the sender and recipient information from the shipping label through two law enforcement databases. From these databases, Investigator Menzie determined that the phone number given for the target package's sender "Marcus Rawls" did not match the phone number for the listed shipping address, and he confirmed that the "(888) 888 8888" phone number provided for its recipient "Joe Teague" did not exist. Investigator Menzie also noticed that the target package had been sent from a different location than its listed shipping address. Investigator Menzie then placed the target package in a line with "four or five" other similar parcels. His partner, Officer James Smith, was already on the scene with his certified narcotics detector dog, Hydro. At Officer Smith's command, Hydro conducted a drug sniff of the packages. Hydro alerted to the target package.

¶ 4 Investigator Menzie removed the target package from the FedEx facility and obtained a search warrant for it. Investigator Menzie, Officer Smith, and other law enforcement officers then opened the target package at the interdiction unit office. Inside the target package, the officers found approximately 15 yellow envelopes, each containing vacuum-sealed bags of a green, leafy substance that they recognized as marijuana; inside one of the bags, they also discovered what appeared to be a GPS tracking device. After weighing and photographing the contents of each bag, the officers determined that the target package contained approximately 15 pounds of the green, leafy substance that they recognized as marijuana.

¶ 5 Investigator Menzie then drove to the address listed on the target package's shipping label, where he saw people (including one later identified as Defendant) in the driveway. While surveilling the recipient's address, Investigator Menzie observed that there was a self-storage facility approximately two miles away. He later testified that the proximity of this facility was noteworthy to him "[b]ecause a storage unit is commonly used by individuals who [are] dealing with large amounts of illegal substance to store away sometimes from their residence, sometimes just to disassociate themselves from the residence that they're actually living in."

¶ 6 Later that day, a FedEx employee informed Investigator Menzie that a man identifying himself as "Marcus" had called FedEx to inquire about the status of the target package, and that he left a phone number

at which to contact him with further information. Investigator Menzie called Marcus, who confirmed the tracking number of the target package, its shipping address, and the name of its intended recipient. At that point, Investigator Menzie identified himself as a law enforcement officer; Marcus reacted with surprise, cussed, and abruptly ended the call.

¶ 7 The next day, on 22 March 2018, Investigator Menzie, Officer Smith, and Sergeant Daniel Wright investigated the self-storage facility near the intended recipient's address. Officer Smith took Hydro to a row of storage units that were "out of sight[,]" and Hydro alerted to a particular unit. Investigator Menzie left to obtain a search warrant for the unit. Before Investigator Menzie returned, Defendant arrived and approached the unit with a bag in his hand. Sergeant Wright intercepted Defendant and patted him down.

¶ 8 When Defendant placed the bag on the back of his car, Sergeant Wright observed a substance inside of the bag that he recognized, from his training and experience, as "marijuana wax." Sergeant Wright handcuffed Defendant, and they waited for Investigator Menzie to return with the search warrant. After Investigator Menzie returned and read the search warrant to Defendant, the officers opened the storage unit with the use of a key provided by Defendant. Inside, the officers found a box containing more vacuum-sealed bags of what appeared to be the same green, leafy substance that they recognized as marijuana, and a suitcase containing several clear jars of a brown substance that Sergeant Wright later testified was "commonly referred to as shatter . . . . [I]t's cooked-down marijuana. It's highly concentrated THC."

¶ 9 Investigator Menzie then obtained a document search warrant for Defendant's residence, which matched the address for the intended recipient of the target package. Law enforcement officers executed the search warrant that same day and discovered items that they believed to be drugs and drug paraphernalia. At that point, the officers temporarily halted the search until they obtained a drug search warrant; then, the search resumed. Inside a padlocked bedroom, officers discovered empty vacuum-sealed bags in a dresser drawer; a butane gas canister used to manufacture marijuana wax; a digital scale hidden behind a television; a bong; an e-cigarette with cartridges containing a brown liquid; and glass jars similar to those found in the search of Defendant's storage unit.

¶ 10 On 5 June 2018, a Wake County grand jury returned indictments charging Defendant with two counts of conspiracy to traffic marijuana (one charge by transportation and one by possession); two counts of possession with intent to sell or deliver marijuana; one count of

possession with intent to sell or deliver THC; two counts of possession of marijuana; one count of maintaining a storage unit for purposes of keeping or selling controlled substances; and one count of maintaining a dwelling for purposes of keeping or selling controlled substances.

¶ 11 On 19 November 2018, Defendant moved to suppress "evidence obtained as the result of an unconstitutional seizure of the [target package] addressed to . . . Defendant, the unconstitutional search, seizure, and interrogation of [Defendant], and the unconstitutional search and seizure of [Defendant]'s storage locker and residence." On 27 January 2020, Defendant's motion came on for hearing in Wake County Superior Court. After considering the motion and arguments of counsel, the trial court denied Defendant's motion from the bench. No written order was entered.

¶ 12 At the close of the State's evidence, Defendant moved to dismiss all charges against him, which the trial court denied. Defendant renewed his motion to dismiss at the close of all evidence, which the trial court again denied. The State then voluntarily dismissed the charge of conspiracy to traffic marijuana by possession. During the charge conference, the trial court *sua sponte* dismissed one count of possession with intent to sell or deliver marijuana and one count of felony possession of marijuana.

¶ 13 On 31 January 2020, the jury returned its verdicts finding Defendant guilty of the remaining charges. The trial court sentenced Defendant to an active term of 25–39 months in the custody of the North Carolina Division of Adult Correction for conspiracy to traffic marijuana by transportation. The trial court then consolidated the remaining convictions into three judgments, sentenced Defendant to three consecutive terms of 5–15 months in the custody of the North Carolina Division of Adult Correction, then suspended these sentences and ordered that Defendant be placed on supervised probation for a period of 24 months following his release from incarceration. Defendant gave oral notice of appeal in open court.

II. Discussion

¶ 14 On appeal, Defendant raises several constitutional issues concerning the investigation of the target package. Defendant argues that the trial court erred by denying his motion to suppress because law enforcement officers lacked either probable cause or reasonable suspicion to support (1) the initial removal of the target package from the conveyor belt at the FedEx facility and (2) the temporary retention of the target package to effectuate a drug dog sniff.

¶ 15 Defendant then makes several arguments that arise from our General Assembly's legalization of industrial hemp. *See* An Act to Recognize the Importance and Legitimacy of Industrial Hemp Research, to Provide for Compliance with Portions of the Federal Agricultural Act of 2014, and to Promote Increased Agricultural Employment, S.L. 2015-299, 2015 N.C. Sess. Laws 1483. The Industrial Hemp Act "legalized the cultivation, processing, and sale of industrial hemp within the state, subject to the oversight of the North Carolina Industrial Hemp Commission." *State v. Parker*, 277 N.C. App. 531, 2021-NCCOA-217, ¶ 27, *disc. review denied*, 378 N.C. 366, 860 S.E.2d 917 (2021).

¶ 16 In sum, Defendant argues that "[b]ecause industrial hemp and marijuana . . . are identical in appearance and odor, and both contain THC, law enforcement officers and drug-detecting canines are unable to distinguish the two without a quantitative test measuring the chemical percentage of THC, irrespective of their training and experience." Thus, Defendant maintains that (1) the trial court erred by denying his motion to suppress because the green, leafy substance inside the target package was seized prior to determining whether it contained an unlawful concentration of THC; (2) the indictment charging Defendant with possession with intent to sell or deliver THC was facially invalid because it failed to specifically allege an unlawful concentration of THC; (3) the trial court erred by denying Defendant's motion to dismiss the charge of possession with intent to sell or deliver THC because the State presented insufficient evidence that the brown material recovered during lawful searches of Defendant's storage unit, residence, and the bag that he was carrying when he arrived at the storage unit contained an unlawful concentration of THC; and (4) the trial court erred by permitting several of the State's witnesses to offer opinion testimony identifying the various seized substances as "marijuana," "marijuana wax," "shatter," and "highly concentrated THC," absent a scientifically valid chemical analysis of each substance, in violation of Rule 702 of the North Carolina Rules of Evidence.

¶ 17 Defendant further argues that the trial court committed plain error by admitting evidence regarding the chemical analysis of the seized material discovered inside the target package, in violation of his constitutional right to confront testimonial witnesses against him.

¶ 18 Finally, Defendant advances a pair of arguments concerning the charge of conspiracy to traffic marijuana by transportation. Defendant contends that the trial court erred by denying his motion to dismiss this charge due to insufficient evidence, and that the trial court erred by

admitting into evidence a recording of a phone call between Investigator Menzie and Marcus Rawls, Defendant's alleged co-conspirator.

A. Motion to Suppress

¶ 19 **[1]** We begin by addressing Defendant's constitutional arguments concerning the initial removal of the target package from the conveyor belt at the FedEx facility and the subsequent searches and seizures that followed. Defendant raises several arguments arising under the federal and state constitutions, essentially claiming that the trial court erred by denying his motion to suppress because law enforcement officers lacked either probable cause or reasonable suspicion[1] to seize the target package at the FedEx facility. However, for the following reasons, we affirm the trial court's denial of Defendant's motion to suppress.

1. Standard of Review

¶ 20 "In evaluating the denial of a motion to suppress, the reviewing court must determine whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) (citation and internal quotation marks omitted). "The trial court's findings of fact on a motion to suppress are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Id.* (citation and internal quotation marks omitted). "Findings of fact that are not challenged on appeal are deemed to be supported by competent evidence and are binding upon this Court." *State v. Lane*, 280 N.C. App. 264, 2021-NCCOA-593, ¶ 12 (citation and internal quotation marks omitted). "Conclusions of law are reviewed de novo and are fully reviewable on appeal." *Williams*, 366 N.C. at 114, 726 S.E.2d at 165 (citation and internal quotation marks omitted).

2. The Trial Court's Ruling

¶ 21 At the conclusion of the suppression hearing, the trial court denied Defendant's motion to suppress. The court instructed the assistant district attorney to prepare a proposed order[2] consistent with the following orally rendered findings of fact and conclusions of law:

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1. Defendant argues that "this Court could—and should—rule under our State Constitution that probable cause is required to seize and investigate a parcel," rather than continuing to apply the reasonable suspicion standard adopted by the United States Supreme Court. *See United States v. Van Leeuwen*, 397 U.S. 249, 252–53, 25 L. Ed. 2d 282, 285–86 (1970). As discussed in section II.A.2 below, we decline Defendant's invitation to address this issue.

2. No written order on Defendant's motion to suppress appears in the record on appeal.

You should find the facts by a preponderance of the evidence that on the day in question, March 21, 2018, these officers were working interdiction at Fed Ex, that Fed Ex facility on Atlantic Avenue; that they observed this parcel coming down the conveyor belt, and their attention was attracted to it by the fact that all the seams were taped, which, based upon their training and experience -- or, rather, training and experience of Investigator Menzie, is an indication of a parcel which might contain controlled substances.

That upon examination of the shipping label, the phone number listed for the recipient appeared to be fictitious. It was 888-8888.

That the officers removed the package from the conveyor belt and examined it further. Upon running the name and address and phone number for the sender through the law enforcement databases -- and you should identify those which they were employing -- it appeared that the address for the sender was fictitious; that the phone number for the sender was fictitious; that the sender, in fact, lived at another address; that the package was actually shipped out of Sun Valley, California, not North Hollywood, California.

That the officers then placed the package in a lineup with four other parcels and had a K-9 or dog trained in narcotics detection, which dog is on the scene with its handler, sniff the packages. Include as a fact, of course, that the dog was certified, and please include the name of the certifying agency.

That the dog alerted on the suspect package, and based upon this information, the officers seized the package and applied to the magistrate for a search warrant.

Based upon these facts, the Court would conclude as a matter of law that [D]efendant did have standing to challenge the search warrant based upon the fact that [D]efendant is the named recipient of the package; that a reasonable and articulable suspicion existed sufficient to justify the brief detention of the package for purposes of having a drug dog sniff it; and that the retention of the package was for a reasonable period

> of time given that the dog was on the scene. And, in fact, as a finding of fact, you may include that the process of this lineup took about five to ten minutes.
>
> And that based upon the totality of the circumstances, probable cause existed for the issuance of the search warrant for the parcel. And, accordingly, the motion to suppress the issuance of the search warrant and seizure of the parcel is denied.

¶ 22 On appeal, Defendant does not specifically challenge any of the trial court's findings of fact, and therefore they are binding upon this Court. *Lane*, ¶ 12. Rather, Defendant challenges the trial court's conclusion of law, based upon the unchallenged facts, that "the brief detention of the [target] package for purposes of having a drug dog sniff it" was supported by reasonable suspicion.[3]

¶ 23 We conclude that Defendant's Fourth Amendment rights were not violated in the case at bar. At the outset, we do not accept Defendant's initial contention that the mere removal of the target package from the conveyor belt for a drug dog sniff was a "seizure" implicating his Fourth Amendment rights. Neither was the drug dog sniff at the FedEx facility a "search" infringing upon any of Defendant's Fourth Amendment rights.

¶ 24 However, assuming, *arguendo*, that Defendant's Fourth Amendment rights were implicated, we also conclude that he waived appellate review of these arguments. Each of these reasons compels our conclusion that the trial court did not err by denying Defendant's motion to suppress.

3. Removal of the Target Package

¶ 25 At all stages of this case, from the suppression hearing through appellate briefing, Defendant has maintained that the initial removal of the

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3. The United States Supreme Court has determined that a warrantless postal interdiction must be supported by reasonable suspicion of illegal activity afoot. *See Van Leeuwen*, 397 U.S. at 252–53, 25 L. Ed. 2d at 285–86. However, Defendant invites this Court to interpret the North Carolina Constitution as requiring that the State satisfy the more stringent probable cause standard in warrantless postal interdictions. *See State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988) ("Even were the two provisions identical, we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision."), *superseded in part by statute on other grounds*, An Act to Provide for the Adoption of the Good Faith Exception to the Exclusionary Rule into State Law, S.L. 2011-6, § 2, 2011 Sess. Laws 10, 11. Given our disposition of Defendant's other Fourth Amendment arguments, we need not address this issue at this juncture.

target package from the conveyor belt was a seizure in violation of the Fourth Amendment. After careful review, we disagree.

¶ 26 The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "The North Carolina Constitution affords similar protection." *State v. Cabbagestalk*, 266 N.C. App. 106, 111, 830 S.E.2d 5, 9 (2019); *see* N.C. Const. art. I, § 20. "Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable." *United States v. Jacobsen*, 466 U.S. 109, 114, 80 L. Ed. 2d 85, 94 (1984). "Both the sender and the designated recipient of a package sent by mail or other carrier have a legitimate expectation of privacy in the contents of that package." *United States v. Hurley*, 182 F. App'x 142, 145 (4th Cir.), *cert. denied*, 549 U.S. 905, 166 L. Ed. 2d 183 (2006)[4]; *see also Jacobsen*, 466 U.S. at 114, 80 L. Ed. 2d at 94.

¶ 27 "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Jacobsen*, 466 U.S. at 113, 80 L. Ed. 2d at 94. "The intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent. The seizure may be made after the owner has relinquished control of the property to a third party[,]" such as an express courier. *United States v. Place*, 462 U.S. 696, 705, 77 L. Ed. 2d 110, 119–20 (1983). A sender who voluntarily relinquishes control of a package to a private courier may be "unable to show that the invasion intruded upon either a privacy interest in the contents of the packages or a possessory interest in the packages themselves." *Id.* at 705–06 n.6, 77 L. Ed. 2d at 120 n.6 (citation omitted). Therefore, in postal interdiction cases just as in other Fourth Amendment contexts, the nature and extent of the intrusion upon the privacy interest in the contents of a package vary with the totality of the circumstances. Indeed, as Justice Brennan noted in *Place*, "the mere detention of mail not in [an addressee's] custody or control amounts to at most a minimal or technical interference with his person or effects, resulting in no personal deprivation at all." *Id.* at 718 n.5, 77 L. Ed. 2d at 128 n.5 (Brennan, J., concurring) (citation omitted).

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4. It is axiomatic that the courts of North Carolina must treat "decisions of the United States Supreme Court as binding" on issues arising under the federal constitution, but our Supreme Court has repeatedly recognized that we may also "accord[ ] to decisions of lower federal courts such persuasiveness as these decisions might reasonably command." *State v. Berryman*, 360 N.C. 209, 212, 624 S.E.2d 350, 353 (2006) (citation omitted).

¶ 28 Although neither the appellate courts of North Carolina nor the United States Court of Appeals for the Fourth Circuit have directly addressed the Fourth Amendment in the context of postal interdiction, other federal circuit courts of appeals have considered this issue. For example, the Ninth Circuit has concluded that, "[a]lthough a person has a legitimate interest that a mailed package will not be opened and searched en route, there can be no reasonable expectation that postal service employees will not handle the package or that they will not view its exterior[.]" *United States v. Hernandez*, 313 F.3d 1206, 1209–10 (9th Cir. 2002) (citation omitted), *cert. denied*, 538 U.S. 1023, 155 L. Ed. 2d 867 (2003). The *Hernandez* Court further explained that the recipient of a mailed package has a different interest in the package than its sender:

> The recipient of a mailed item . . . has a reasonable expectation that the mail will not be detained by postal employees beyond the normal delivery date and time. In other words, *an addressee's possessory interest is in the timely delivery of a package*, not in having his package routed on a particular conveyor belt, sorted in a particular area, or stored in any particular sorting bin for a particular amount of time.

Id. at 1210 (emphasis added) (citation and internal quotation marks omitted). Therefore, "even though first-class mail is protected by the Fourth Amendment from unreasonable search and seizure, it is not beyond the reach of all inspection. Rather, the question is whether the conditions for its detention and inspection have been satisfied." *Id.* (citations and internal quotation marks omitted); *United States v. Van Leeuwen*, 397 U.S. 249, 251–52, 25 L. Ed. 2d 282, 285 (1970).

¶ 29 In *Van Leeuwen*, for instance, the United States Supreme Court concluded that law enforcement officers' warrantless detention of a first-class package for approximately 29 hours while they obtained a search warrant did not implicate the defendant's privacy interest:

> No interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited. *The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.*

397 U.S. at 253, 25 L. Ed. 2d at 286 (emphasis added).

¶ 30 Accordingly, "for the purposes of the Fourth Amendment, no seizure occurs if a package is detained in a manner that does not significantly interfere with its timely delivery in the normal course of business." *United States v. Quoc Viet Hoang*, 486 F.3d 1156, 1162 (9th Cir. 2007), *cert. denied*, 552 U.S. 1144, 169 L. Ed. 2d 813 (2008); *see also id.* (holding that "the ten minute detention of [a defendant]'s package in the FedEx hold room without reasonable suspicion d[id] not implicate his Fourth Amendment rights").

¶ 31 In the instant case, when the trial court denied Defendant's motion to suppress, it found as fact that Hydro was "on the scene with" Officer Smith and that "the process of this lineup took about five to ten minutes." Defendant does not challenge these findings of fact, and they are, therefore, binding on appeal. *See Lane*, ¶ 12. Based on these unchallenged findings, the trial court concluded that "the retention of the [target] package was for a reasonable period of time given that the dog was on the scene." Defendant's insistence that this temporary retention of the target package amounted to a seizure implicating his Fourth Amendment rights is not supported by the relevant case law, as a delay of approximately five to ten minutes to procure an on-site canine unit for a drug sniff of an apparently suspicious package did "not significantly interfere with [the target package's] timely delivery in the normal course of business." *Quoc Viet Hoang*, 486 F.3d at 1162. Accordingly, Defendant's "possessory interest . . . in the timely delivery of [the target] package" was not disturbed, *Hernandez*, 313 F.3d at 1210, and we cannot agree with Defendant's argument that the mere removal of the target package from the conveyor belt for a drug dog sniff was a "seizure" implicating the Fourth Amendment.

¶ 32 Defendant also challenges several investigatory acts undertaken by law enforcement officers before Investigator Menzie obtained a search warrant to open the target package upon Hydro's positive alert to the presence of controlled substances during the drug dog sniff conducted at the FedEx facility. For the reasons explained above, the initial removal of the target package from the conveyor belt was not a "seizure" implicating Defendant's Fourth Amendment rights. As the trial court properly concluded, "a reasonable and articulable suspicion existed sufficient to justify the brief detention of the package for purposes of having a drug dog sniff it; and . . . the retention of the package was for a reasonable period of time given that the dog was on the scene."

¶ 33 Neither was Hydro's drug sniff a "search" implicating Defendant's Fourth Amendment rights. And, given that Hydro alerted to the target package in the line-up, the trial court correctly concluded "that based

upon the totality of the circumstances, probable cause existed for the issuance of the search warrant for the parcel." Taken together, neither the removal of the package nor the drug dog sniff violated Defendant's Fourth Amendment right to be free from unreasonable searches and seizures because under the facts presented, those acts constituted neither a seizure (the removal) nor a search (the drug dog sniff). Rather, those acts, viewed in the totality of the circumstances, merely provided further support for Investigator Menzie's determination that probable cause existed to obtain a search warrant to open the target package. Accordingly, the trial court did not err by denying Defendant's motion to suppress.

¶ 34 Moreover, the subsequent searches and seizures flowing from these acts were supported by valid warrants. Defendant challenges the validity of these warrants solely for want of probable cause, based on the same Fourth Amendment arguments that we have addressed and determined to be without merit. Yet each search warrant application reveals that law enforcement officers properly built their investigation step by step.

¶ 35 Having determined that probable cause existed to support his application for a search warrant of the target package, Investigator Menzie immediately sought and obtained one, and the resultant search yielded approximately 15 pounds of vacuum-sealed marijuana and a GPS tracker. When Investigator Menzie surveilled the residence to which the target package was addressed, he noticed a nearby storage facility and subsequently learned that Defendant rented a unit at that location. In a second drug dog sniff—which Defendant does not challenge on appeal—Hydro alerted to Defendant's storage unit, and within an hour Defendant arrived at the unit carrying a tote in which was visible a brown substance that law enforcement officers believed was THC. These facts, combined with the previously developed probable cause, gave rise to further probable cause sufficient to support the issuance of a search warrant for the storage unit. That lawful search, in turn, provided sufficient probable cause to support the issuance of a document search warrant for the residence, the search of which provided sufficient probable cause to support the issuance of a controlled substances search warrant, permitting the lawful search of the residence.

¶ 36 In sum, at every stage of the investigation—from the initial removal of the target package and the drug dog sniff at the FedEx facility through each search and seizure conducted pursuant to valid and lawfully obtained warrants—law enforcement officers complied with the requirements of the Fourth Amendment. Accordingly, Defendant's challenge is overruled.

¶ 37 However, even assuming, *arguendo*, that the law enforcement officers' actions here amounted to searches or seizures within the purview of the Fourth Amendment, we additionally conclude that he has waived appellate review of these issues.

4. Waiver of Appellate Review

¶ 38 Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure establishes that a party must object at trial, and obtain a ruling from the court, in order to preserve an issue for appellate review:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1).

¶ 39 A motion in limine, such as a pretrial motion to suppress, is "not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial." *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Following the denial of a pretrial motion to suppress evidence, the defendant's subsequent "[f]ailure to object at trial waives appellate review[.]" *State v. Anthony*, 271 N.C. App. 749, 752, 845 S.E.2d 452, 455, *disc. review denied*, 376 N.C. 544, 851 S.E.2d 634 (2020).

¶ 40 Here, Defendant filed a pretrial motion to suppress, *inter alia*, "evidence obtained as the result of an unconstitutional seizure of the [target package] addressed to . . . Defendant," and renewed his objection at trial to the introduction of evidence concerning the drug dog sniff. Nonetheless, Defendant concedes that he "did not object when the State elicited testimony about the removal of the [target package] from the conveyor belt." Therefore, Defendant has waived appellate review of the issue of the target package's removal from the conveyor belt, *see id.*, and the trial court's conclusion that "a reasonable and articulable suspicion existed sufficient to justify a brief detention of the package for purposes of having a drug dog sniff it" remains undisturbed.

¶ 41 Perhaps in an attempt to avoid this waiver, Defendant couches his dog-sniff argument in the conjunctive, combining the drug dog sniff with

the alleged "seizure" of the target package from the conveyor belt: "such actions *plus* the conducting of a lineup with a narcotics-detecting canine constituted a search[.]" (Emphasis added). This argument fails.

¶ 42 Despite the fact that Defendant objected at trial to the introduction of evidence regarding Hydro's drug sniff of the target package once it was removed from the conveyor belt, this subsequent objection cannot overcome Defendant's failure to object to the State's initial introduction of Investigator Menzie's testimony regarding the removal of the target package itself—the alleged "seizure" that Defendant has consistently characterized as the initial Fourth Amendment violation. Moreover, Defendant's subsequent objection at trial to the introduction of evidence regarding the drug dog sniff cannot preserve Defendant's broader Fourth Amendment arguments for appellate review because the drug dog sniff, on its own, did not infringe on Defendant's Fourth Amendment rights.

¶ 43 Defendant primarily bases his argument concerning the drug dog sniff on *Florida v. Jardines*, in which the United States Supreme Court concluded that "the officers' investigation took place in a constitutionally protected area"—the front porch of the defendant's home—and held that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." 569 U.S. 1, 7, 11–12, 185 L. Ed. 2d 495, 501–02, 504 (2013).

¶ 44 In analogizing the target package in this case to the front door of the home in *Jardines*, Defendant disregards extensive precedent according a person's home heightened Fourth Amendment protection. *Id.* at 6, 185 L. Ed. 2d at 501 ("[W]hen it comes to the Fourth Amendment, the home is first among equals."). In fact, the *Jardines* Court explicitly distinguished a warrantless drug dog sniff of the home and its immediate surroundings from previous decisions involving warrantless drug dog sniffs in public places, which the Supreme Court determined did not implicate the defendants' constitutional expectations of privacy in their property or effects. *Id.* at 10–11, 185 L. Ed. 2d at 503–04; *see also Illinois v. Caballes*, 543 U.S. 405, 409, 160 L. Ed. 2d 842, 847 (2005) (concluding that "the use of a well-trained narcotics-detection dog . . . during a lawful traffic stop, generally does not implicate legitimate privacy interests"); *Place*, 462 U.S. at 707, 77 L. Ed. 2d at 121 (concluding that the "exposure of [the] respondent's luggage, which was located in a public place, to a trained canine . . . did not constitute a 'search' within the meaning of the Fourth Amendment").

¶ 45 The *Jardines* Court focused on the physical intrusion of the defendant's "home and its immediate surroundings" rather than any violation of his reasonable expectation of privacy. 569 U.S. at 11, 185 L. Ed.

2d at 504 ("[W]e need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz* [*v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576 (1967)]. . . . That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.").

¶ 46 As our Supreme Court has explained, *Jardines* presents an exception to the "generally permissive view of public dog sniffs under the Fourth Amendment." *State v. Miller*, 367 N.C. 702, 708, 766 S.E.2d 289, 293 (2014). Insofar as the relevant decisions of the United States Supreme Court "*encourage police to utilize dog sniffs in the public sphere*," the Court's decision in *Jardines* "places police on a much shorter leash when employing dog sniffs *in and around the home*." *Id.* (emphases added).

¶ 47 In the present case, however, Defendant can claim no physical intrusion analogous to that in *Jardines*, because the drug dog sniff in question did not occur at his home or within its immediate surroundings. Instead, the drug dog sniff here is precisely in line with the sort of investigation in the "public sphere" that our Supreme Court noted was "encourage[d]" by the United States Supreme Court's pre-*Jardines* opinions. *Id.*

¶ 48 We conclude that the drug dog sniff of the target package, which occurred on the grounds of a private, third-party facility at which Defendant was not present and in which he claimed no property interest, did not implicate any Fourth Amendment right in and of itself. Further, at the time of these events, Defendant was unaware of either the drug dog sniff or the temporary retention of the target package that precipitated the sniff. Lastly, as previously discussed, the target package was only detained for a brief period of time, which was insufficient to implicate Defendant's Fourth Amendment rights. *See Van Leeuwen*, 397 U.S. at 253, 25 L. Ed. 2d at 286.

¶ 49 Accordingly, the warrantless drug dog sniff of the target package, still in the mail stream and in the custody of a third party on the grounds of a facility in which Defendant had no possessory interest, and which the trial court found only "took about five to ten minutes[,]" did not in and of itself implicate the Fourth Amendment. Therefore, Defendant's renewed objection at trial to the introduction of evidence concerning the drug dog sniff was insufficient to resurrect any prior unpreserved Fourth Amendment argument for appellate review.

5. Plain Error

¶ 50 Finally, "out of an abundance of caution," Defendant contends that the trial court's denial of his motion to suppress "constituted plain

error necessitating reversal." However, "[t]he first step under plain error review is . . . to determine whether any error occurred at all." *State v. Oxendine*, 246 N.C. App. 502, 510, 783 S.E.2d 286, 292, *disc. review denied*, 368 N.C. 921, 787 S.E.2d 24 (2016). We have already determined that the law enforcement officers' actions did not implicate *any* of Defendant's Fourth Amendment rights. In that Defendant is unable to show any error in the trial court's denial of his motion to suppress, Defendant's plain error arguments are overruled as well.

¶ 51 Moreover, in reaching these determinations, we have carefully reviewed the evidence at the suppression hearing. We further conclude that the trial court's findings of fact are supported by the evidence, and that those findings, in turn, support the trial court's conclusions of law and its denial of Defendant's motion to suppress. For all of these reasons, we affirm the denial of Defendant's motion to suppress.

B. Industrial Hemp

¶ 52 The majority of Defendant's remaining issues on appeal stem from our General Assembly's legalization of industrial hemp. "Industrial hemp is a variety of the species Cannabis Sativa—the same species of plant as marijuana. The difference between the two substances is that industrial hemp contains very low levels of [THC], which is the psychoactive ingredient in marijuana." *Parker*, ¶ 27. Our General Statutes define "industrial hemp" as "[a]ll parts and varieties of the plant Cannabis sativa (L.), cultivated or possessed by a grower licensed by the [North Carolina Industrial Hemp] Commission, whether growing or not, that contain a [THC] concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis." N.C. Gen. Stat. § 106-568.51(7) (2021).[5]

¶ 53 Defendant maintains that the passage of the Industrial Hemp Act altered the legal landscape surrounding marijuana and THC, changes which

5. In order to maintain the legal status of "hemp" and "hemp products," *see* N.C. Gen. Stat. § 90-87(13a)–(13b) (2022), following the expiration of the Industrial Hemp Act on 30 June 2022, our General Assembly amended the North Carolina Controlled Substances Act effective 30 June 2022, *see* An Act to Conform the Hemp Laws with Federal Law by Permanently Excluding Hemp from the State Controlled Substances Act, S.L. 2022-32, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2022-32.pdf. Nonetheless, as a general rule, "the amendment of a criminal statute does not affect the prosecution or punishment of a crime committed before the amendment becomes effective[.]" *State v. Hart*, 287 N.C. 76, 81, 213 S.E.2d 291, 295 (1975) (citation omitted). Thus, "as to such crimes the original statute remains in force." *Id.* (citation omitted). Because the Industrial Hemp Act was in effect at all times relevant to this appeal, our analysis is unchanged by this recent legislation.

resulted in prejudicial errors during several stages of his prosecution. Specifically, Defendant challenges: (1) the validity of the indictment charging him with possession with intent to sell or deliver THC; (2) the sufficiency of the State's evidence regarding the charge of possession with intent to sell or deliver THC; and (3) the admissibility of the opinion testimony of witnesses for the State identifying the various seized substances as "marijuana," "marijuana wax," "shatter," and "highly concentrated THC."

¶ 54 We note initially that at the root of these arguments is a fundamental misapprehension concerning the State's burden of proof at each stage of these proceedings, none of which the provisions of the Industrial Hemp Act affect to the degree that Defendant contends. Although our appellate courts have yet to fully address the effect of industrial hemp's legalization on the panoply of standards and procedures applicable during the various stages of a criminal investigation and prosecution for acts involving marijuana, *see Parker*, ¶ 29 ("The legal issues raised by the recent legalization of hemp have yet to be analyzed by the appellate courts of this state."), the federal courts of North Carolina have considered some of these issues. We find their analyses illustrative with regard to the enduring viability of our marijuana case law and the legal principles articulated by those precedents, despite the enactment of the Industrial Hemp Act.

¶ 55 In *United States v. Harris*, the United States District Court for the Eastern District of North Carolina explained that "the smell of marijuana alone . . . supports a determination of probable cause, even if some use of industrial hemp products is legal under North Carolina law. This is because '*only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause*.' " No. 4:18-CR-57-FL-1, 2019 WL 6704996, at *3 (E.D.N.C. Dec. 9, 2019) (emphasis added) (quoting *Illinois v. Gates*, 462 U.S. 213, 235, 76 L. Ed. 2d 527, 546, *reh'g denied*, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983)).

¶ 56 Similarly, in *United States v. Brooks*, the United States District Court for the Western District of North Carolina denied a defendant's motion to suppress where, *inter alia*, the defendant argued that the odor of marijuana that the law enforcement officer detected "*could* have been from a legal source." No. 3:19-cr-00211-FDW-DCK, 2021 WL 1668048, at *4 (W.D.N.C. Apr. 28, 2021). In denying the motion to suppress, the trial court noted that the defendant cited "no relevant case law which requires a law enforcement officer to test contraband found in a vehicle based on the plain smell of marijuana." *Id.*

¶ 57 The court then explained the basis for its determination that the legalization of industrial hemp did not alter the court's probable-cause analysis:

> Assuming, *arguendo*, hemp and marijuana smell "identical," then the presence of hemp does not make all police probable cause searches based on the odor unreasonable. The law, and the legal landscape on marijuana as a whole, is ever changing but *one thing is still true: marijuana is illegal*. To date, even with the social acceptance of marijuana seeming to grow daily, precedent on the plain odor of marijuana giving law enforcement probable cause to search has *not* been overturned. Therefore, if hemp does have a nearly identical smell to marijuana — and hemp was present — it would suggest to this court that [the law enforcement officer] was even more reasonable to believe evidence of marijuana was present.

Id. (first emphasis added) (footnotes omitted).

¶ 58 The reasoning and analyses of these federal cases are persuasive, and demonstrate the general shortcoming that underlies Defendant's various arguments on appeal. The passage of the Industrial Hemp Act, in and of itself, did not modify the State's burden of proof at the various stages of our criminal proceedings.[6]

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6. Defendant also invokes the Industrial Hemp Act to support his argument that the trial court erred by denying his motion to suppress because the green, leafy substance inside the parcel was "seized" from the target package prior to determining whether it contained an unlawful concentration of THC. However, for the reasons articulated in section II.A.3 above, to the extent that Defendant challenges the initial removal of the target package from the conveyor belt at the FedEx facility, such removal was not a "seizure" implicating his Fourth Amendment rights. And to the extent that Defendant refers to the seizure of the vacuum-sealed bags discovered inside the target package, the bags were seized pursuant to the execution of a valid, lawfully obtained search warrant and therefore did not violate Defendant's Fourth Amendment rights. Further, for the reasons articulated herein, the Industrial Hemp Act has not changed the State's burden of proof to overcome a motion to suppress.

Finally, we note that this is not a case where the detectable odor of marijuana was the only suspicious fact concerning the package. The trial court's findings of fact include, *inter alia*, that the seams of the package were sealed, the phone number listed for the recipient on the target package was fictitious, the sender's address and phone number listed on the target package were fictitious, and the actual city from which the target package was sent differed from the city of origin stated on the package. We therefore need not address in this case whether the odor of marijuana alone may give rise to probable cause for the issuance of a search warrant, as the totality of the circumstances here was sufficient to give rise to probable cause. Accordingly, this argument is overruled.

1. Sufficiency of the Indictment

¶ 59 **[2]** With the above guidance in mind, we first reject Defendant's argument that the indictment charging him with possession with intent to sell or deliver THC "was facially defective because it did not allege with particularity an offense proscribed by North Carolina law subsequent to the legalization of industrial hemp."

¶ 60 It is axiomatic that "a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Mostafavi*, 370 N.C. 681, 684, 811 S.E.2d 138, 140 (2018) (citation omitted). While "an indictment must allege all the essential elements of the offense endeavored to be charged, . . . an indictment couched in the language of the statute is generally sufficient to charge the statutory offense[.]" *Id.* at 685, 811 S.E.2d at 141 (citations and internal quotation marks omitted).

¶ 61 In the instant case, the challenged indictment alleged that Defendant "unlawfully, willfully and feloniously did possess with intent to sell or deliver a controlled substance, delta-9-tetrahydrocannabinol, commonly referred to as 'THC', which is included in Schedule VI of the North Carolina Controlled Substances Act. This act was done in violation of N.C.G.S. § 90-95(a)(1)." Defendant contends that, in light of the legalization of industrial hemp, "a cognizable criminal charge would be possession of a substance containing an unlawful quantity of the chemical compound" THC. Defendant argues that the indictment was facially defective because it failed to specifically allege that he possessed "an unlawful quantity" of THC, and thus the trial court lacked jurisdiction to enter judgment on this charge.

¶ 62 However, regardless of the passage of the Industrial Hemp Act, the concentration of THC is not an element of the offense of possession with intent to sell or deliver THC. The Controlled Substances Act makes it illegal to "possess with intent to manufacture, sell or deliver, a controlled substance[.]" N.C. Gen. Stat. § 90-95(a)(1). "The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001). "Tetrahydrocannabinols"—a broader category of substances that includes THC—are Schedule VI controlled substances. N.C. Gen. Stat. § 90-94(2). Accordingly, by identifying THC as a controlled substance, the indictment at issue here was appropriately "couched in the language of the statute" and "sufficient to charge the statutory offense[.]" *Mostafavi*, 370 N.C. at 685, 811 S.E.2d at 141 (citation omitted).

¶ 63 Finally, the "plain reading of Chapter 90 reveals lawful possession of a controlled substance is not an element of the statute but rather an exception[.]" *State v. Palmer*, 273 N.C. App. 169, 169, 847 S.E.2d 449, 450 (2020). Significantly, the Industrial Hemp Act did not *remove* THC from Schedule VI of the Controlled Substances Act. *See* N.C. Gen. Stat. § 90-94(2). And if the Industrial Hemp Act creates an exception for industrial hemp or somehow alters the State's well-established burden of proof in controlled-substance prosecutions, "[i]t shall not be necessary for the State to negate any exemption or exception set forth in [the Controlled Substances Act] in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under" the Controlled Substances Act. *Id.* § 90-113.1(a). The burden of proving that a controlled substance is, in fact, lawfully possessed is borne by *the defendant*. *Id.*

¶ 64 Defendant has not shown that the indictment charging him with possession with intent to sell or deliver THC was fatally deficient. Accordingly, this argument is overruled.

2. Motion to Dismiss

¶ 65 **[3]** Defendant next argues that the trial court erred by denying his motion to dismiss the charge of possession with intent to sell or deliver THC "because there was insufficient evidence the brown material tested by the CCBI lab contained the requisite percentage of [THC] to be deemed an unlawful substance."[7] This argument, too, is without merit, because none of the "brown material" falls within the Industrial Hemp Act's definition of "industrial hemp."

¶ 66 This Court reviews a trial court's denial of a motion to dismiss de novo. *State v. McClaude*, 237 N.C. App. 350, 352, 765 S.E.2d 104, 107 (2014). The question for the trial court upon a defendant's motion to dismiss "is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied." *Id.* at 352–53, 765 S.E.2d at 107 (citation omitted). "In making its determination, the trial court must consider all

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7. At trial, the State's forensic chemist testified that she tested one item ("11 sheets of shatter") of the several items of brown material that were submitted to her lab at the City-County Bureau of Investigation. She testified that she only tested this item because there is no statutory "weight-based threshold for . . . THC," and that it is "fairly common in most crime labs to test to [the] statutory threshold in terms of efficiency." *See* N.C. Gen. Stat. § 90-95(d)(4) (making the possession "of *any* quantity of . . . tetrahydrocannabinols isolated from the resin of marijuana" a Class I felony (emphasis added)).

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." *Id.* at 353, 765 S.E.2d at 107 (citation omitted).

¶ 67 As stated above, for the purposes of the Industrial Hemp Act, "industrial hemp" means "[a]ll parts and varieties of the plant Cannabis sativa (L.), cultivated or possessed by a grower licensed by the [North Carolina Industrial Hemp] Commission, whether growing or not, that contain a [THC] concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis." N.C. Gen. Stat. § 106-568.51(7).

¶ 68 Defendant's claim—that "[w]ithout determining the level of concentration of [THC] in the brown substance, the State did not present any evidence that the brown substance actually contained 0.3% or more of [THC] and was thus illegal"—assumes, without explicitly arguing, that the "brown material" was "industrial hemp," as defined by N.C. Gen. Stat. § 106-568.51(7), in the first place. We disagree.

¶ 69 The brown material was neither a *part* nor a *variety* of the plant Cannabis sativa. The State's forensic chemist, who was tendered and accepted as an expert witness without objection from Defendant, testified that "[t]here was no plant material present" in her macroscopic identification of the solid brown material. The forensic chemist also testified that the brown materials were "extracts of the marijuana plant[.]" Thus, the brown material is not within the Industrial Hemp Act's definition of "industrial hemp," but instead more squarely falls under its definition of "THC": "[t]he natural or synthetic equivalents of the substances contained in the plant, or in the *resinous extractives* of, cannabis, or any synthetic substances, compounds, salts, or derivatives of the plant or chemicals and their isomers with similar chemical structure and pharmacological activity." *Id.* § 106-568.51(8) (emphasis added). Further, even if we accepted Defendant's implicit argument that the brown material *was* a "part" or "variety" of the plant Cannabis sativa, Defendant makes no argument that he was "a grower licensed by the [North Carolina Industrial Hemp] Commission," or that the brown material was cultivated by such a licensed grower, as the statutory definition of "industrial hemp" requires. *Id.* § 106-568.51(7).

¶ 70 Because the brown material was not "industrial hemp" as defined by the Industrial Hemp Act, the State was not required to present evidence that the substance contained 0.3% or more of THC by dry-weight concentration in order to meet its burden of proof for the offense of possession with intent to sell or deliver THC.

¶ 71 Accordingly, after careful review of the record, and viewing the evidence "in the light most favorable to the State," *McClaude*, 237 N.C. App. at 353, 765 S.E.2d at 107 (citation omitted), we conclude that the State presented sufficient evidence to withstand Defendant's motion to dismiss the charge of possession with intent to sell or deliver THC.[8] This argument is overruled.

3. Opinion Testimony

¶ 72 **[4]** Lastly, Defendant argues that the trial court erred by permitting several of the State's witnesses to offer opinion testimony that seized substances were "marijuana," "marijuana wax," "shatter," and "highly concentrated THC" without scientifically valid chemical analyses identifying them as such, in violation of Rule 702.

¶ 73 Our appellate courts "review the trial court's decision to admit lay opinion testimony evidence for abuse of discretion, looking to whether the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Delau*, 381 N.C. 226, 2022-NCSC-61, ¶ 29 (citation omitted). Further, in order to show that the erroneous admission of evidence in a criminal trial prejudiced the defendant, the "defendant bears the burden of showing that there is a reasonable possibility that a different result would have been reached at the trial had the trial court excluded" the erroneously admitted evidence. *State v. Carter*, 237 N.C. App. 274, 284, 765 S.E.2d 56, 63 (2014) (citation and internal quotation marks omitted); N.C. Gen. Stat. § 15A-1443(a). For the reasons that follow, we conclude that Defendant has not shown prejudicial error.

¶ 74 "[T]he State has the burden of proving every element of the charge beyond a reasonable doubt . . . ." *State v. Nabors*, 365 N.C. 306, 313, 718

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8. Defendant's argument concerning the sufficiency of the evidence to support the charge of possession with intent to sell or deliver THC dovetails with his argument, addressed below, concerning the allegedly erroneous admission of testimony identifying the seized materials as unlawful controlled substances absent scientifically valid chemical analyses in violation of Rule 702. To the extent that Defendant's Rule 702 argument bears on his motion to dismiss argument, we note that our Supreme Court has recently clarified that it would be error for this Court to first determine "whether the evidence suffices to support a defendant's criminal conviction by ascertaining whether the evidence relevant to the issue of the defendant's guilt should or should not have been admitted[,]" and then to consider "whether the admissible evidence, examined without reference to the allegedly inadmissible evidence that the trial court allowed the jury to hear, sufficed to support the defendant's conviction." *State v. Osborne*, 372 N.C. 619, 630, 831 S.E.2d 328, 336 (2019). Accordingly, pursuant to our Supreme Court's guidance in *Osborne*, we cannot and should not exclude the challenged identification testimony from our consideration of the evidence supporting Defendant's convictions. *Id.*

S.E.2d 623, 627 (2011). Specifically, in prosecutions involving controlled substances, the State bears the burden of proving the substance's identity beyond a reasonable doubt. *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010). As a general rule, "the expert witness testimony required to establish that . . . substances introduced [at trial] are in fact controlled substances must be based on a scientifically valid chemical analysis and not mere visual inspection." *Id.* at 142, 694 S.E.2d at 744.

¶ 75 However, marijuana has long been excepted from this rule. Notwithstanding *Ward*, this Court has "specifically noted that marijuana is distinguishable from other controlled substances that require more technical analyses for positive identification. In keeping with a long line of cases, we [have repeatedly] held . . . that the State is not required to submit marijuana for chemical analysis." *State v. Mitchell*, 224 N.C. App. 171, 179, 735 S.E.2d 438, 444 (2012) (citation omitted), *appeal dismissed and disc. review denied*, 366 N.C. 578, 740 S.E.2d 466 (2013).

¶ 76 Nevertheless, Defendant argues that "the legalization of industrial hemp in North Carolina has eviscerated th[e] justification" for the marijuana exception recognized in *Mitchell* and other cases. Yet assuming, *arguendo*, that the trial court abused its discretion in admitting this testimony, Defendant fails to demonstrate that he was prejudiced by its admission.

¶ 77 As the State observes, "Defendant makes no argument explaining how or for which convictions that evidence affected the jury's verdict." To be sure, Defendant's assertion of prejudice is little more than a general recapitulation of his overall arguments regarding the Industrial Hemp Act. For example, Defendant claims that "the State failed to produce any evidence that the substances seized in the storage unit, in the bag [Defendant] carried at the storage unit, or in the residence were subjected to a valid scientific chemical analysis that confirmed their percentage of" THC. Thus, Defendant contends that the testimony from Investigator Menzie, Officer Smith, and Sergeant Wright "that, in their opinion, such substances were 'marijuana,' 'marijuana wax,' 'shatter,' or 'highly concentrated THC,' constituted the State's most compelling evidence that [Defendant] was guilty of possessing the alleged substances in question." Accordingly, if the "most compelling evidence" of Defendant's guilt was erroneously admitted, then that admission must have been prejudicial. We disagree with Defendant's contention.

¶ 78 First, as Defendant candidly acknowledges, the green, leafy substance in the target package *was* tested, and the substance was determined to contain an unlawful concentration of THC. Defendant,

therefore, could not have been prejudiced by any erroneously admitted testimony regarding the green, leafy substance found in the target package because "a scientifically valid chemical analysis" *was* conducted with respect to this substance. *Ward*, 364 N.C. at 142, 694 S.E.2d at 744.

¶ 79 Second, as discussed above, the brown material was not "industrial hemp" as defined in the Industrial Hemp Act. As such, the State was not required to present evidence of the concentration of THC present in the brown material; it needed only present "a scientifically valid chemical analysis" showing that the brown material contained THC, *id.*, which the State did. Therefore, Defendant could not have been prejudiced by any erroneously admitted testimony identifying the brown material.

¶ 80 Lastly, although the green, leafy substance discovered in the storage unit was not tested for its concentration of THC, the State presented overwhelming evidence of Defendant's guilt of the offense of possession with intent to sell or deliver marijuana, such that any erroneously admitted testimony regarding its identification could not have reasonably affected the jury's verdict on this charge. Significantly, as discussed below, the State presented substantial evidence of Defendant's participation in a conspiracy to traffic marijuana—a conspiracy that culminated in the discovery of approximately $153,000.00 worth of "high quality" marijuana inside the target package, which was addressed to Defendant at Defendant's residence. The State also presented a scientifically valid chemical analysis showing that the green, leafy material discovered in the target package contained an unlawful concentration of THC. Further, the State presented evidence of Defendant's unlawful possession of various other controlled substances and drug paraphernalia, which law enforcement officers recovered from four distinct sources: the target package; the storage unit (to which the officers gained entry pursuant to a lawful search warrant by use of Defendant's key and with his cooperation); a bag in Defendant's possession when he arrived at the storage unit, in which some of the brown material was in plain view when he set down the bag at the request of a law enforcement officer; and his residence.

¶ 81 For the foregoing reasons, and in light of the substantial and overwhelming evidence of Defendant's guilt, we conclude that Defendant has not shown "that there is a reasonable possibility that a different result would have been reached at the trial had the trial court excluded" any erroneously admitted testimony regarding the identification of any untested substances. *Carter*, 237 N.C. App. at 284, 765 S.E.2d at 63

(citation and internal quotation marks omitted). Defendant's argument is overruled.[9]

C. Conspiracy

¶ 82 Defendant next argues that the trial court erred by denying his motion to dismiss the charge of conspiracy to traffic marijuana by transportation, due to insufficient evidence of a conspiracy between him and another. Additionally, Defendant contends that the trial court erroneously and prejudicially admitted into evidence the recording of a phone call between Investigator Menzie and "Marcus," the shipper of the target package. Defendant's arguments are without merit.

1. Motion to Dismiss

¶ 83 **[5]** The elements of a criminal conspiracy are well established:

> A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. To constitute a conspiracy, it is not necessary that the parties should have come together and agreed in express terms to unite for a common object: A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.

State v. Chavez, 378 N.C. 265, 2021-NCSC-86, ¶ 14 (citation omitted).

¶ 84 Significantly, "[t]he conspiracy is the crime and not its execution. Therefore, no overt act is necessary to complete the crime of conspiracy.

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9. Defendant also argues that the trial court committed plain error by admitting evidence concerning the chemical analysis of the green, leafy substance discovered in the target package when individuals involved in allegedly critical stages of that analysis did not testify, which Defendant contends violated his constitutional right to confront witnesses against him. However, "plain error review in North Carolina is normally limited to instructional and evidentiary error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 596, 607 (2001). Defendant acknowledges that he did not preserve this issue by objecting to the testimony regarding the analysis or testing of the substances in this case, nor did he object to the admission of the written certificate of analysis into evidence. Moreover, Defendant did not seek to introduce at trial the testimony of any of the "numerous individuals involved in critical stages of the testing process"—none of whom signed the certificate of analysis admitted into evidence at trial. These are the individuals that Defendant now complains he constitutionally should have been able to confront. This asserted error is based upon a constitutional right, and is not squarely an evidentiary error; thus, plain error review is not available and this argument is dismissed.

As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *Id.* (citation omitted).

¶ 85 The State may establish the existence of a conspiracy "by direct or circumstantial evidence." *Id.* (citation omitted). Indeed, direct evidence is not essential to proving a conspiracy, for such proof "is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *Id.* (citation omitted).

¶ 86 As stated above, we review de novo a trial court's denial of a criminal defendant's motion to dismiss. *McClaude*, 237 N.C. App. at 352, 765 S.E.2d at 107.

¶ 87 Here, Defendant argues that "the State lacked evidence of any communication or planning between [himself] and another person that could sufficiently prove an agreement or understanding to traffic marijuana." According to Defendant, "[t]he State's evidence, at best, raised the suspicion of a possible association between [Defendant] and the shipper of the [target package], but that was not enough to submit this charge to the jury." Defendant asserts that the State's case "essentially rested on the fact that 'Joe Teague' was the addressee listed on the" target package. Yet in a separate evidentiary challenge, Defendant also asserts that the trial court erroneously admitted into evidence the recording of a phone call between Investigator Menzie and Marcus. Although seemingly irrelevant to the question at hand, Defendant's evidentiary argument nevertheless implicitly acknowledges that the State did, in fact, present additional evidence—more than just the shipping label—to establish the existence of a conspiracy.

¶ 88 Indeed, the State proffered other circumstantial evidence in support of the existence of a conspiracy in addition to the recording of the phone call between Investigator Menzie and Marcus. For example, Investigator Menzie testified that he estimated the street value of the "high quality" marijuana contained in the target package to be approximately $153,000.00. We agree with the State that such evidence creates "a strong inference that Marcus did not simply randomly mail the [target package] to Defendant but instead that he mailed it because Defendant agreed to accept it." *See id.* at 353, 765 S.E.2d at 107 (explaining that the State is entitled to "the benefit of every reasonable inference" and the resolution of "any contradictions in its favor" on appellate review of the denial of a defendant's motion to dismiss (citation omitted)). Additionally, Marcus shipped this valuable parcel from California to

Defendant's address using Defendant's actual name and packed a GPS tracker within the target package. Viewed "in the light most favorable to the State," *id.* (citation omitted), these facts further indicate a mutual concern for and interest in the target package.

¶ 89 Moreover, the recorded phone call itself—which was not erroneously admitted, for the reasons discussed below—constitutes additional circumstantial evidence supporting the existence of a conspiracy. As detailed in Investigator Menzie's search-warrant application for Defendant's mobile phone, a FedEx employee informed Investigator Menzie that Marcus called FedEx to inquire about the target package's status, requested a return call when the package was located, and left his phone number. In the affidavit supporting his search-warrant application, Investigator Menzie averred that:

> I called the number and spoke with "Marcus" who confirmed the tracking number of his parcel, the address it was going [to] and the name of the recipient. The information he provided was the same information listed on the [target package] intercepted. After obtaining that information, I identified myself to him and informed him I had his parcel in my custody. Marcus said, "F[***]" and hung up.

¶ 90 "[T]aken collectively," Marcus's recorded admission to Investigator Menzie that he sent the target package, his knowledge of its relevant details, his documented concern for the package's apparent failure to reach its destination, and his profane exclamation upon learning that he was speaking with a law enforcement officer provide strong circumstantial evidence that "point[s] unerringly to the existence of a conspiracy." *Chavez*, ¶ 14 (citation omitted). Defendant's argument is overruled.

2. Statement of a Co-Conspirator

¶ 91 **[6]** Defendant also argues that the recorded phone-call audio was inadmissible hearsay, which was erroneously and prejudicially admitted into evidence. We disagree.

a. Standard of Review

¶ 92 "This Court conducts de novo review of the admission of evidence over a hearsay objection. An erroneous admission of hearsay necessitates a new trial only if the defendant shows that there is a reasonable possibility that without the error the jury would have reached a different result." *State v. Roberts*, 268 N.C. App. 272, 276, 836 S.E.2d 287, 291 (2019) (citations omitted), *disc. review denied*, 374 N.C. 271, 839 S.E.2d 350 (2020).

b. Analysis

¶ 93 Rule 801 of the North Carolina Rules of Evidence defines "hearsay" as "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). "Hearsay is not admissible except as provided by statute" or by the Rules of Evidence. *Id.* § 8C-1, Rule 802. "A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . a statement by a co[-]conspirator of such party during the course and in furtherance of the conspiracy." *Id.* § 8C-1, Rule 801(d). The proper admission into evidence of a conspirator's statement against a co-conspirator "requires the State to establish that: (1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended." *State v. Valentine*, 357 N.C. 512, 521, 591 S.E.2d 846, 854 (2003) (citation and internal quotation marks omitted).

¶ 94 Defendant argues that the State has not satisfied any of these requirements, primarily alleging that "[s]tatements not made between the alleged co-conspirators do not satisfy the criteria for admitting hearsay under the co-conspirator exception." However, "when the State has introduced *prima facie* evidence of a conspiracy, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members *regardless* of their presence or absence at the time the acts and declarations were done or uttered." *State v. Tilley*, 292 N.C. 132, 138, 232 S.E.2d 433, 438 (1977). Accordingly, Defendant's argument that a statement must be made "between the alleged co-conspirators" in order to be admissible under the co-conspirator exception to the hearsay rule lacks merit.

¶ 95 Further, as the trial court found in ruling on Defendant's objection:

> [I]n the light most favorable to the State, the State established a conspiracy existed and that this statement was made while the conspiracy was still active, that is, after it was formed and before it was ended; that the statements were made by a party to the conspiracy, to wit, Marcus Rawls or a person purporting to be Marcus Rawls; and that it was in pursuance of its objectives in that the declarant was attempting to ensure that the [target] package was properly delivered.

¶ 96 After the trial court noted that it was "not aware of any requirement that the statement must be made to another party to the conspiracy as

opposed to some third party who is not a co-conspirator[,]" the court overruled Defendant's objection and admitted the recording of the phone call as the statement of a co-conspirator. We discern no error in the trial court's ruling.

III. Conclusion

¶ 97 For the reasons stated above, including the fact that neither the initial removal of the target package nor the drug dog sniff constituted a search or seizure implicating Defendant's Fourth Amendment rights and Defendant's waiver of appellate review of his Fourth Amendment arguments concerning the initial removal of the target package from the conveyor belt, we affirm the trial court's denial of Defendant's motion to suppress.

¶ 98 The legalization of industrial hemp, which is reported to be indistinguishable from marijuana without quantitative chemical analysis, raises compelling legal issues for our courts. However, we conclude that Defendant's arguments in the instant case are without merit. Accordingly, these arguments are overruled.

¶ 99 Similarly, Defendant's arguments relating to the charge of conspiracy to traffic marijuana by transportation are unpersuasive and overruled. For all these reasons, we conclude that Defendant received a fair trial, free from prejudicial error.

AFFIRMED IN PART; NO PREJUDICIAL ERROR IN PART.

Judges DILLON and COLLINS concur.

BRACEY v. MURDOCK

[286 N.C. App. 191, 2022-NCCOA-705]

ALICE BRACEY (FORMERLY MURDOCK), PLAINTIFF
v.
MICHAEL WELBORN MURDOCK, DEFENDANT

No. COA22-198

Filed 1 November 2022

Civil Procedure—consent order—equitable distribution—Rule 59 motion to amend judgment—untimely

In a divorce case involving a consent order on equitable distribution, which directed plaintiff ex-wife to transfer funds from her retirement accounts to defendant ex-husband pursuant to two qualified domestic relations orders (QDROs), the trial court properly denied defendant's motion for entry of the QDROs where defendant filed the motion nearly sixteen years after the consent order was entered. Because defendant's motion requested relief beyond the entry of the QDROs—defendant also sought passive gains and losses on the unpaid retirement funds and moved to compel discovery regarding those gains and losses—it constituted a Rule 59 motion to amend the consent order, which needed to be filed no more than ten days after the consent order was entered. Additionally, defendant failed to allege that the consent order was either not actually consented to or that it was obtained by mutual mistake or fraud.

Judge JACKSON concurring in the result only.

Appeal by defendant from order entered 29 September 2021 by Judge J. Brian Ratledge in Wake County District Court. Heard in the Court of Appeals 6 September 2022.

Wake Family Law Group, by Nancy Grace, Kelley Cash, and Zach Underwood, for plaintiff-appellee.

Rik Lovett & Associates, by S. Thomas Currin II, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Michael Welborn Murdock appeals from the trial court's order granting Plaintiff Alice Bracey's motion to dismiss, dismissing Defendant's motion for entry of qualified domestic relations orders

("QDROs"), and dismissing as moot his other pending motions. After careful review, we affirm.

I. Background

¶ 2 The trial court granted Plaintiff an absolute divorce from Defendant on 31 October 2003, while retaining jurisdiction over, *inter alia*, both parties' claims for equitable distribution. On 28 February 2005, the trial court entered the parties' consent order and judgment for equitable distribution (the "2005 Consent Order"). The 2005 Consent Order provides, in pertinent part:

> Plaintiff shall retain her 401(k) account and IRA account as her separate property. Plaintiff shall transfer to Defendant $31,618.00, equal to one-half of the date of separation balance in her IRA and $75,203.74, equal to one-half of the date of separation balance of her 401(k) account. The judgment of divorce in the above-entitled action shall be amended to create the tax free transfer of funds from Plaintiff's IRA account. . . . Defendant's attorney shall prepare a [QDRO] to create the tax free transfer of funds from Plaintiff's 401(k) account. Plaintiff shall cooperate in obtaining all information necessary for the preparation of the [QDRO].

The requisite documents were not submitted to the trial court, and the ordered amounts were not transferred from Plaintiff's IRA and 401(k) accounts to Defendant.

¶ 3 On 25 February 2021, nearly 16 years after the entry of the 2005 Consent Order, Defendant filed a motion for (1) a temporary restraining order, (2) a preliminary injunction, and (3) "the entry of [QDROs] (or other appropriate orders) to effectuate the provisions of" the 2005 Consent Order. That same day, the trial court entered an *ex parte* order denying Defendant's motions for a temporary restraining order and a preliminary injunction.

¶ 4 On 22 March 2021, Plaintiff moved to dismiss Defendant's remaining motion for the entry of QDROs. On 3 June 2021, Defendant filed a motion to strike, correct, and/or revise the trial court's *ex parte* order. After serving discovery requests upon Plaintiff, to which Plaintiff obtained extensions of time to respond, on 17 August 2021, Defendant filed a motion to compel discovery from Plaintiff and a motion to strike Plaintiff's motions for extensions of time.

¶ 5 The parties' several motions came on for hearing on 17 September 2021 in Wake County District Court. By order entered 29 September 2021, the trial court granted Plaintiff's motion to dismiss, dismissed Defendant's motion for entry of QDROs, and dismissed as moot Defendant's motion to strike, correct, and/or revise the court's order, motion to strike Plaintiff's extension motions, and motion to compel discovery. Specifically, the trial court concluded that "Defendant's motion for entry of a [QDRO] does not state a claim upon which relief can be granted because Defendant's claim is barred by the statute of limitation[s] pursuant to N.C. Gen. Stat. § 1-47. In the alternative, the equitable doctrine of laches bars Defendant from obtaining relief."

¶ 6 Defendant timely filed notice of appeal.

II. Discussion

¶ 7 Defendant argues that the trial court erred by concluding that his motion for entry of QDROs is time-barred by N.C. Gen. Stat. § 1-47 (2021), and that, in the alternative, his motion is barred by the equitable doctrine of laches. For the reasons below, we affirm the trial court's order.

A. Standard of Review

¶ 8 Our appellate courts "review a dismissal under Rule 12(b)(6) de novo, viewing the allegations as true and in the light most favorable to the non-moving party. Dismissal is proper when the complaint fails to state a claim upon which relief can be granted." *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5, 802 S.E.2d 888, 891 (2017) (citations and internal quotation marks omitted). When conducting de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the trial court." *Jackson v. Charlotte Mecklenburg Hosp. Auth.*, 238 N.C. App. 351, 353, 768 S.E.2d 23, 25 (2014) (citation omitted).

B. Analysis

¶ 9 This case requires that we determine the nature of Defendant's motion for entry of QDROs. Defendant argues that the trial court erred by granting Plaintiff's motion to dismiss pursuant to N.C. Gen. Stat. § 1-47, which provides a ten-year statute of limitations for an action "[u]pon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its entry." N.C. Gen. Stat. § 1-47(1). Defendant contends that his motion for the entry of QDROs is neither an "action" generally nor an "action upon a judgment" as specifically contemplated by § 1-47. Defendant further asserts that his motion "is also NOT a 'Claim' or 'Action' governed by the Statute of Limitations at all." "Rather than commencing a new action," Defendant alleges that

his motion for the entry of QDROs "seeks to finalize the current action." We disagree.

¶ 10 Upon careful review of Defendant's motion, it is plain that he does not simply "seek[ ] to finalize" the 2005 Consent Order or to effectuate its equitable distribution provisions. The 2005 Consent Order provides that Plaintiff shall make two transfers to Defendant: one from her 401(k) and one from her IRA, each for a sum certain "equal to one-half of the date of separation balance" of each account. Yet Defendant's motion, although titled "Motion For Entry of [QDROs]," in fact seeks relief beyond the entry of QDROs to effectuate the 2005 Consent Order's retirement account provisions. In this motion, Defendant asserts that he "is entitled to, not only the amounts listed in the [2005 Consent] Order, but also all passive gains and losses on his portion of the retirement accounts through the entry of the QDROs[,]" and that he "is in need of, and entitled to, discovery" to enable him to determine the amounts of the passive gains and losses on each account. Indeed, he also moves to compel discovery with regard to the passive gains and losses on the retirement accounts.

¶ 11 As Plaintiff correctly noted in her motion to dismiss, "[t]he 2005 [Consent] Order does not award Defendant passive gains and losses on the funds[.]" The 2005 Consent Order does not divide the retirement accounts between the parties; it provides that "Plaintiff shall retain her 401(k) account and IRA account as her separate property." Instead, the trial court's awards of $31,618.00 and $75,203.74 to Defendant were distributive awards. "A distributive award is a sum certain and does not include gains and/or losses." *Harris v. Harris*, 162 N.C. App. 511, 517, 591 S.E.2d 560, 563 (2004). Accordingly, Defendant actually seeks to amend or modify the 2005 Consent Order to include passive gains and losses, rather than to finalize or effectuate its provisions.

¶ 12 "Because motions are properly treated according to their substance rather than their labels, we treat [Defendant]'s motion for what it really was, namely, a Rule 59 motion" to amend the 2005 Consent Order. *Scott v. Scott*, 106 N.C. App. 379, 382, 416 S.E.2d 583, 585 (1992) (citation omitted). A Rule 59 motion to amend a judgment must "be served not later than 10 days after entry of the judgment." N.C. Gen. Stat. § 1A-1, Rule 59(e). Therefore, "because [Defendant]'s motion was made well beyond the 10-day limit, [his] motion to amend was not timely" and was properly dismissed. *Scott*, 106 N.C. App. at 382, 416 S.E.2d at 585.

¶ 13 Moreover, Defendant's attempt to modify the 2005 Consent Order is hindered by its status as a consent judgment. "A consent judgment incorporates the bargained agreement of the parties. Such a judgment can

only be attacked on limited grounds. The party attacking the judgment must properly allege and prove that consent was not in fact given, or that it was obtained by mutual mistake or fraud." *Stevenson v. Stevenson*, 100 N.C. App. 750, 752, 398 S.E.2d 334, 336 (1990) (citation omitted). The trial court entered the 2005 Consent Order "with the consent of the parties," and Defendant does not allege either that "consent was not in fact given," or that the 2005 Consent Order "was obtained by mutual mistake or fraud." *Id*. Therefore, the trial court did not err by granting Plaintiff's motion to dismiss and dismissing Defendant's motion.

¶ 14 "Where a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision." *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990). As a result, "a trial court's ruling must be upheld if it is correct upon any theory of law, and thus it should not be set aside merely because the court gives a wrong or insufficient reason for it." *Templeton v. Town of Boone*, 208 N.C. App. 50, 54, 701 S.E.2d 709, 712 (2010) (citations and internal quotation marks omitted). Although our analysis relies on neither a statute of limitations nor the equitable doctrine of laches, after conducting de novo review and "consider[ing] the matter anew and freely substitut[ing our] own judgment for that of the trial court[,]" *Jackson*, 238 N.C. App. at 353, 768 S.E.2d at 25 (citation omitted), we nevertheless uphold the trial court's ruling.

III. Conclusion

¶ 15 For the foregoing reasons, the trial court's order is affirmed.

AFFIRMED.

Judge GORE concurs.

Judge JACKSON concurs in the result only.

CASH v. CASH

[286 N.C. App. 196, 2022-NCCOA-706]

KATHERINE GLEDHILL CASH (McGEE), PLAINTIFF
v.
MATTHEW CASH, DEFENDANT

No. COA21-774

Filed 1 November 2022

Child Custody and Support—child support modification—findings of fact—bad faith—imputed income

In its order modifying child support, the trial court's factual findings were supported by competent evidence where it was within the trial court's discretion to make credibility determinations and where defendant was required to provide ongoing documentation of his income (even if the trial court incorrectly identified the specific mechanism requiring the documentation). The trial court did not abuse its discretion in imputing income to defendant based on the determination that he had acted in bad faith where the circumstances surrounding the termination of his employment from his friend's business the week before the child support modification hearing, combined with his refusal to seek gainful employment or file for unemployment, supported the trial court's reasoned decision.

Appeal by defendant from order entered 21 April 2021 by Judge Juanita Boger-Allen in District Court, Cabarrus County. Heard in the Court of Appeals 23 August 2022.

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

No brief for plaintiff-appellee.

STROUD, Chief Judge.

¶ 1 Father Matthew Cash appeals from an order modifying child support to Mother Katherine Cash (now McGee). Because the trial court had competent evidence to support the challenged Findings of Facts and because it did not abuse its discretion in imputing income to Father based on a determination he acted in bad faith, we affirm.

I. Background

¶ 2 Mother and Father married in 2007, and they had a child born in 2008. Also in 2008, they separated and were later divorced. On 10 December

2008, Mother filed a Complaint seeking, *inter alia*, child support. In September 2011, Mother and Father entered a "Child Support Consent Order."[1] In the consent order, Father was ordered to pay Mother $50 per month in child support plus an additional $50 per month towards $5,292 in child support arrears, and they were each to pay one half of the child's medical expenses with Mother covering the first $250 each year. At some later point, the parties voluntarily and informally agreed Father would increase his child support payments to $350 per month. Father continued making those payments through the time the trial court entered the order on appeal, the "Amended Order for Modification of Permanent Child Support" (hereinafter "Child Support Modification Order"),[2] which ruled on Mother's motion for "Modification of Child Support and Attorney Fees"[3] filed 27 August 2020. (Capitalization altered.)

¶ 3 In the Modification Motion filed in August 2020, Mother alleged "there has been a substantial and material change in the circumstances since the" September 2011 order based on three grounds: the existing order was "more than three (3) years old and there has been at least a 15% change in the amount owed under the North Carolina Child Support Guidelines"; Mother had two children since entry of the previous order; and Father's "income has increased significantly."

¶ 4 Father filed a "Financial Affidavit" on 22 January 2021 in which he indicated he was employed by Huntley Brothers Company and made approximately $99,000 in adjusted gross income in 2019 and a current monthly gross income of approximately $9,800. (Capitalization altered.) Father had been employed with Huntley Brothers "for seven or eight years." On 12 March 2021—five days before the scheduled hearing on Mother's motion to modify child support—Father filed an "Amended Financial Affidavit" indicating he had been laid off from Huntley Brothers and as a result his monthly gross income was reduced to $0. (Capitalization altered.)

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1. This is the first child support order in our record. While the record does not definitively explain the long gap between the separation and Complaint in 2008 and the order in 2011, child custody was not settled until 12 February 2010, which could account for at least part of the delay since Mother was granted primary legal and physical custody.

2. A few days after entering an "Order for Modification of Permanent Child Support," the trial court entered an "Amended Order for Modification of Permanent Child Support." (Capitalization altered.) Since Father appeals from the Amended Order, *i.e.*, the "Child Support Modification Order," we focus on that order.

3. The attorney fees portion of the motion is not at issue in this appeal. In the Child Support Modification Order, the trial court explained Mother "did not offer any evidence to support an award of attorney's fees" and thus denied her request.

¶ 5 On 17 March 2021, the trial court held a hearing on Mother's Modification Motion. At the outset of the hearing, Mother's attorney raised before the trial court that Mother had not received updated income verification and financial information from Father. Mother's attorney argued "[t]his was an ongoing discovery issue" because "it was all part of the Request for the Production of Documents" and the trial court could "take that in consideration when rendering [its] judgment." Father's attorney responded they had "provide[d] updated statements prior to the last time" the motion was scheduled for a hearing, in late January 2021. The trial court thanked the parties and then moved on to ask about pretrial motions.

¶ 6 For the remainder of the hearing, three witnesses testified—Father, Mother, and David Huntley, one of the owners of Huntley Brothers. Father testified about: his current child support obligation; his previous employment with Huntley Brothers and when the previous child support order was entered including his income during those times; a masonry business he started in August 2020 including his recent jobs for the business as well as the deposits, debits, withdrawals, checks, and balance of the associated business banking account and credit card; and his plan to focus on his own masonry business instead of seeking new employment. The discussion of his time with Huntley Brothers included some questions about income verification documents Father provided during discovery, and Father testified he had not provided a 2020 W-2 or a paystub since 2020. Similarly, during the discussion of Father's masonry business, Mother's attorney asked Father about discovery and verification documents related to the business's income and expenses, and Father testified he had "been asked to provide everything" and "didn't – haven't just not done it, just been asked." Father later clarified he had not provided any relevant business documents past November 2020.

¶ 7 Mother testified about: the previous child support order and amount as well as her motion for modification; her income including supporting documentation and account statements; her family unit including her husband and other children; and the costs and expenses for the parties' child. David Huntley testified about how Huntley Brothers laid off Father. On cross-examination, Mr. Huntley testified the company laid off Father rather than offer him a reduced salary with a different position because Mr. Huntley "know[s]" Father and did not think he would accept it. Finally, at the hearing, the parties argued during closing argument about whether the trial court could impute income to Father for the child support calculation based on a determination he was acting in bad faith.

¶ 8 Following the hearing, the trial court entered its initial "Order for Modification of Permanent Child Support" on 16 April 2021. (Capitalization altered.) The trial court entered the "Amended Order for Modification of Permanent Child Support" (*i.e.*, the Child Support Modification Order) on 21 April 2021. Father appeals from the Child Support Modification Order, so we focus on that Order's contents.

¶ 9 First, the trial court made Findings about the procedural history of the case and jurisdiction, including the previous child support order and Mother's Modification Motion. It then found "there had been a substantial change in circumstances affecting the welfare of the minor child, which warrants a modification of child support," for the three reasons listed in Mother's Modification Motion; in addition, Mother's income had "increased substantially." Next, the trial court made Findings on Mother's and Father's income. As part of these Findings, the trial court found Father had "intentionally failed to comply" with requirements to provide income verifications for his employment with Huntley Brothers or his masonry business. The trial court also found Mr. Huntley's testimony about how Father was laid off was not "credible, especially in light of Father expressing that he has no intention of looking for employment, filing for unemployment or applying for /taking another position . . . ." As a result, the trial court rejected Father's contention his income was $0. Based on those facts, the trial court also determined Father acted in "bad faith" and "deliberate[ly]" tried to "suppress[]" his income "to avoid or minimize his child support obligation," so it imputed income to him. Finally, the trial court made Findings incorporating the appropriate worksheet from the North Carolina Child Support Guidelines and modifying Father's child support retroactive to 1 September 2020 with appropriate arrears.

¶ 10 The trial court then made Conclusions of Law on its jurisdiction, Father's bad faith and the resulting imputation of income, and the reasonableness of the child support obligation that would begin 1 September 2020. As a result, the trial court ordered Father pay approximately $1140 in child support each month beginning 1 September 2020 and lasting until the child "turns 18-years-old or graduates high school, whichever is later." The trial court also awarded arrears of $5,510 and set out a payment schedule for the arrears of $363 per month and ordered him to pay a portion of the child's medical, dental, and counseling bills.

¶ 11 On 20 May 2021, Father filed a written notice of appeal from the Child Support Modification Order.

II. Analysis

¶ 12 "[C]hild support modification is a two-step process." *Harnett County ex rel. De la Rosa v. De la Rosa*, 240 N.C. App. 15, 23, 770 S.E.2d 106, 112 (2015) (quotations and citation omitted). First, the trial court must "determine a substantial change of circumstances has taken place." *Id.* (quotations and citation omitted). Second, if a substantial change has occurred, the court "calculate[s] the applicable amount of support." *Id.* (quotations and citation omitted). On appeal, Father does not challenge the trial court's Finding and Conclusion "there has been a substantial change in circumstances affecting the welfare of the minor child, which warrants a modification of child support." Therefore, we focus on the trial court's calculation of child support.

¶ 13 As this Court has previously explained

> [N]ormally, a party's ability to pay child support is determined by that party's income at the time the award is made. However, capacity to earn may be the basis for an award where the party deliberately depressed his income or deliberately acted in disregard of his obligation to provide support. Before earning capacity may be used as the basis of an award, there must be a showing that the actions which reduced the party's income were taken in bad faith, to avoid family responsibilities.

Balawejder v. Balawejder, 216 N.C. App. 301, 312–13, 721 S.E.2d 679, 686 (2011) (quoting *Pataky v. Pataky*, 160 N.C. App. 289, 306–07, 585 S.E.2d 404, 415–16 (2003), *aff'd per curiam*, 359 N.C. 65, 602 S.E.2d 360 (2004) (quotations, citations, and alterations in original block quotation omitted)); *see also State ex rel. Williams v. Williams*, 179 N.C. App. 838, 840–41, 635 S.E.2d 495, 497 (2006) ("Capacity to earn, however, may be the basis of an award [of child support] if it is based upon a proper finding that the husband is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and children." (quoting *Beall v. Beall*, 290 N.C. 669, 673–74, 228 S.E.2d 407, 410 (1976)) (emphasis from original omitted)); North Carolina Child Support Guidelines, AOC-A-162 (rev. 1 March, 2020) (hereinafter "Child Support Guidelines")[4] ("If the court finds that the parent's voluntary unemployment or underemployment is the result of the parent's bad

4. Available at: https://ncchildsupport.ncdhhs.gov/ecoa/cseGuideLineDetails.htm.

faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income."). This Court also refers to the use of earning capacity to determine a party's child support obligation as "imputation of income." *See Balawejder*, 216 N.C. App. at 312, 721 S.E.2d at 686 (introducing the above block quote as "the legal and factual bases for imputation of income for purposes of child support").

¶ 14 Father's appeal primarily focuses upon the trial court's determination he was acting in bad faith, and therefore the trial court could impute income to Father when calculating child support. Within this broad argument, Father challenges several Findings of Fact (10(c), 10(e), 11(f), 12, 13, and 14) supporting the trial court's bad faith determination as well as its ultimate decision to impute income to Father. Father also argues one Finding (11(g)[5]) unrelated to the bad faith determination "was not supported by sufficient evidence." We address the standard of review and then review those arguments in turn.

A. Standard of Review

¶ 15 "The standard of review of a trial court's determination of child support is abuse of discretion." *State ex rel. Midgett v. Midgett*, 199 N.C. App. 202, 205, 680 S.E.2d 876, 878 (2009) (citing *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005)); *see also Loosvelt v. Brown*, 235 N.C. App. 88, 93, 760 S.E.2d 351, 354–55 (2014) ("Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." (quoting *Leary v. Leary*, 152 N.C. App. 438, 441–42, 567 S.E.2d 834, 837 (2002) (alteration from original omitted))); *Cauble v. Cauble*, 133 N.C. App. 390, 395, 515 S.E.2d 708, 712 (1999) (including same abuse of discretion standard for the "amount of a trial court's child support award"). Under the abuse of discretion standard of review, "the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Loosvelt*, 235 N.C. App. at 93, 760 S.E.2d at 354–55 (quoting *Leary*, 152 N.C. App. at 441–42, 567 S.E.2d at 837).

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5. The Finding Father labels and challenges as Finding 11(g) is actually the second Finding labeled 11(f) in the Child Support Modification Order. Since Father also challenges the first Finding labeled 11(f), we will continue to refer to the second Finding labeled 11(f) as Finding 11(g) to distinguish between the two. When we discuss the Findings below, we also quote them from the record to ensure all interested parties and readers know which we are discussing.

¶ 16 Further, to ensure "the trial court correctly exercised its function to find the facts and apply the law thereto," we ensure "evidence . . . support[s] findings; findings . . . support conclusions; [and] conclusions . . . support the judgment." *Midgett*, 199 N.C. App. at 206, 680 S.E.2d at 878–79 (quoting *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980)); *see also Loosvelt*, 235 N.C. App. at 98, 760 S.E.2d at 358 ("[W]e review the child support award to consider if the evidence supports the findings of fact, the findings support the conclusions of law, and the conclusions support the judgment." (citing *Atwell v. Atwell*, 74 N.C. App. 231, 234, 328 S.E.2d 47, 49 (1985))). As pertinent to Father's arguments on appeal, "this Court is bound by the trial court's findings where there is competent evidence to support them." *Cauble*, 133 N.C. App. at 395–96, 515 S.E.2d at 712 (quotations, citations and alterations omitted); *see also Midgett*, 199 N.C. App. at 206, 680 S.E.2d at 879 ("This Court's review of a trial court's findings of fact is limited to whether there is competent evidence to support the findings of fact, despite the fact that different inferences may be drawn from the evidence." (quotations and citations omitted)). When an appellant does not challenge the trial court's findings of fact on appeal, they are binding. *See Loosvelt*, 235 N.C. App. at 96, 760 S.E.2d at 356 (holding findings binding on appeal after explaining they were not challenged).

B. Bad Faith and Imputation of Income

¶ 17 Turning to the merits of his appeal, Father primarily argues "the trial court committed reversible error by finding [he] acted in bad-faith and then by imputing income to [him]." (Capitalization altered.) The trial court determined Father acted in "bad faith" and "deliberate[ly] suppress[ed]" his income "to avoid or minimize his child support obligation" in two paragraphs included in both its Findings of Fact and Conclusions of Law:

> Father's failure to provide the Court and the opposing party with the most recent documentation of his income from Huntley Brothers and his business and as a response to discovery requests shows Father's bad faith and a deliberate suppression of income to avoid or minimize his child support obligation. Further, Father's intent to not file for unemployment and not applying for/taking another position at Huntley Brothers (of which he qualifies) or another company while simultaneously alleging that he has been laid off and has no current income shows Father's bad

> faith and a deliberate suppression of income to avoid or minimize his child support obligation.
>
> Father's voluntary unemployment and/or underemployment is the result of his bad faith or deliberate suppression of income to avoid or minimize his child support obligation after March 12, 2021. A potential income is imputed to Mr. Cash, such that he has the capacity to earn at least $9,774.49 per month after March 12, 2021, as evidenced by his income with Huntley Brothers.

¶ 18 Father challenges the trial court's determination he acted in bad faith on both the listed grounds, the failure to provide discovery and the circumstances surrounding the end of his employment with Huntley Brothers. As part of his challenge, Father also contends four Findings of Fact (10(e), 10(c), 11(f), and 12) that underlie the bad faith determination are "not supported by the evidence."[6] (Capitalization altered.) We first address Father's argument the Findings of Fact are unsupported and then address his argument about the trial court's overall bad faith determination.

1. Challenges to Findings of Fact Related to Bad Faith

¶ 19 We first address Father's challenge to Findings of Fact 10(e), 10(c), 11(f), and 12. Findings 10(e) and 12 both involve credibility determinations made by the trial court. Finding 10(e) provides:

> e. The court does not find the letter or Mr. Huntley's testimony to be credible, especially in light of Father expressing that he has no intention of looking for employment, filing for unemployment or applying for /taking another position at Huntley Brothers (of which he qualifies) or another company while simultaneously arguing that the Court should find his income to be $0 for the purpose of calculating child support. The court rejects Father's argument that his current income is $0.

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6. Father also challenges Findings 13 and 14, which are the two paragraphs included above where the trial court explains why it determined Father acted in bad faith. Because those Findings are actually Conclusions of Law, we will review them as such. *See Walsh v. Jones*, 263 N.C. App. 582, 589–90, 824 S.E.2d 129, 134 (2019) ("The labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review." (quotations, citation, and alterations omitted)).

Finding 12 states:

> 12. The North Carolina Guidelines require[] parties to provide proof of current earnings, Father intentionally failed to comply with this requirement.

Father's challenge to both these Findings fail for the same reason: this Court does not "determine de novo the weight and credibility to be given to evidence disclosed by the record on appeal." *Craven County ex rel. Wooten v. Hageb*, 277 N.C. App. 586, 2021-NCCOA-231, ¶ 14 (quoting *Coble*, 300 N.C. at 712–13, 268 S.E.2d at 189); *see also Loosvelt*, 235 N.C. App. at 104–05, 760 S.E.2d at 361 ("[A]rguments about which evidence should weigh more heavily are properly directed to the trial court, which has the discretion to determine the credibility and the weight of the evidence." (citing *Coble*, 300 N.C. at 712–13, 268 S.E.2d at 189).

¶ 20 The other two challenged Findings, Findings 10(c) and 11(f), both concern discovery and verification of Father's income. Finding 10(c) provides:

> c. Father was served with interrogatories and requests for production of documents which included requests for ongoing verification of his income; however, Father did not provide a paystub from Huntley Brothers after the December 31, 2020 paystub mentioned in the above paragraph nor did he present documentation of his income from Huntley Brothers to the Court.

Finding 11(f) states:

> f. Father was served with interrogatories and requests for production of documents which included requests for ongoing verification of his income. The last business statement Father provided to the opposing side was for November 2020. Approximately $15,000.00 was remaining in Father's business account at the close of November 2020. Father offered no current documentation of his business income and expenses at trial.

These Findings closely resemble each other with identical first sentences and then similar remainders that focus on Father not providing the appropriate documents for his income.

¶ 21 We can also address the challenges to these Findings similarly. For both Finding 10(c) and 11(f), the first sentence is not (fully) supported

by competent evidence, but the remainder of the Findings is supported. The printed record on appeal does not include any competent evidence concerning interrogatories and requests for document production directed towards Father, only documentation for such discovery items directed towards Mother, which was introduced into evidence at the hearing.

¶ 22 Turning to the transcript, the clearest discussion of interrogatories or requests for document production directed at Father came at the start of the hearing when the trial court asked if the parties had exchanged documentation. Mother's attorney said she had not received updated financial information from Father, which "was all part of the Request for the Production of Documents" and an "ongoing discovery issue." "It is axiomatic that the arguments of counsel are not evidence." *Crews v. Paysour*, 261 N.C. App. 557, 561, 821 S.E.2d 469, 472 (2018) (quotations, citation, and alteration omitted); *see also Blue v. Bhiro*, 381 N.C. 1, 2022-NCSC-45, ¶ 12 ("[I]t is axiomatic that the arguments of counsel are not evidence." (quotations and citation omitted)).

¶ 23 The only other discussion of Father having an obligation to provide documents came when they were discussing his business statements:

> Q. All right. And do you recall having to produce documents back last year sometime? I won't ask you to tell me the exact date.
>
> A. Oh, yeah. Yeah, I think we've done it a couple times.
>
> Q. Right. Where you came up with a bunch of documents?
>
> A. Yes.
>
> Q. Why did you not provide a December statement, Mr. Cash?
>
> A. I didn't -- I didn't really know that I didn't do it. But I can't remember when -- when the last time we did the discovery was.
>
> Q. Okay. And you understand that you have an ongoing obligation to provide updated statements, correct?
>
> A. I mean, I -- if I'm asked, yeah. I didn't -- like ---
>
> Q. All right.
>
> A. --- I've been asked to provide everything. I didn't – haven't just not done it, just been asked.

While the discussion is not entirely clear, Father acknowledged he had "been asked to provide everything," referring back to the "ongoing

obligation to provide updated statements" but had "just not done it." This testimony, then, supports that Father has an ongoing obligation to at least provide business statements, thereby at least partially supporting the first sentence of Finding 11(f). Although Father acknowledged he had been asked to provide financial information and he had failed to provide all the information requested, he did not say whether this request came in the form of interrogatories and a request for production or from the requirements of the Child Support Guidelines and Local Rules. The record includes no evidence Father was served with interrogatories and requests for production of documents, let alone the specific questions seeking ongoing verification of his income, so the first sentences of these Findings are not fully supported by competent evidence.

¶ 24 But Father was required to provide his income verification even if Mother had not served interrogatories and requests for production for this information, thereby blunting the impact of the lack of evidence that discovery requests required such action. First, the Child Support Guidelines include the following requirements for income verification:

> Child support calculations under the guidelines are based on the parents' current incomes at the time the order is entered. Income statements of the parents should be verified through documentation of both current and past income. Suitable documentation of current earnings (at least one full month) includes pay stubs, employer statements, or business receipts and expenses, if self-employed. Documentation of current income must be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period. Sanctions may be imposed for failure to comply with this provision on the motion of a party or by the court on its own motion.

Additionally, the Local Rules of Judicial District 19A on "Non-Jury Domestic Relations" require parties to bring income verification documents to child support hearings: "In all child support and post separation cases, both parties shall bring to the hearing records of their earnings for the past two years including tax returns, pay stubs, or other records." Civil Rules of District Court of the 19A District Court District, Rule 7.2 (last revised 3/04) (Capitalization altered.).[7] Similarly, the "Amended

7. These local rules are available at: https://www.nccourts.gov/assets/documents/local-rules-forms/170.pdf.

Financial Affidavit" Father filed 12 March 2021, a mere five days before the hearing on the Modification Motion, directed Father to "attach to this affidavit copies of the past two (2) months wage and earnings statements." (Capitalization altered.) Both of these provisions required Father to provide more updated information than he did according to Findings 10(c) and 11(f)—pay stubs more recent than 31 December 2020 and business statements more recent than November 2020.

¶ 25 The rest of these challenged Findings (10(c) and 11(f)) are supported by competent evidence because Father did not provide additional documentation past the dates listed in the Findings. Related to his income from the job with Huntley Brothers, during questioning by Mother's attorney, Father initially said he did not even have a pay stub as recent as December 2020 before later providing information for his pay for the entire year of 2020, indicating they found the pay stub.[8] Turning to his business statements, Father testified he provided statements through November 2020 but did "not presently" have any December 2020 or January or February 2021 statements to "back up [his] testimony." And he testified he had approximately $15,000 in his business account as of the end of November, in line with the last remaining part of Finding 11(f). Therefore, the remainder of the challenged Findings on discovery issues are supported by competent evidence and are therefore binding. *Cauble*, 133 N.C. App. at 395, 515 S.E.2d at 712.

¶ 26 Thus, even if the trial court incorrectly identified the specific mechanism by which Father was required to provide these documents—discovery requests instead of requirements of the Local Rules and Child Support Guidelines—its fundamental point in Findings 10(c) and 11(f) was still correct. Father had an obligation to provide additional documentation to support his income, but he failed to do so. Further, aside from the first sentences, the trial court's Findings that Father failed to provide updated income verification documents for his job at Huntley Brothers and his own business are supported by competent evidence.

2. Bad Faith Determination

¶ 27 Turning to his challenge to the trial court's bad faith determination overall, Father first argues the trial court erred in determining he was acting in bad faith based on the events surrounding the end of his

8. This testimony came when Father was reviewing Plaintiff's Exhibit 19, which were his pay stubs from Huntley Brothers. While this exhibit was admitted into evidence, it is not in the record on appeal because it "can't be located." Therefore, we cannot additionally confirm, beyond the testimony, the pay stubs Father provided by reviewing this exhibit.

employment with Huntley Brothers. Father then asserts the trial court erred by concluding he "acted in bad faith by not updating his discovery documents." We review the trial court's bad faith determination for abuse of discretion; "the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Loosvelt*, 235 N.C. App. at 93, 760 S.E.2d at 354–55.

¶ 28 As explained above, to impute income to a party, the trial court must determine "the actions which reduced the party's income were taken in bad faith, to avoid family responsibilities." *Balawejder*, 216 N.C. App. at 312, 721 S.E.2d at 686. When considering whether to impute income to a party, the following factors support a determination the party acted in bad faith:

> (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) willfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or (8) intentionally leaving his employment to go into another business.

Lueallen v. Lueallen, 249 N.C. App. 292, 312–13, 790 S.E.2d 690, 704 (2016) (quoting *Mason v. Erwin*, 157 N.C. App. 284, 288–89, 579 S.E.2d 120, 123 (2003)); *see also Wolf v. Wolf*, 151 N.C. App. 523, 526–27, 566 S.E.2d 516, 518–19 (2002) (including same list with citation to *Bowes v. Bowes*, 287 N.C. 163, 171–72, 214 S.E.2d 40, 45 (2002)).

¶ 29 The trial court's bad faith reasoning based on the circumstances surrounding Father leaving Huntley Brothers implicates factors (4) and (5) listed above. Father refused to seek or accept gainful employment and willfully refused to find or take a job based on the following unchallenged or supported Findings of Fact:

> d. A letter from Chet Huntley, of Huntley Brothers was received into evidence. In said letter, Mr. Huntley states that Father was laid off as a Masonry Supervisor. Mr. David Huntley testified on Father's behalf and is a 25% owner of Huntley Brothers and a good friend of Father. David Huntley and Father socialized with each other at least every other weekend. Mr. Huntley testified that Father was laid off on March 12, 2021, which was less than one (1) week

> prior to the hearing. Mr. Huntley admitted that Father was the only employee laid off out of one hundred and twenty (120) of Huntley Brothers employees. During cross-examination, Mr. Huntley admitted that Huntley Brothers was currently advertising for several positions all of which Father was qualified. One of the positions paid $50,000 per year. Mr. Huntley testified that he did not offer Father a lower salary because he "knows" Father and Father would not accept a lower salary. Mr. Huntley testified that Father's performance was not a factor in the company's decision to eliminate Father's role. Rather, Father's position was eliminated due to the high cost of Father's supervisor salary and because Father was the most recent supervisor hire.
>
> e. The court does not find the letter or Mr. Huntley's testimony to be credible, especially in light of Father expressing that he has no intention of looking for employment, filing for unemployment or applying for /taking another position at Huntley Brothers (of which he qualifies) or another company while simultaneously arguing that the Court should find his income to be $0 for the purpose of calculating child support. The court rejects Father's argument that his current income is $0.

These Findings align with the trial court's reasoning that Father's "intent to not file for unemployment and not applying for/taking another position at Huntley Brothers (of which he qualifies) or another company while simultaneously alleging that he has been laid off and has no current income shows Father's bad faith." The trial court thus made a reasoned decision and therefore did not abuse its discretion. *Loosvelt*, 235 N.C. App. at 93, 760 S.E.2d at 354–55.

¶ 30 Father's arguments on appeal otherwise are not persuasive. As to the trial court's determination that his claim to have zero income was not credible, Father argues the trial court "could have disregarded his Amended Affidavit" and used his business income rather than impute income to him since that was "why he was not looking for a different employment." First, this argument ignores the "substantial deference" we give to trial courts in child support cases. *Id.*, 235 N.C. App. at 93, 760 S.E.2d at 354. Assuming *arguendo* the trial court could have used Father's business income instead, we note Father failed to provide

current documentation as to his business income and expenses, as he was required to do by the Local Rules and Child Support Guidelines. Child Support Guidelines; Civil Rules of District Court of the 19A District Court District, Rule 7.2. The trial court had the discretion to impute income based upon the best information available regarding Father's recent earnings and employment information, and that information came from his employment with Huntley Brothers. The trial court also noted it did not find Father's claim of being laid off immediately prior to the child support hearing credible and stated several reasons for this credibility determination. Because the trial court made a reasoned decision to impute income, we will not disturb this decision on appeal. On a more fundamental level, Father cannot now claim the trial court should have ignored the very Amended Affidavit he presented, and swore to the truth of via his verification, on the eve of the hearing and instead ask the trial court to use his unsupported claims as to his business income. Our courts have long held, "the law does not permit parties to swap horses between courts in order to get a better mount." *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 734–35 (2011) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)) (alterations from original omitted). We reject Father's new attempt on appeal to get a better mount by arguing the trial court should have relied upon his business income.

¶ 31 Father also argues finding employment at the same level following an "involuntar[y] la[y] off" was not required because "[t]he facts here are very similar to the facts in" *Sharpe v. Nobles*, 127 N.C. App. 705, 493 S.E.2d 288 (1997). Father misreads *Sharpe*. In *Sharpe*, the father was laid off from a position that paid $56,000 per year and then took positions that paid $46,000 and eventually $40,000 per year. 127 N.C. App. at 708–09, 493 S.E.2d at 290. While the trial court determined the father acted in bad faith, this Court found merely "not look[ing] for work that would pay him what he made before changing jobs" did not amount to bad faith. *Id*. Here, by contrast, Father had not taken another job at all; the trial court found he "has no intention of looking for employment . . . or applying for/ taking another position at Huntley Brothers (of which he qualifies) or another company." If Father had taken the $50,000 per year position at Huntley Brothers, his situation might have resembled that in *Sharpe*, but his own "good friend" testified Father "would not accept a lower salary" in addition to Father's own testimony on the matter. Therefore, the trial court did not abuse its discretion in determining Father acted in bad faith and could therefore have income imputed to him based on his failure to seek alternative employment.

¶ 32 Turning to the trial court's other ground for determining Father acted in bad faith—his failure to provide relevant income verification

documents—we need not address this ground. *See Lueallen*, 249 N.C. App. at 313, 790 S.E.2d at 704 (emphasizing in response to party's argument against one factor in the trial court's bad faith determination that "[t]he trial court identified other factors as well"). And if we were to address this ground, the trial court still would not have abused its discretion in determining Father acted in bad faith. The "dispositive issue" when deciding whether to impute income "is whether a party is motivated by a desire to avoid his reasonable support obligations." *Wolf*, 151 N.C. App. at 527, 566 S.E.2d at 519. Failing to provide income verification as required provides some evidence a party is intentionally seeking to avoid or minimize the child support obligation because any hidden income will typically increase the amount of child support owed. *See Balawejder*, 216 N.C. App. at 312, 721 S.E.2d at 686 ("Normally a party's ability to pay child support is determined by that party's income at the time the award is made." (quotations, citations, and alterations omitted)); Child Support Guidelines ("The Schedule of Basic Child Support Obligations is based upon net income converted to gross annual income . . . .").

¶ 33 This case is illustrative of exactly how that would happen. Here, Father filed an Amended Financial Affidavit a week before trial indicating he had been laid off and therefore his income was zero. But Father also had his own business that in the past had provided additional income. By claiming in his Amended Affidavit his income was zero and not providing documentation about his business, Father wanted the trial court to accept his income was zero, which would lead to a lower child support obligation than if he had some business income. This understanding implicit in the trial court's bad faith determination is not "so arbitrary that it could not have been the result of a reasoned decision." *Loosvelt*, 235 N.C. App. at 93, 760 S.E.2d at 355. Therefore, the trial court did not abuse its discretion in determining Father acted in bad faith based in part on Father's failure to provide income verification, although as we have already said the other ground for bad faith was sufficient on its own.

¶ 34 Father's argument to the contrary is not persuasive. Father contends "[n]one of the reasons cited in *Wolf* provide for a court to find a party acting in bad faith or impute income based on a failure to provide discovery." Father is correct none of the eight reasons above, which originally came from *Wolf*, address discovery failures. *See Wolf*, 151 N.C. App. at 526–27, 566 S.E.2d at 518–19 (listing eight factors recounted above). But *Wolf* does not say those reasons are exclusive; it instead reiterates "[t]he dispositive issue is whether a party is motivated by a desire to

avoid his reasonable support obligations." *Id.*, 151 N.C. App. at 527, 566 S.E.2d at 519. And Father cites no other caselaw indicating *Wolf*'s factors are exclusive or replace that dispositive issue.

¶ 35 Thus, we hold the trial court had competent evidence to support the challenged Findings of Fact related to bad faith and did not abuse its discretion in determining Father acted in bad faith such that it could impute income to him.

C. Challenge to Finding 11(g)

¶ 36 Father also argues Finding 11(g)—which focuses on health insurance for the minor child and thus is not related to the bad faith issue—"was not supported by sufficient evidence." As with the Findings related to bad faith, we review this challenge to determine "whether there is competent evidence to support the" Finding. *Midgett*, 199 N.C. App. at 206, 680 S.E.2d at 879.

¶ 37 Finding 11(g) states:

> [g.] Father has no other children for whom he pays support. Father provided no evidence of his providing health insurance on [the child]. Father testified that [the child] will be covered through Father's wife's insurance but failed to say how much the premiums would be or when coverage would begin. Father failed to provide evidence of the cost of health insurance premiums for the minor child through his employment with Huntley Brothers.

Father does not argue with the first sentence about his lack of other children to support, but he does challenge the remainder of the Finding on medical insurance for his and Mother's child. Therefore, we only focus on the challenge to the remainder of the Finding.

¶ 38 The trial court had competent evidence for the remainder of Finding 11(g). The sentence about Father providing no evidence of his providing health insurance for the child is an introduction to the other sentences that explain what the trial court meant, so if the other sentences are supported, the first sentence is supported. As the trial court found, Father testified his wife's insurance would cover the child since he was laid off. Father did not testify about how much premiums would be or when that coverage would begin as the previous testimony about his wife's insurance covering the child was his only testimony on the topic. Father argues his Amended Financial Affidavit lists the monthly insurance premium and therefore he did provide evidence for how much the premium

would be. But his Amended Financial Affidavit only lists "Total Health Insurance Premium Costs." It does not indicate how much of the premium is his health insurance versus the health insurance premium for his child. Finally, Father also did not testify about the cost of health insurance premiums for the child while he was working at Huntley Brothers. While his original Financial Affidavit prepared when he was still employed at Huntley Brothers lists his "Total Health Insurance Premium Costs," it also does not breakdown the costs specific to the child versus him and anyone else covered under the insurance policy. Thus, Finding 11(g) is fully supported by competent evidence.

III. Conclusion

¶ 39 After reviewing all of Father's contentions on appeal, we affirm the trial court's order. As to its imputation of income to Father, the trial court had competent evidence to support its Findings of Fact, and it did not abuse its discretion in concluding Father acted in bad faith. As to the challenged Finding on health insurance, the trial court also had competent evidence to support that Finding.

AFFIRMED.

Judges DIETZ and ZACHARY concur.

TOD COLES, PLAINTIFF
v.
SUGARLEAF LABS, INC. (FORMERLY KNOWN AS NEPTUNE ACQUISITION USA, INC.), AND NEPTUNE WELLNESS SOLUTIONS, INC., DEFENDANTS

No. COA22-116

Filed 1 November 2022

Arbitration and Mediation—motion to compel arbitration—simultaneous dismissal of complaint with prejudice—stay required—substantive issue not immediately appealable

In a breach of contract action filed by plaintiff after his employment was terminated, the trial court erred by entering an order both granting defendant's motion to compel arbitration and dismissing plaintiff's complaint with prejudice; while an order dismissing with prejudice is a final order and is therefore immediately appealable, an order compelling arbitration is interlocutory and not subject to an immediate appeal of right. Pursuant to the North Carolina Revised

Uniform Arbitration Act, trial courts must stay proceedings when compelling arbitration. Therefore, the dismissal portion of the order was vacated and the matter remanded for the trial court to enter an order staying the action pending arbitration. However, the appellate court had no jurisdiction to review the substantive merits of the trial court's decision to mandate arbitration and dismissed the remainder of plaintiff's appeal.

Judge MURPHY concurring by separate opinion.

Appeal by Plaintiff from an order entered 17 August 2021 by Judge Gregory Hayes in Catawba County Superior Court. Heard in the Court of Appeals 6 September 2022.

Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for Plaintiff-Appellant.

Jackson Lewis P.C., by H. Bernard Tisdale, III, and Janean B. Dunn, for Defendants-Appellees.

INMAN, Judge.

¶ 1 Plaintiff-Appellant Tod Coles ("Plaintiff") appeals from an order compelling arbitration and dismissing his complaint with prejudice. The parties dispute whether this Court has jurisdiction over this appeal. Orders compelling arbitration are interlocutory and are generally not immediately appealable, but a dismissal of a complaint with prejudice ordinarily operates as a final judgment from which a party may immediately appeal. After careful review, we hold that the trial court's dismissal with prejudice was in error under North Carolina law, vacate that portion of the trial court's order, and remand for entry of a stay. But, because we would otherwise lack jurisdiction to consider Plaintiff's appeal, we dismiss Plaintiff's appeal without consideration of its merits and leave undisturbed the remainder of the trial court's order compelling arbitration.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The record below discloses the following:

¶ 3 In 2018, Plaintiff was employed as the president of Sugarleaf Labs, LLC and Forest Remedies, LLC, two entities involved in the processing and sale of hemp products. The following year, Defendant Neptune Wellness

Solutions, Inc. ("Neptune") purchased Sugarleaf Labs, LLC, and Forest Remedies, LLC, through a newly-formed subsidiary, Defendant Sugarleaf Labs, Inc. ("Sugarleaf," together with Neptune as "Defendants").

¶ 4 Neptune's purchase of Plaintiff's employers was memorialized in an Asset Purchase Agreement ("APA"). The APA required Sugarleaf to enter into new employment agreements with certain key employees, including Plaintiff. It also required that any disputes relating to the APA and its "Ancillary Documents"— defined to include Plaintiff's employment agreement with Sugarleaf—must be resolved through arbitration.

¶ 5 On 24 July 2019, after the APA was executed, Plaintiff and Sugarleaf entered into the contemplated employment agreement; this agreement did not include an arbitration provision, and Plaintiff was not a signatory to the earlier APA. However, the employment agreement did expressly state that it was a condition of the APA and that the employment agreement "include[ed] . . . the agreements and other documents referenced in this Agreement."

¶ 6 Sugarleaf eventually terminated Plaintiff's employment, leading him to sue Defendants for: (1) breach of contract; (2) fraud; (3) negligent misrepresentation; (4) Wage & Hour Act violations; (5) injunctive relief; and (6) unfair and deceptive trade practices. Defendants filed an answer and subsequently moved "to compel arbitration and dismiss, or in the alternative, stay pending arbitration." Defendants premised their motion to compel arbitration on Plaintiff's admission in his complaint that he was a third-party beneficiary under the APA and argued that Plaintiff could only enforce the employment agreement consistent with the APA's mandatory arbitration provision. The motion included several exhibits, namely pertinent portions of the executed APA, Plaintiff's employment agreement with Sugarleaf, and emails showing Plaintiff's refusal to arbitrate.

¶ 7 Both parties submitted briefs to the trial court in advance of the hearing. Plaintiff argued that there was no evidence[1] he had agreed to arbitrate any claims because he did not sign the APA, and any attempt to enforce the APA's arbitration provision against him would be contrary to North Carolina public policy.

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1. Plaintiff challenged the competency and sufficiency of the evidence presented below concerning the existence of an agreement to arbitrate, and he maintains that challenge on appeal. Because we dismiss his appeal without addressing its substance, we do not purport to decide whether the record includes sufficient admissible evidence to compel arbitration or support the trial court's findings of fact to that effect. *Goetz v. N.C. Dept. of Health & Human Svcs.*, 203 N.C. App. 421, 433, 692 S.E.2d 395, 403 (2010) (holding that appeals dismissed as interlocutory contain "no rulings of law which could become the law of the case").

¶ 8 Defendants' brief asserted that under either the Federal Arbitration Act ("FAA") or the North Carolina Revised Uniform Arbitration Act ("RUAA"), the trial court was required to stay the proceeding and compel arbitration. They argued that regardless of which statute applied, North Carolina contract and agency law requires a third-party beneficiary seeking to enforce a contract with a mandatory arbitration provision to do so through arbitration. Defendants' brief also included several additional documentary exhibits showing Plaintiff's agency/third-party beneficiary relationship to the APA and its signatories.

¶ 9 The trial court heard Defendants' motion via Webex on 25 January 2021. It allowed Defendants' motion from the bench, concluding that the employment agreement was part of the APA (and vice-versa). The trial court did not, however, expressly indicate whether it was staying the action, which typically occurs when a motion to compel arbitration is granted, or dismissing the action, as requested by Defendants' motion.

¶ 10 After the parties submitted dueling proposed orders, the trial court entered a written order compelling arbitration and dismissing Plaintiff's complaint with prejudice. Plaintiff now appeals, arguing that the dismissal with prejudice is a final judgment or, if interlocutory, affects a substantial right. Failing that, he requests this Court treat his brief as a petition for writ of certiorari.

II. ANALYSIS

¶ 11 Plaintiff asserts on appeal that the trial court's order is immediately appealable as a final judgment because it dismissed his complaint with prejudice. Defendants maintain that the order is interlocutory, does not affect a substantial right, and is thus not subject to immediate appeal. *See*, *e.g.*, *C. Terry Hunt Indus.*, *Inc. v. Klausner Lumber Two*, *LLC*, 255 N.C. App. 8, 12, 803 S.E.2d 679, 682 (2017) (holding an order compelling arbitration is not immediately appealable for these reasons).

¶ 12 Both parties are correct to some extent: a dismissal with prejudice is a final judgment, but an order compelling arbitration—properly entered—is interlocutory and not subject to immediate appeal as of right. Thus, by compelling arbitration *and* dismissing Plaintiff's complaint with prejudice, the trial court entered something akin to Schrodinger's cat: an appealable unappealable order, an interlocutory final judgment.

¶ 13 Faced with this quantum-state quandary, and reviewing the relevant statutes and caselaw, we hold that the trial court erred in dismissing Plaintiff's complaint with prejudice. After compelling arbitration, the trial court was required to stay proceedings based on the mandatory

language of the RUAA, which supplies the applicable procedural law in this case. We therefore vacate that portion of the order and remand for entry of an order staying the action pending arbitration.

¶ 14 As for Plaintiff's substantive arguments contending the trial court erred in compelling arbitration, we dismiss that portion of the appeal because our precedents establish that such orders are neither final judgments nor interlocutory orders affecting a substantial right subject to immediate appeal. Lastly, we decline in our discretion to treat Plaintiff's brief as a petition for writ of certiorari on this issue.

A. Appellate Jurisdiction Generally

¶ 15 Appellate jurisdiction is a threshold issue that we must consider *sua sponte*. *Akers v. City of Mount Airy*, 175 N.C. App. 777, 778, 625 S.E.2d 145, 146 (2006). Whether this Court has jurisdiction turns largely on the nature—interlocutory or final—of the order from which the parties appeal. A party may always appeal from a final judgment, *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001), which our caselaw defines as "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 (1950). Stated differently, "[a] final judgment generally is one which ends the litigation on the merits." *Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013) (cleaned up).

¶ 16 Interlocutory orders differ substantially from final judgments both in their character and their appealability. Such orders are made "during the pendency of an action, which do[] not dispose of the case, but leave[] it for further action by the trial court in order to settle and determine the entire controversy." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. In layperson's terms, an interlocutory order is entered *during* an ongoing court case, while a final judgment *ends* a lawsuit. And, unlike a final judgment, an interlocutory order is only appealable if the order "is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b)," *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995), or if it "affects a substantial right of the appellant that would be lost without immediate review." *Embler*, 143 N.C. App. at 165, 545 S.E.2d at 261 (citations omitted). This important limitation serves to "prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard." *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980).

B. Appealability of Orders Compelling Arbitration and Dismissals with Prejudice

¶ 17 Our caselaw concerning the appealability of orders compelling arbitration establishes two key points: (1) "[a]n order compelling the parties to arbitrate is an interlocutory order," *Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 285, 314 S.E.2d 291, 293 (1984); and (2) "an order compelling arbitration affects no substantial right that would warrant immediate appellate review," *C. Terry Hunt Indus., Inc.*, 255 N.C. App. at 12, 803 S.E.2d at 682. Thus, as an ordinary matter, a party may not immediately appeal an order compelling arbitration. *Id.*

¶ 18 Equally ordinary, however, is the principle that dismissals of lawsuits with prejudice are immediately appealable as final judgments adjudicating matters on the merits. *See Doe v. Roman Catholic Diocese of Charlotte*, 2022-NCCOA-288, ¶ 13 (noting a summary judgment order dismissing a complaint with prejudice was immediately appealed as a final judgment); *Clements v. Southern Ry. Co.*, 179 N.C. 225, 102 S.E. 399, 400 (1920) ("[T]he allowance of a motion to dismiss is final, and of course appealable."); *cf. Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 79-80, 148 L. Ed. 2d 373 (2000) (holding that an order compelling arbitration under the FAA and dismissing the complaint with prejudice was a final decision subject to immediate appellate review under federal law without deciding whether such a dismissal was actually proper under the statute).

¶ 19 The order before us places the above precepts in direct tension. Thankfully, North Carolina's RUAA, the FAA, and our state's caselaw provide a ready release: a North Carolina state trial court may not compel arbitration *and* dismiss a complaint with prejudice.

C. The RUAA Does Not Allow for Dismissal

¶ 20 The plain text of the RUAA does not contemplate dismissal upon entry of an order compelling arbitration. To the contrary, it requires, in mandatory terms, that "the court on just terms *shall stay* any judicial proceeding that involves a claim subject to . . . arbitration." N.C. Gen. Stat. § 1-569.7(g) (2021) (emphasis added); *see also State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979) ("As used in statutes, the word 'shall' is generally imperative or mandatory."). Consistent with this language, we have mandated stays when reversing and remanding orders denying arbitration under the RUAA. *See Fontana v. Southeast Anesthesiology Consultants, P.A.*, 221 N.C. App. 582, 592 729 S.E.2d 80, 88 (2012) ("[S]ince we have held the breach of the employment contract is subject to arbitration, the trial court *must stay* the proceedings with

regard to that claim." (emphasis added)); *Ellison v. Alexander*, 207 N.C. App. 401, 415, 700 S.E.2d 102, 112 (2010) ("[T]he trial court's order denying Defendants' motion to compel arbitration should be, and hereby is, reversed and this matter is remanded to the trial court for the entry of an order staying all further proceedings and requiring the parties to proceed to arbitration.").

¶ 21 Other analogous decisions further illustrate that a stay, and not dismissal, is the proper remedy under the RUAA. In *Novacare Orthotics & Prosthetics East, Inc. v. Speelman*, the trial court granted a defendant's motion to dismiss on arbitrability grounds. 137 N.C. App. 471, 478, 528 S.E.2d 918, 922 (2000). We vacated that dismissal and remanded the matter for further proceedings, reasoning that "defendant's motion was an application *to stay litigation* and compel arbitration pursuant to [the RUAA's predecessor statute]," notwithstanding the fact that the motion sought outright dismissal of the plaintiff's complaint. *Id.* And, in another case surveying arbitration caselaw, we described a stay as the "appropriate remedy" when compelling arbitration. *Patel v. Scottsdale Ins. Co.*, 221 N.C. App. 476, 484, 728 S.E.2d 394, 400 (2012) ("After reviewing the relevant decisions of this Court, we note that, in the event that a litigant initiates civil litigation on the basis of a claim that is subject to arbitration, the appropriate remedy is to order the parties to arbitrate their dispute and stay the litigation pending completion of the arbitration process."). Indeed, Defendants' own brief to the trial court in this matter acknowledged that the RUAA calls for a stay when compelling arbitration.

¶ 22 Reading the RUAA to require a stay rather than dismissal is also in keeping with the purposes and structure of the statute. There is "a strong public policy favoring the settlement of disputes by arbitration," *Johnston County, N.C. v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992), and our arbitration statutes serve "to provide and encourage an expedited, efficient, relatively uncomplicated, alternative means of dispute resolution, with limited judicial intervention or participation, and without the primary expense of litigation—attorneys' fees[,]" *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 154, 423 S.E.2d 747, 750 (1992). Notably, the RUAA itself does not allow for appeals from orders compelling arbitration; instead, a party contending he was wrongly ordered to submit his claim to arbitration may only challenge such a ruling by moving to vacate the award on that ground *after* said award has been rendered by the arbitrator and, should the award nonetheless be confirmed, appealing the issue after entry of that final judgment. N.C. Gen. Stat. §§ 1-569.28 & 1-569.23(a)(5) (listing the orders appealable under the RUAA—omitting orders compelling

arbitration—and instead allowing a challenge to arbitrability by motion to vacate an award).[2]

¶ 23 With these intentions in mind, it is evident that allowing orders compelling arbitration to be entered as final judgments would re-inject the appellate judiciary into the proceedings at the exact juncture that the court system is supposed to be stepping aside in favor of arbitration. *See Henderson v. Herman*, 104 N.C. App. 482, 485, 409 S.E.2d 739, 741 (1991) (noting that, in passing the RUAA's predecessor statute, "the legislature intended the courts to send certain predetermined issues to arbitration and then to step back until the arbitration proceeding is complete"). We therefore hold, consistent with the plain language and purposes of the RUAA, that a trial court must stay proceedings when compelling arbitration. It may not convert what is otherwise intended to be an unappealable interlocutory order into an appealable final judgment by dismissing a complaint with prejudice.

D. The RUAA's Procedural Law Applies Even If the FAA Governs the Substantive Law

¶ 24 Left unanswered by the above analysis is the FAA's role in this appeal. That statute contains a substantively identical provision to our RUAA that, in apparently mandatory terms, requires the trial court to enter a stay of those claims subject to arbitration. 9 U.S.C. § 3 (2022) ("[T]he court . . . upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had . . . .").[3] Ultimately, what Section 3 of the FAA procedurally requires is immaterial, as this Court has held that "Section 3 of the FAA only applies in federal district court, not in state court."

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2. Orders denying arbitration are, by contrast, immediately appealable under the RUAA. N.C. Gen. Stat. § 1-569.28(a)(1); *see also Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) ("[A]n order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed."). This is for good reason. *See Katz v. Cellco P'ship*, 794 F.3d 341, 346 (2nd Cir. 2015) ("[I]t would make little sense to receive a conclusive arbitrability ruling only after a party has already litigated the underlying controversy.").

3. The federal circuits are presently split as to whether a trial court may dismiss a complaint in lieu of stay when compelling arbitration. *See Katz*, 794 F.3d at 345 (reviewing the circuit split before holding that a stay, and not dismissal, is the only appropriate disposition in an order compelling arbitration under the FAA). Different panels of the Fourth Circuit have rendered conflicting decisions on the matter. *See Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 376 n.18 (4th Cir. 2012) (noting that there is "some tension" between the Fourth Circuit's various decisions regarding the availability of dismissal under Section 3 of the FAA).

Elliott v. KB Home North Carolina, Inc., 231 N.C. 332, 336, 752 S.E.2d 694, 697 (2013). And because the procedural provision of the RUAA compelling a mandatory stay furthers the purposes of the FAA by favoring arbitration, the RUAA's procedural provisions back-fill the gap left by Section 3 of the FAA's inapplicability. *See Blow v. Shaughnessy*, 68 N.C. App. 1, 313 S.E.2d 868 (1984) (holding the procedural stay provision of the RUAA's predecessor statute, and not Section 3 of the FAA, provide the remedy when compelling arbitration pursuant to an agreement governed by the FAA).

¶ 25 The trial court's order dismissing Plaintiff's complaint does not comport with the law as set forth above. Under the RUAA, the trial court could only stay Plaintiff's complaint, N.C. Gen. Stat. § 1-569.7(g), and that procedural remedy is the only one available even if the FAA substantively governs the arbitration agreement at issue. We therefore vacate the portion of the order that dismisses the complaint with prejudice and remand the matter for entry of an order that stays the action.

E. No Other Grounds Permit Appellate Review

¶ 26 Having held that the portion of the trial court's order giving this Court jurisdiction was in error, we now dismiss the remainder of Plaintiff's appeal. He has made no showing distinguishing this case from the decades of precedents holding orders compelling arbitration do not affect a substantial right, relying instead on entirely conclusory assertions without citation to caselaw or the record. *See K2HN Construction NC, LLC v. Five D Contractors, Inc.*, 267 N.C. App. 207, 213-14, 832 S.E.2d 559, 564 (2019) (observing that conclusory arguments are inadequate to raise an issue on appeal).

¶ 27 We also decline to treat Plaintiff's brief as a petition for writ of certiorari. Not only is making such a request absent a proper petition under Rule 21 of the North Carolina Rules of Appellate Procedure disfavored, *Doe v. City of Charlotte*, 273 N.C. App. 10, 23, 848 S.E.2d 1, 11 (2020), but Plaintiff has not demonstrated any basis for discarding the two substantial public policy considerations at play in this appeal. *See Embler*, 143 N.C. App. at 165, 545 S.E.2d at 261-62 (discussing the policy behind the prohibition against fragmentary interlocutory appeals); *Nucor Corp.*, 333 N.C. at 154, 423 S.E.2d at 750 (detailing the public policy rationale for favoring arbitration over traditional litigation).

III. CONCLUSION

¶ 28 For the foregoing reasons, we hold the trial court erred in dismissing Plaintiff's complaint with prejudice, vacate that limited portion of

the order, and remand the matter for entry of an order that stays the litigation. We do not address the substantive merits of the trial court's order and pass no judgment as to whether arbitration was properly ordered in this case; Plaintiff may properly raise that issue before the trial court in the post-award proceedings authorized by statute and upon appeal of that interlocutory order from a final judgment confirming the award. *See C. Terry Hunt Indus., Inc.*, 255 N.C. App. at 12, 803 S.E.2d at 682 (detailing post-award challenges to arbitration under the RUAA); *In re Fifth Third Bank, Nat'l Ass'n*, 216 N.C. App. 482, 487, 716 S.E.2d 850, 854 (2011) (discussing the same under the FAA); N.C. R. App. P. 3 (2022) (allowing a party to designate an appeal from an order after judgment).

VACATED AND REMANDED IN PART; APPEAL DISMISSED IN PART.

Judge DILLON concurs.

Judge MURPHY concurs by separate opinion.

MURPHY, Judge, concurring.

¶ 29 I fully join the Majority in its result and its analysis. However, insofar as ¶¶ 22-23 or 27, *supra*, could be read as even tacitly endorsing our current system or supporting a policy favoring arbitration, I write separately to reiterate the observations and critiques made in *AVR Davis Raleigh, LLC v. Triangle Constr. Co., Inc.*, 260 N.C. App. 459, 463-66, 818 S.E.2d 184, 188-89 (2018) (Murphy, J., concurring). To the extent that I am not bound to do so, I refuse to perpetuate the myth that it is the policy of the People of this state to favor arbitration over jury trials.

D.V. SHAH CORP. v. VROOMBRANDS, LLC

[286 N.C. App. 223, 2022-NCCOA-708]

D.V. SHAH CORP., PLAINTIFF
v.
VROOMBRANDS, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, AND VICTOR OBAIKA, DEFENDANTS

No. COA22-104

Filed 1 November 2022

Civil Procedure—summary judgment—commercial lease dispute—order vacated

In a plurality opinion, the Court of Appeals vacated the trial court's order granting summary judgment to plaintiff on its claim for breach of a commercial lease and on defendant's counterclaim for fraudulent inducement (which plaintiff had not included in its motion for summary judgment). The authoring appellate judge reasoned that the trial court abused its discretion by denying defendant's motion to continue the summary judgment hearing because plaintiff violated multiple Civil Procedure Rules, General Rules of Practice, and local county rules regarding service, notice, and scheduling. The appellate judge concurring in the result wrote in a separate opinion that, not only was summary judgment on the counterclaim inappropriate since it was not part of plaintiff's motion, but also, where the trial court failed to exercise its discretion to hear defendant's oral testimony on plaintiff's breach claim, defendant was prejudiced.

Judge DILLON concurring in result by separate opinion.

Judge TYSON dissenting.

Appeal by Defendants from order entered on 10 June 2021 by Judge Karen Eady Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 June 2022.

Miller Walker & Austin, by Carol L. Austin, for the Plaintiff-Appellee.

Nexsen Pruet, PLLC, by Austin King and Caitlin A. Mitchell, for the Defendant-Appellant.

JACKSON, Judge.

¶ 1 Victor Obaika and Vroombrands, LLC ("Defendants") appeal the trial court's order granting summary judgment in favor of D.V. Shah Corp. ("Plaintiff") and awarding Plaintiff attorney's fees. We vacate the trial court's order and remand the case for further proceedings.

I. Background

¶ 2 On 1 April 2018, VroomBrands, LLC ("VroomBrands") entered into a commercial lease of a gas station, convenience store, and tire shop from Plaintiff. Eight days later, Mr. Obaika, the sole member and manager of VroomBrands, signed an unconditional personal guaranty of VroomBrands's obligations under the lease. The lease term was from 1 April 2018 to 31 March 2023. VroomBrands agreed to pay $4,500 on the first of each month, real property taxes on the property, miscellaneous fees, and a security deposit of $13,500, which Plaintiff had the right to apply to any arrearage in rent or to other payments due under the lease in the event of a default. By signing the lease, Mr. Obaika agreed on behalf of VroomBrands to pay all costs associated with a breach of the lease, including reasonable attorney's fees. The lease included a merger clause, which provides that the lease "contains a complete expression of the agreement between the parties and there are no promises, representations or inducements except such as are [t]herein provided."

¶ 3 Mr. Obaika paid the security deposit in full as well as the rent for nearly a year, but never paid the property taxes. In order to obtain gas for the service station Defendants were operating, Plaintiff released $9,000 of the security deposit to pay Mid-State Petroleum for gas. Mr. Obaika was aware of and consented to this arrangement.

¶ 4 Mr. Obaika stopped paying rent on 1 February 2019. Defendants vacated the premises on 1 October 2019.

¶ 5 After some difficulty finding a new tenant during the COVID-19 pandemic, Plaintiff eventually relet the property on 1 August 2020 for a monthly rent of only $1,000.

¶ 6 Plaintiff filed its Complaint, verified by Plaintiff's president, on 17 October 2019. No summons is included in the record, nor is any evidence of when or how Defendants were served; there is, however, a stipulation that the trial court had personal jurisdiction over the parties.

¶ 7 Defendants filed their Answer and Counterclaim on 1 June 2020. On 15 June 2020, Plaintiff moved to dismiss the counterclaim. The trial court entered a scheduling order on 15 June 2020, setting (1) the matter for trial on 1 February 2021; (2) 16 November 2020 as the close of discovery; and (3) a dispositive motion deadline of 1 December 2020. By a

22 January 2021 administrative amendment to the scheduling order, trial was postponed from 1 February 2021 to 28 June 2021 due to COVID-19.

¶ 8 The scheduling order provides that "an extension of the trial date after the end of the discovery deadline[] does not extend the discovery deadline[,]" and since discovery closed on 16 November 2020—well before 22 January 2021, the date to which trial was postponed—the postponement of trial did not change any other date in the scheduling order.

¶ 9 On 15 September 2020, Plaintiff propounded its first set of interrogatories and requests for production of documents. On 18 November 2020, Mr. Obaika responded to this written discovery, making various and sundry objections and asserting claims of privilege, as well as offering to produce non-privileged documents at a mutually convenient time and location. He did not, however, produce any responsive documents. Plaintiff subsequently emailed Shawn Copeland, then Defendants' counsel, to inform Mr. Copeland that Plaintiff considered Defendants' discovery responses inadequate and that Defendants' failure to produce any documents in response to the requests for production was unacceptable. Plaintiff's counsel notified Mr. Copeland that Plaintiff would file a motion to compel production of the documents if Defendants did not supplement their responses and produce the documents. Mr. Copeland responded by email one week later. On 7 December 2020, Mr. Copeland's office relayed to Plaintiff's counsel that any supplemental responses would be delayed due to a serious family medical issue.

¶ 10 Plaintiff did not file any dispositive motions by the dispositive motion deadline. Nor did Plaintiff file a motion to compel or any dispositive motion while Defendant was still represented by Mr. Copeland. Instead, after Mr. Copeland moved to withdraw as Defendants' counsel on 5 January 2021, with the other parties' consent, and the court granted the motion to withdraw in an order entered 3 February 2021, Plaintiff filed a motion for summary judgment. Plaintiff filed the motion on 29 April 2021—35 days after the dispositive motion deadline—and exactly 60 days from the date set for trial. Discovery had closed, and as previously noted, Plaintiff had not moved to compel production of the documents or for Defendants to supplement their responses, despite notifying Defendants' former counsel that Plaintiff intended to do so. Nor had Plaintiff ever moved for a default or default judgment as a sanction for Defendants' failure to produce documents in response to Plaintiff's requests for production.

¶ 11 On 29 April 2021, when Plaintiff filed the motion for summary judgment, Plaintiff's counsel caused the motion to be served on Mr.

Copeland—Defendants' former counsel—not either of Defendants—even though counsel had joined the 3 February 2021 order allowing Mr. Copeland to withdraw as Defendants' counsel over three months beforehand, on 18 January 2021—and had not been informed at the time the motion for summary judgment was served of the identity of any new counsel representing either of Defendants.

¶ 12 Then, on 7 May 2021, Plaintiff noticed the motion for hearing, noticing the hearing for 24 May 2021. Nothing in the record indicates whether Plaintiff corresponded with Defendants or counsel for either of them before selecting 24 May 2021 as the date for the hearing, but the fact that Plaintiff's counsel served Defendants' former counsel rather than Defendants with the motion a week beforehand suggests there was no communication whatsoever about the date of the hearing between Plaintiff's counsel and Defendants prior to Plaintiff noticing a motion for hearing that had not even been served on Defendants. The notice of hearing omitted any mention of Defendants' counterclaim. What is more, rather than serving Defendants' former counsel with the notice of hearing—as Plaintiff's counsel had with the motion itself—Plaintiff's counsel caused the notice to be served on Defendants—a week after serving their former counsel with the *motion*.

¶ 13 Consequently, it was not until 7 May 2021 that Defendants were served with Plaintiff's 29 April 2021 motion for summary judgment and Plaintiff's counsel served Defendants with an *amended* certificate of service reflecting service of *both* the motion and the notice of hearing on Defendants that day. Defendants thus only received notice of the date of the hearing on Plaintiff's motion for summary judgment—a date it does not appear either of them were consulted about—ten business days ahead of the hearing.

¶ 14 Four days later, on 14 May 2021, Mr. Obaika sent Plaintiff's counsel an email in which he requested that the affidavit in support of Plaintiff's motion for summary judgment be shared with him. Plaintiff's counsel did not serve Defendants with this affidavit until 20 May 2021, two business days before the 24 May 2021 hearing. Although the notary stamp on the affidavit states that the affidavit was signed on 19 May 2021, the clerk's file stamp on the affidavit appears to be for 12:27 p.m. on 21 May 2021. Nothing in the record explains the discrepancy between the date on the notary seal on the affidavit and the time stamp on the affidavit.

¶ 15 Two business days in advance of the hearing—also on 20 May 2021—Plaintiff served a Memorandum of Points of Authorities in Support

of Plaintiff's Motion for Summary Judgment on Defendants. There is no file stamp on this filing in the record on appeal so the date it was filed with the court—and indeed, whether it was filed at all—is not known. The transcript of the 24 May 2021 hearing suggests that the filing was shared with the court in advance of the hearing.

¶ 16 This Memorandum of Points of Authorities in Support of Plaintiff's Motion for Summary Judgment was the first time Defendants received notice of any kind that Plaintiff was seeking summary judgment on Defendants' counterclaim and affirmative defenses at the 24 May 2021 hearing. The substance of the argument in Plaintiff's motion filed on 29 April 2019 was restricted to Plaintiff's breach of contract claim—there was no mention in the motion of Defendants' counterclaim and affirmative defenses at all. Only the brief served on Defendants two days before the hearing notified Defendants that the counterclaim and Defendants' affirmative defenses were potentially before the court on 24 May 2021 on a motion filed 35 days after the deadline for dispositive motions and while Defendants were not represented by counsel.

¶ 17 The motion came on for hearing before the Honorable Karen Eady Williams in Mecklenburg County Superior Court on 24 May 2021 via WebEx videoconference, in accordance with local COVID-19 protocols. The only record evidence of any actions taken by Plaintiff to follow up on outstanding discovery issues prior to the 24 May 2021 hearing on the motion was from 12 May 2021, ten days before the hearing.

¶ 18 Mr. Obaika appeared *pro se* on his own behalf at the hearing but was not allowed to appear on behalf of VroomBrands because he is not a lawyer. Mr. Obaika objected that the motion was untimely and requested a continuance until he could obtain counsel, but the trial court denied his request. The court posed numerous questions to Plaintiff's counsel about the lack of notice given with regard to Defendants' counterclaim, but in the end, the court heard argument on whether summary judgment was proper with respect to both Plaintiff's claims and Defendants' counterclaim. The court granted summary judgment in favor of Plaintiff on both Plaintiff's claims and Defendants' counterclaim in an order entered 10 June 2021. The court's Order Granting Plaintiff's Motion for Summary Judgment and Request for Attorney's Fees also ordered Defendants to pay Plaintiff a total of $103,078.35—$90,500 for past due and future rent and real property taxes—and $12,578.35 in reasonable attorney's fees.

¶ 19 Defendants timely noted an appeal to our Court.

II. Analysis

¶ 20 This case presents the question of whether the trial court abused its discretion in denying Mr. Obaika's request for a continuance. Under the circumstances presented here, we hold that it did.

A. Standard of Review

¶ 21 "The standard of review for denial of a motion to continue is generally whether the trial court abused its discretion." *Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873, *disc. rev. denied*, 354 N.C. 219, 557 S.E.2d 531 (2001) (citation omitted). However, "this discretion is not unlimited, and must not be exercised absolutely, arbitrarily, or capriciously, but only in accordance with fixed legal principles." *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976) (cleaned up). Promotion of substantial justice should be the chief consideration. *Id.* "Before ruling on a motion to continue, 'the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice.' " *Rossi v. Spoloric*, 244 N.C. App. 648, 651, 781 S.E.2d 648, 651 (2016) (quoting *Shankle*, 289 N.C. at 483, 223 S.E.2d at 386 (1976)).

B. The Rules of Court in North Carolina Are Rules of Law

¶ 22 The Constitution of North Carolina confers on the General Assembly the authority to prescribe the jurisdiction of North Carolina trial and appellate courts—within constitutional constraints not at issue here—and "to prescribe rules of procedure and practice in the district and superior court divisions of the General Court of Justice." *State v. Mangino*, 200 N.C. App. 430, 431-32, 683 S.E.2d 779, 780-81 (2009). Article IV, § 13(2) of our Constitution specifically authorizes the General Assembly to delegate the authority to prescribe rules of practice and procedure in North Carolina trial courts to our Supreme Court, N.C. Const. art. IV, § 13(2),[1] and "[t]he General Assembly has authorized our Supreme Court to promulgate rules of practice and procedure for the superior and district courts[,]" *Young v. Young*, 133 N.C. App. 332, 515 S.E.2d 478 (1999) (citing N.C. Gen. Stat. § 7A-34).[2] "Pursuant to this authority, our Supreme Court requires the Senior Resident Judge and Chief District

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1. The General Assembly nevertheless retains ultimate authority to "alter, amend, or repeal any rule of procedure or practice adopted by the Supreme Court for" North Carolina trial courts. N.C. Const. art. IV, § 13(2).

2. Likewise, rules of practice and procedure adopted under the statutory authority conferred on the judicial branch by N.C. Gen. Stat. § 7A-34 must be "supplementary to, and not inconsistent with, acts of the General Assembly." N.C. Gen. Stat. § 7A-34 (2021).

Judge in each judicial district to take appropriate actions such as the promulgation of local rules to [e]nsure prompt disposition of any pending motions or other matters necessary to move the cases toward a conclusion." *Id.* (cleaned up). These "[l]ocal rules are rules of court which are adopted to promote the effective administration of justice[.]" *Mitchell v. Mitchell*, 199 N.C. App. 392, 402, 681 S.E.2d 520, 527 (2009) (internal mark and citation omitted).

¶ 23 In general, our Supreme Court has cautioned that rules of practice and procedure should be applied in favor of "just and prompt consideration and determination of [] the business before [our courts]" rather than be allowed to permit "technical delay[.]" 276 N.C. 735. In a recent reaffirmation of this principle, the Court by a 25 August 2021 order revised Rule 6 of the General Rules of Practice to *require* that counsel first meet and confer with opposing counsel before scheduling a hearing on a motion. *See* N.C. Super. and Dist. Ct. R. 6 (2022) ("An attorney scheduling a hearing on a motion *must* make a good-faith effort to request a date for the hearing on which each interested party is available.") (emphasis added). In that order, the Court specified that "[a]n attorney's failure to comply with th[e] [meet and confer] requirement is an adequate ground on which [a] court may grant a continuance." *Id.*

¶ 24 The General Assembly adopted the North Carolina Rules of Civil Procedure in 1967 and amended them in 1971 pursuant to the authority conferred on it by Article IV, § 13(2) of our Constitution. *See Marks v. Thompson*, 14 N.C. App. 272, 274, 188 S.E.2d 22, 23-24 (1972). Rule 5 of the North Carolina Rules of Civil Procedure requires, in general, that "every pleading subsequent to the original complaint . . . be served upon each of the parties[.]" N.C. Gen. Stat. § 1A-1, Rule 5(a) (2021). It further requires service of "every brief or memorandum in support . . . at least two days before the hearing on the motion." *Id.*, Rule 5(a1).

¶ 25 Rule 56 of the North Carolina Rules of Civil Procedure requires service of any motion for summary judgment "at least 10 days before the time fixed for the hearing." *Id.*, Rule 56(c). It also requires service of "opposing affidavits at least two days before the hearing." *Id.*

¶ 26 "Affidavits in support of a motion for summary judgment are required by . . . Rules 6(d) and 56(c) to be filed and served with the motion [for summary judgment]," *Burlington Ins. Co. v. Fishermans Bass Cir., Inc.*, 165 N.C. App. 439, 444, 598 S.E.2d 678, 681 (2004) (citation and quotation marks omitted)—and "at least 10 days before the time fixed for the [summary judgment] hearing," N.C. Gen. Stat. § 1A-1, Rule 56(c) (collectively, the "10-day affidavit rule"). *See also* 2 North Carolina Civil

Procedure § 56-9 (4th ed. 2021) ("Although Rule 56 is silent, Rule 6(d) requires that summary judgment affidavits be served with the motion.").

¶ 27 Rule 6(b) grants the trial court discretion to enlarge the time within which an affidavit in support of a summary judgment motion may be served if the moving party requests additional time "before the expiration of the period originally prescribed or as extended by previous order." *Nationwide Mut. Ins. Co. v. Chantos*, 21 N.C. App. 129, 131, 203 S.E.2d 421, 423 (1974). "If the request is made after the motion for summary judgment has been served, there must be a showing of excusable neglect." *Id.* In addition to the exception provided by Rule 6(d), Rule 56(e) also "grants the trial judge wide discretion to permit further affidavits to supplement those which have already been served." *Rolling Fashion Mart, Inc. v. Mainor*, 80 N.C. App. 213, 216, 341 S.E.2d 61, 63 (1986) (citation omitted) (emphasis added). "However, this provision presupposes that an affidavit or affidavits have already been served." *Battle v. Nash Tech. Coll.*, 103 N.C. App. 120, 127, 404 S.E.2d 703, 707 (1991) (citation omitted).

¶ 28 Under the authority delegated by the General Assembly to our Supreme Court, N.C. Const. art. IV, § 13(2), and delegated by our Supreme Court to the Senior Resident Superior Court Judge of the Twenty-Sixth Judicial District of North Carolina, N.C. Gen. Stat. § 7A-34 (2021), encompassing Mecklenburg County, then-Senior Resident Superior Court Judge W. Robert Bell adopted the local rules in effect during the pendency of this case, which are still in effect today, on 20 January 2017.

¶ 29 In Mecklenburg County Superior Court, Local Rule 6 governs scheduling orders—or Case Management Orders ("CMOs")—as they are known there. *See* Mecklenburg ("Meck.") Cnty. Loc. R. 6. With exceptions for medical malpractice and exceptional civil and complex business cases, which are governed by different rules, when a case is ready to be scheduled for trial, "a Case Management Order ('CMO') will be issued and forwarded to all parties or their counsel of record[,]" which "shall include deadlines for the trial of the case, the filing of dispositive motions, the designation of experts, the completion of discovery, and pre-trial disclosures." Meck. Cnty. Loc. R. 6.2. Local Rule 6.3 affords parties the opportunity to seek to modify the scheduling order by either (1) submitting a joint proposed substitute scheduling order within 30 days of entry of the first scheduling order; (2) requesting to be heard by the court regarding the scheduling order; or (3) notifying the Mecklenburg County Caseflow Manager "that a motion to dismiss the entire complaint, or [] to compel arbitration, or request for designation as Exceptional or Complex Business Case has been filed or submitted[.]" Meck. Cnty. L. R.

6.3. Notably, under Local Rule 6.7, the dispositive motion deadline is one of the only three scheduling dates that cannot be extended or altered by the parties—the others being the trial date and the mediation deadline. Meck. Cnty. L. R. 6.7. Local Rule 6.7(a) specifically provides that "[*u*]*nder no circumstances* shall any agreed extensions or any consent order extensions of the discovery deadline by the Clerk of Superior Court's Office alter the dispositive motion filing deadline or assigned trial date in the CMO." Meck. Cnty. L. R. 6.7(a) (emphasis added).

¶ 30 Local Rule 12 governs motions and motions practice in Mecklenburg County Superior Court. *See* Meck. Cnty. Loc. R. 12. As under newly revised Rule 6 of the General Rules of Practice, under Local Rule 12.1 in Mecklenburg County Superior Court, movants *must* "make a good faith effort to obtain the availability of represented parties involved prior to obtaining a hearing date *and* should refrain from scheduling hearings without *first* attempting a good faith consultation." Meck. Cnty. Loc. R. 12.1 (emphasis added).

¶ 31 Consistent with the two-day requirement of Rules 5 and 56 of the North Carolina Rules of Civil Procedure, Local Rule 12.11 in Mecklenburg County Superior Court requires submission of briefs-in-support of motions set for hearing to the court and other parties "no later than two business days before the hearing date[.]" Meck. Cnty. Loc. R. 12.1(e). Local Rule 12.11 is more exacting than Rules 5 and 56 of the Rules of Civil Procedure though, requiring that briefs be submitted "no later than two business days before the hearing date *and* no later than 48 hours prior to the hearing time." Meck. Cnty. Loc. R. 12.1(e) (emphasis added). Likewise, Local Rule 12.15, which governs evidence submitted in support of motions set for hearing such as affidavits, deposition transcripts, and other exhibits, requires that any such material be submitted to the court and other parties "no later than two business days before the hearing date *and* no later than 48 hours prior to the hearing time of the hearing." Meck. Cnty. Loc. R. 12.15(a) (emphasis added).

¶ 32 Local Rule 12.11(e) offers the following instructive example regarding the notice to which parties are entitled in advance of a hearing on a motion:

> For example, if the Motion is scheduled to be heard at 10:00 a.m. on Monday morning, the briefs shall be delivered for receipt by the opposing side no later than 10:00 a.m. on the previous Thursday. *In no event shall briefs be delivered to the Judge prior to the opposing side.*

Meck. Cnty. Loc. R. 12.11(e) (emphasis added). As Local Rule 12.11(f) goes on to explain, "[t]he purpose of this rule is to allow the judge to review briefs in advance of the hearing to ensure that oral advocacy is meaningful and to allow counsel *the same time* to review the opposing party's brief in advance of the hearing[,]" Meck. Cnty. Loc. R. 12.11(f) (emphasis added), i.e., to prevent any party from benefiting from unfair surprise. As a remedy for violations of Local Rule 12.11(e), Local Rule 12.11(g) specifically provides that "the Court may continue the hearing for a reasonable period of time, proceed with the hearing without considering the untimely served briefs, or take such action as justice requires." Meck. Cnty. Loc. R. 12.11(g).

C. Violations and Apparent Violations by Plaintiff

¶ 33 On 29 April 2021, Plaintiff filed the motion for summary judgment. The motion was not timely: although it was filed more than ten business days in advance of the 24 May 2021 hearing, as required by Rule 56 of the North Carolina Rules of Civil Procedure, the deadlines set by the 15 June 2020 scheduling order governed, and the motion violated the deadline set by the scheduling order. The motion was filed 35 days late, merely 60 days from the trial date. The record does not reflect any attempt by the parties to extend the dispositive motion deadline, nor could they do so by consent. *See*, *e.g.*, Meck. Cnty. L. R. 6.7(a) ("Under no circumstances shall any agreed extensions or any consent order extensions of the discovery deadline by the Clerk of Superior Court's Office alter the dispositive motion filing deadline[.]").

¶ 34 Plaintiff then noticed the motion for hearing on 7 May 2021 in apparent violation of Local Rule 12.1, which states that parties "should refrain from scheduling hearings without first attempting a good faith consultation" regarding the date of the hearing. Meck. Cnty. Loc. R. 12.1. Although the record does not affirmatively demonstrate that Plaintiff did not consult with Defendants before selecting 24 May 2021 as the hearing date and noticing the hearing for that date on 7 May 2021, the record does show that Plaintiff's counsel served Defendants' former counsel rather than Defendants with the motion and then a week later served Defendants and not counsel for either of them, current or former, with the notice of hearing, all after joining an order over three months beforehand allowing Defendants' former counsel to withdraw from the case, which strongly suggests Defendants were not consulted about the 24 May 2021 hearing date on or before 7 May 2021, when Plaintiff's counsel noticed it. This apparent violation of Local Rule 12.1 would also have violated newly revised Rule 6 of the General Rules of Practice, had the apparent violation not predated the Supreme Court's 25 August 2021 revision of Rule 6 by three months.

¶ 35 The motion was not properly served. Again, the motion was served on 29 April 2021 on Defendants' former counsel, not Defendants, even though Plaintiff's counsel had joined an order allowing Mr. Copeland to withdraw from the case over three months before the motion was served. Serving Mr. Copeland rather than Defendants violated Rule 5(b)b. of the North Carolina Rules of Civil Procedure, which allows service by mail but requires the mail be sent to the *party's* address, not the address of their former counsel. *See* N.C. Gen. Stat. § 1A-1, Rule 5(b)b. (2021). This defect in service was only cured by Plaintiff when the amended certificate of service for the motion and the notice was filed with the court on 12 May 2021—eight business days before the hearing Plaintiff's counsel appears to have unilaterally scheduled for 24 May 2021.

¶ 36 Because of the absence of a file stamp on the Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment that was the first notice Defendants could have received that their counterclaim and affirmative defenses were potentially before the court on 24 May 2021, we cannot say with certainty that this brief was not timely filed. Above the signature line it is dated 20 May 2021 and the certificate of service reflects a 20 May 2021 date of service. Plaintiff noticed the hearing for 11:30 a.m. on 24 May 2021 so unless the brief was served on Defendants and the court prior to 11:30 a.m. on 21 May 2021, and served on both the court and Defendants at the same time, it was not properly served. *See* Meck. Cnty. Loc. R. 12.1(e), (f).

¶ 37 The brief references a supporting affidavit repeatedly. The certificate of service of this affidavit reflects service of the affidavit on 20 May 2021, the same day as the brief. Although the notary stamp on the affidavit states that the affidavit was signed on 19 May 2021, the clerk's file stamp on the affidavit is for 12:27 p.m. on 21 May 2021, which shows that service of the affidavit violated Local Rule 12.15, which required service of the affidavit on Defendants by 11:30 a.m. on 20 May 2021 (because the hearing was scheduled for 11:30 a.m. on 24 May 2021). This violation of Local Rule 12.15 in the service of the supporting affidavit, the unexplained discrepancy between date on the notary seal and the time of service, and the absence of a file stamp on the brief in the record on appeal at least supports the inference that the affidavit was filed and served at the same time as the brief and that service of the brief therefore likewise violated Local Rule 12.1(e).

¶ 38 The affidavit was served on Defendants in violation of Local Rule 12.15 even though Mr. Obaika had specifically requested a copy of the affidavit from Plaintiff's counsel a week beforehand. After finally being served with the motion on 7 May 2021, Mr. Obaika noted

in correspondence to Plaintiff's counsel that he had not received any affidavit(s) in support of Plaintiff's motion for summary judgment and requested that counsel provide him with the same on 14 May 2021. Yet, counsel appears to have ignored this request and instead served the affidavit on Defendants less than 48 hours before the 24 May 2021 hearing.

D. Plaintiff's Violations and Apparent Violations of the Local Rules Constitute Gamesmanship

¶ 39 "[G]amesmanship and actions designed to minimize adequate notice to one's adversary have no place within the principles of professionalism governing the conduct of participants in litigation." *Collins v. CSX Transp., Inc.*, 114 N.C. App. 14, 20, 441 S.E.2d 150, 153 (1994) (internal marks omitted). Gamesmanship is both bad for the legal profession and the public it serves because it "leads to cynicism about whether justice prevails in our [] justice system." *State v. White*, 372 N.C. 248, 256, 827 S.E.2d 80, 85 (2019) (Newby, J., dissenting). As our Court has noted with more frequency than should be necessary, the purpose of discovery and motions practice "is to facilitate the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit so as to permit the receiving party to adequately prepare her case." *GEA, Inc. v. Luxury Auctions Mktg., Inc.*, 259 N.C. App. 443, 451, 817 S.E.2d 422, 429 (2018) (internal marks and citation omitted). Discovery practice should be an "expeditious handling of factual information before trial so that the critical issues may be presented at trial unencumbered by unnecessary or specious issues and so that evidence at trial may flow smoothly and objections and other interruptions be minimized[,]" *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976), not an opportunity for gamesmanship.

¶ 40 Our Supreme Court has identified joining opposing counsel's motion only to later engage in conduct inconsistent with joining the motion as an example of gamesmanship. *See, e.g., State v. Sanderson*, 336 N.C. 1, 10 n.2, 442 S.E.2d 33, 39 n.2 (1994) (identifying as gamesmanship a prosecutor initially joining a defense attorney's motion for a mistrial after the prosecutor elicited testimony the court had already ruled inadmissible and "then [the prosecutor] recanted" from joining the motion). Plaintiff's counsel has engaged in precisely this sort of gamesmanship here.

¶ 41 After joining the order concerning Mr. Copeland's withdrawal from the case on 18 January 2021, counsel caused an untimely motion for summary judgment to be served on Mr. Copeland rather than Defendants over three months later, and then, doubling down on this course, caused a

notice of hearing to be served on Defendants rather than Mr. Copeland a week after causing the motion to be served on Mr. Copeland.

¶ 42 It was only after Mr. Copeland withdrew on 3 February 2021 and Plaintiff's counsel knew Defendants were unrepresented that counsel filed the untimely motion for summary judgment, served the motion and a supporting affidavit improperly, and noticed the motion for a hearing date that it does not appear counsel communicated with Defendants about, in violation of Local Rule 12.1.

¶ 43 The course Plaintiff's counsel chose—summary judgment by ambush on unrepresented parties—was unprofessional and unbecoming, as well as in violation of numerous rules. Defendants only received notice of the date of the hearing on Plaintiff's motion for summary judgment—a date it does not appear either of them were consulted about—ten business days ahead of the hearing. Four days later, on 14 May 2021, Mr. Obaika sent Plaintiff's counsel an email in which he requested an affidavit he would only be served with over a week later, less than 48 hours before the hearing, in violation of Local Rule 12.15. The brief without a file stamp in the record in support of Plaintiff's motion, proper service of which therefore cannot be confirmed, was the first time Defendants received notice of any kind that Plaintiff was seeking summary judgment on Defendants' counterclaim and affirmative defenses.

¶ 44 The trial court nevertheless denied Defendants' request for a continuance and granted summary judgment not only on Plaintiff's claims but also against Defendants on their counterclaim—even though Plaintiff never moved for summary judgment on Defendants' counterclaim, nor properly noticed hearing for any motion on it—and refused to allow Defendants to proffer any evidence in response to Plaintiff's evidence. At first, the trial court recognized and noted the improper notice that was given in the following colloquy with Plaintiff's counsel:

> THE COURT: Let me stop you there, Ms. Austin, and ask you a question. In looking at your motion, is this on for both a motion for summary judgment and a motion to dismiss, or is it only on for a motion for summary judgment? Because you're addressing what I believe is a motion to dismiss the counterclaim.
>
> MS. AUSTIN: This is on for motion for summary judgment, Your Honor.
>
> THE COURT: And in summary judgment, it's your case against Defendant. But as to the Defendants' case against you, the counterclaim is what you're

addressing by way of – I'm assuming you're addressing it by way of request for a dismissal. But my only question is, was it notice for the dismissal as well, or can I even consider that? That's my – that's my procedural question.

MS. AUSTIN: Sure. Well, I – the intent was always to address the counterclaim as part of our summary judgment motion. So the reason why I'm saying motion to – well, the reason why I'm saying motion to dismiss is – is – because the case law that I was just citing was referring to a motion to dismiss; right?

THE COURT: Okay.

MS. AUSTIN: So I – the – the – the Defendants fraud claim fails, number one, because based on the circumstances of the case, they failed to allege certain facts required to establish a fraud claim. But number two, there's also been no evidence to suggest that there was any fraud.

THE COURT: I guess my – but my question is, are there two different motions before the Court, and only one has been noticed? That's my question.

MS. AUSTIN: No. It's just a motion for summary judgment, Your Honor.

THE COURT: How do you anticipate addressing the counterclaim then? Because that's still – that will still be alive because the summary judgment addresses Plaintiff's case, but it doesn't address Defendants' case.

MS. AUSTIN: Well, we're asking that the Court grant summary judgment in favor of Plaintiff on Plaintiff's claims and to grant summary judgment on Defendants' counterclaim. So, in other words, we're arguing there's no genuine issue of material fact for Defendant to move forward in its fraud –

THE COURT: Understood. Okay. Understood. Thank you.

While the court clearly recognized that no hearing had been noticed as to the Defendants' counterclaim, in the end the court just let it go.

¶ 45 To recapitulate, Plaintiff noticed the motion for hearing on 7 May 2021 in apparent violation of Local Rule 12.1, which requires "good faith consultation" about scheduling before noticing a hearing. *See* Meck. Cnty. Loc. R. 12.1. Although not in effect on 7 May 2021, this apparent violation would also today constitute an apparent violation of Rule 6 of the General Rules of Practice, which requires that "[a]n attorney scheduling a hearing on a motion [] make a good-faith effort to request a date for the hearing on which each interested party is available." N.C. Super. and Dist. Ct. R. 6 (2022). Our Supreme Court has specifically directed that "[a]n attorney's failure to comply with th[e] [meet and confer] requirement is an adequate ground on which [a] court may grant a continuance." *Id.*

¶ 46 The motion was served on Defendants' former counsel even though Plaintiff's counsel had joined an order in which former counsel had withdrawn three months beforehand and then Plaintiff's counsel served the notice on Defendants, not Defendants' former counsel, a week after serving the motion on Defendant's former counsel. Rules 6(d) and 56(c) of the North Carolina Rules of Civil Procedure required Plaintiff to serve the affidavit at least ten days before the 24 May 2021 hearing, which Plaintiff failed to do. No motion for summary judgment on Defendants' counterclaim and affirmative defenses had been noticed prior to the 24 May 2021 hearing. The motion that was not actually served on Defendants until ten business days before the hearing did not address the counterclaim. The argument in the brief that was not served on Defendants until two business days before the hearing did not address the counterclaim. Local Rules 12.11(e) and 12.15(a) required Plaintiff to serve the affidavit and brief at least 48 hours before the hearing, which Plaintiff failed to do with respect to the affidavit, and in the absence of a file stamp on the brief in the record on appeal, we cannot say whether it was timely served under Local Rule 12.11(e), but if it was served at the same time as the affidavit, it was not timely served. To remedy violations of Local Rule 12.11(e), Local Rule 12.11(g) specifically provides that "the Court may continue the hearing for a reasonable period of time, proceed with the hearing without considering the untimely served briefs, or take such action as justice requires." Meck. Cnty. Loc. R. 12.11(g). We hold that the trial court abused its discretion when it denied Defendant's request for a continuance here.

III. Conclusion

¶ 47 We vacate the order of the trial court and remand the case for further proceedings. On remand, the trial court may hold another summary judgment hearing on both Plaintiff and Defendants' claims or entertain a

motion to amend the scheduling order to change the dispositive motion deadline or trial date.

VACATED AND REMANDED.

Judge DILLON concurs in result by separate opinion.

Judge TYSON dissents by separate opinion.

DILLON, Judge, concurring in result.

¶ 48 I agree with our dissenting colleague on many points. For example, because Plaintiff's complaint was verified and the allegations contained therein were sufficient to establish Plaintiff's claim, even if Plaintiff's affidavit was not timely, Defendant was not prejudiced by the trial court's consideration of said affidavit. Also, I agree that Defendants failed to meet their burden to produce evidence showing how much, if any, Plaintiff's damages for Defendants' breach should be reduced because of Plaintiff's failure to mitigate.

¶ 49 However, as explained below, I conclude that the Order should be vacated.

¶ 50 Regarding Plaintiff's breach of lease claims, Defendants were required to bring forth evidence at the summary judgment hearing to rebut Plaintiff's verified complaint. Defendants failed to provide affidavits prior to the hearing, and Defendants' answer was not verified. Defendant Victor Obaika did, though, attempt to provide live testimony at the hearing to show, for example, that Plaintiff committed fraud in the inducement as a defense to Plaintiff's claims. The trial court, however, cut him off, stating, "I can't accept your statements because it's . . . testimonial. I can't accept that in the context of a summary judgment hearing. . . . It has to be provided by way of an affidavit." Clearly, the trial court believed that it *lacked discretion* to allow Defendant Obaika to testify.

¶ 51 Our General Assembly, though, has provided that at motion hearings, the trial court "may direct that the matter be heard wholly or partly on oral testimony[.]" N.C. Gen. Stat. § 1A-1, Rule 43(e). And our Supreme Court has held that a trial court may consider oral testimony under Rule 43(e) at a summary judgment hearing. *Kessing v. National Mortg.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) ("Oral testimony may also be received [at a summary judgment hearing] by reason of Rule 43(e).").

¶ 52 Our Supreme Court has held that "there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented." *State v. Lang*, 301 N.C. 508, 510, 272 S.E.2d 123, 124 (1980). And such error is reversible where prejudice is shown. *Id.*

¶ 53 I conclude the record is sufficient to show prejudice. Defendants' answer and counterclaim sets forth allegations which, if true, create an issue of fact regarding Plaintiff's claims. Accordingly, the trial court's grant of summary judgment for Plaintiff regarding its claims should be vacated.

¶ 54 Regarding Defendants' counterclaims, while many allegations in Defendants' counterclaims, in reality, provide a *defense* to Plaintiff's claims, many also support claims for affirmative relief for Defendants. However, Plaintiff never noticed any motion for summary judgment regarding Defendants' counterclaims. Accordingly, it was inappropriate for the trial court to grant summary judgment on Defendants' counterclaims.

TYSON, Judge, dissenting.

I. Background

¶ 55 Victor Obaika is the sole Member and Manager of Vroombrands, LLC, a limited liability company ("LLC" collectively "Defendants"). Plaintiff and LLC entered into a written and integrated commercial lease on 1 April 2018 for real property located in Gaffney, South Carolina to be used as a gas station and convenience store. The lease term was to commence on 1 April 2018 and expires on 31 March 2023. Monthly rent was agreed to be $4,500.00 and due and payable on the first day of each month. LLC also agreed to pay the assessed real property taxes. Obaika personally guaranteed the complete performance of LLC's obligations under the lease. LLC and Obaika also personally agreed in the event of a breach to pay all costs associated with any breach, including attorney's fees.

¶ 56 Beginning 1 February 2019, LLC failed to pay the agreed-upon monthly rental. LLC also failed to pay real property taxes for the tax years 2018 and 2019. Plaintiff demanded LLC pay the overdue sums. LLC refused to do so. LLC vacated the leased premises on or about 1 Oct 2019. Plaintiff re-let the premises beginning 1 Aug 2020 for a $1,000.00 monthly rental.

¶ 57 On 17 Oct 2019, Plaintiff instituted this action alleging breach of contract, seeking enforcement of the guaranty, and requested attorney's fees for LLC's nonpayment of rent beginning 1 February 2019 and nonpayment of real property taxes for the years 2018 and 2019. Defendants asserted affirmative defenses to Plaintiffs claim and a counterclaim for fraudulent inducement. On 3 February 2021, the trial court granted defense counsel's motion to withdraw as counsel for both Defendants. LLC failed to appear through counsel after receiving proper notice at the hearing on 24 May 2021. Defendant Obaika appeared *pro se*.

¶ 58 The trial court granted Plaintiff's motion for summary judgment for all claims in Plaintiff's complaint and against Defendants' Affirmative Defenses and Counterclaim. The trial court found Defendants owed $90,500.00, calculated as follows: past due rent from Feb 2019 to Oct 2019, plus future rent until premises relet to new tenant, with a credit of $4,500.00 security deposit held by Plaintiff, plus pro-rated real property taxes for 2018 and 2019. The trial court also awarded Plaintiff attorney's fees of $12,578.35. Defendants appeal.

II. Issue

¶ 59 Defendants argue the trial court erred in granting summary judgment on Plaintiff's breach of contract claims.

III. Standard of Review

¶ 60 "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

¶ 61 "The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citation omitted). A party may meet this burden "by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Id.* (citation and quotation marks omitted).

¶ 62 A genuine issue of material fact is one supported by evidence that would "persuade a reasonable mind to accept a conclusion." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted). "An issue is material if the facts alleged would

. . . affect the result of the action[.]" *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

¶ 63 When the court reviews the proffers of evidence, verified complaint and affidavits at summary judgment, "[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1998) (citation omitted). We review the grant of summary judgment *de novo*. *Id.*

IV. Issues of Material Fact

¶ 64 Defendants argue summary judgment was not appropriate to resolve Plaintiff's claims because of the existence of at least three genuine issues of material fact: First, Defendants contend Plaintiff's evidence raises a genuine issue of material fact regarding whether Plaintiff owns the leased property. Second, Defendants contend Plaintiff's evidence raises a genuine issue of material fact of whether Plaintiff reasonably mitigated its damages. Finally, Defendants assert Plaintiff's own evidence raises a genuine issue of material fact regarding whether Plaintiff properly calculated and is entitled to receive its requested $90,500 award of compensatory damages.

¶ 65 Plaintiff argues the undisputed evidence demonstrated the Defendants breached the parties' contract as a matter of law, and the burden shifted to the Defendants to set forth specific facts showing the existence of a genuine issue of fact. Plaintiff argues Defendants *failed to proffer or submit any facts* demonstrating the existence of a genuine issue of material fact. Defendants failed to present any evidence to demonstrate Plaintiff does not own the leased property. The trial court correctly entered summary judgment as a matter of law on Defendant LLC's breach of lease for Plaintiff on this issue.

¶ 66 Defendants also failed to proffer evidence tending to show Plaintiff failed to reasonably mitigate its damages. In North Carolina, the non-breaching party to a lease has a duty to mitigate his damages upon the other party's breach of the lease. *Chapel Hill Cinemas, Inc. v. Robbins*, 143 N.C. App. 571, 582, 547 S.E.2d 462, 470 (Tyson, J., concurring in part and dissenting in part), *rev'd per curiam for reasons stated in the dissent*, 354 N.C. 349, 554 S.E.2d 644 (2001); *see also Isbey v. Crews*, 55 N.C. App. 47, 51, 284 S.E.2d 534, 537 (1981).

¶ 67 A plaintiff's duty to mitigate damages following a defendant's breach is a duty that arises as a matter of law. *See, e.g.*, *Tillis v. Calvine Cotton Mills, Inc.*, 251 N.C. 359, 367-68, 111 S.E.2d 606, 613 (1959) (citation

omitted) (explaining a party is "required by law to exercise reasonable diligence to minimize damages"); *Gibbs v. Telegraph Co.*, 196 N.C. 516, 522 146 S.E. 209, 213 (1929) (citations omitted) ("[I]t is a well-settled rule of law that the party who is wronged is required to use due care to minimize the loss."). "[T]he duty to mitigate 'stems from the implied covenant of good faith and fair dealings' inherent in all contracts." *See New Towne Limited Partnership*, 113 Ohio App.3d 104, 108, 680 N.E.2d 644, 646 (1996); Barker, *Commercial Landlords' Duty Upon Tenants' Abandonment—To Mitigate?*, 20 J. Corp. L. 627, 644 (1995).

¶ 68 It is undisputed that Defendant LLC, while in admitted breach of the lease, vacated the premises on 1 Oct 2019 and Plaintiff relet the premises as of 1 Aug 2020. Defendant presented no evidence of Plaintiff's lack of efforts or unreasonable delay to seek a new tenant to lease the property.

¶ 69 Plaintiff reasonably relet the premises during the COVID-19 pandemic and within one year of the breach. Defendants failed to challenge or demonstrate that Plaintiff is not entitled to receive the $90,500.00 award of compensatory damages. From Defendants' first missed lease payment on 1 February 2019 until they vacated the premises on 1 October 2019, $4,500.00 monthly rent due multiplied by the eight-month period equals $36,000.00. From 1 October 2019 when Defendants vacated until 1 August 2020 when Plaintiff relet premises, $4,500.00 of missed monthly rent multiplied by the eleven-month period equals $49,500.00.

¶ 70 Defendants also argue the pro-rated property taxes for six months of 2018 and nine months of 2019 at $6,000.00 and $8,000.00, respectively, were less than the correctly calculated amount. Defendants have failed to show the trial judge's calculations were unreasonable or any error in these calculations. Judge Dillon and I agree: "Defendants failed to meet their burden to produce evidence showing how much, if any, Plaintiff's damages for Defendants' breach should be reduced because of Plaintiff's failure to mitigate." Defendants' arguments are without merit, are properly overruled on all of Plaintiff's claims, and summary judgment was properly entered thereon.

V. Untimely Affidavit

¶ 71 Defendants argue Plaintiff failed to timely serve and file its Supportive Affidavit. Defendants contend the North Carolina Rules of Civil Procedure require Plaintiff to serve its Supportive Affidavit at least ten days before the scheduled hearing and Plaintiff had served Defendants on 20 May 2021, four days before the scheduled hearing on 24 May 2021. Defendants also contend the local rules in Mecklenburg County require Plaintiff to file its Supporting Affidavit no later than two

business days before the hearing. Plaintiffs filed on 27 May 2021, seven days after the deadline. Defendants argue they were prejudiced by the untimely service because they were not given proper time to prepare for the hearing.

¶ 72 Plaintiff argues the local Mecklenburg County Rule 12.15(a) permits copies of affidavits to be served on the opposing party "no later than two business days before the hearing date." Meck. Cnty. Loc. R. Civ. P. 12.15(a). Plaintiff contends Defendants were timely served with the Supporting Affidavit under this rule. *Id*. Plaintiff contends there was no issue of material fact without regard to the Supporting Affidavit. The lease and documents and Defendants' defaults and non-payments thereon speak for themselves. Only a question of law was present.

¶ 73 Plaintiff argues Defendants must show on appeal any alleged error in considering the affidavit was prejudicial rather than harmless. An abuse of discretion standard of review requires deferential review to the trial judge's decision. *Scheffer v. Dalton*, 243 N.C. App. 548, 553-54, 777 S.E.2d 534, 539-40 (2015). Defendants' burden is to show prejudicial error, i.e., a different result would have likely ensued had the error not occurred. *Id*.

¶ 74 The trial judge's decision to permit the asserted untimely service and filing of the affidavit was not prejudicial to the Defendants. The evidence presented at trial showed no issue of material fact existed to deny Plaintiff's claims. Both parties conceded to a breach of the lease and non-payment. Defendants presented no evidence otherwise. Judge Dillon and I also agree on this issue: "Plaintiff's complaint was verified and the allegations contained therein were sufficient to establish Plaintiff's claim, even if Plaintiff's affidavit was not timely, Defendant was not prejudiced by the trial court's consideration of said affidavit." Defendant's arguments are without merit.

VI. Fraudulent Inducement Counterclaim

¶ 75 Defendants argue the trial court erred in granting summary judgment because genuine disputes of material facts are generally inherent in fraudulent inducement claims and are evident in this case.

¶ 76 Plaintiff argues summary judgment on Defendants' fraud claim was proper because Defendants failed to properly allege fraud with particularity and neither proffered nor produced any evidence tending to establish any element of their purported fraud claim.

¶ 77 Summary judgment is granted where the claimants fail to produce evidence of reasonable reliance or of the opposing party's *scienter*.

RD&J Props. v. Lauralea-Dilton Enters., LLC, 165 N.C. App. 737, 744-748, 600 S.E.2d 492, 498-500 (2004). Defendants have provided no evidence tending to show Plaintiff's *scienter* or that their own reliance thereon was reasonable. The trial court properly granted summary judgement on Defendants' fraud claim. *Id.*

VII. Defendants' Proffer

¶ 78 Defendants argue the trial court erred in prohibiting Defendant as an individual from presenting oral testimony in lieu of a written affidavit. Defendants contend Rule 43(e) of the North Carolina Rules of Civil Procedure expressly permits admission of oral testimony during a summary judgment hearing in lieu of or in addition to written affidavits. *See* N.C. Gen. Stat. § 1A-1, Rule 43(e) (2021).

¶ 79 Plaintiff argues the trial court *did not abuse its discretion* by not allowing Defendant individual to testify because Defendants, together or individually, had produced no evidence in discovery or in opposition to the motion for summary judgment and, having failed to do so, could not make their entire case on oral testimony at the hearing and demonstrate prejudice in the trial court's discretionary decision.

¶ 80 Abuse of discretion review requires our Court's deference to the decision-maker and is a difficult burden to overcome. *Scheffer*, 243 N.C. App. at 554, 777 S.E.2d at 540. Defendants cannot demonstrate prohibiting Defendant Obaika's individual oral testimony, even if improper, was prejudicial in the face of admitted default. *Id.*

¶ 81 Defendants failed to present any evidence supporting their affirmative defenses and counterclaim, either during discovery and for the more than six months between November 2020, after their counsel was allowed by court order to withdraw on 3 February, 2021, and the May 2021 hearing or by filing any affidavit prior to the hearing. Defendants have failed to show any abuse in the trial court's decision not to allow or hear oral testimony at the hearing, after Defendants failed to provide discovery or to proffer affidavits in advance of the hearing. *Id.*

VIII. Notice

¶ 82 Defendants argue the trial court reversibly erred by entering summary judgment against Defendants' counterclaim without proper notice. Defendants contend Plaintiff first mentioned its intent to also seek summary judgment against Defendants' counterclaim in its Supporting Affidavit.

¶ 83 On 3 February 2021 the trial court granted Defendants' former counsel's motion to withdraw as counsel of record. Defendants had received prior notice of their counsel's motion to withdraw.

¶ 84 Plaintiff filed its motion for summary judgment on 29 April 2021. The plurality opinion finds reversible error in the trial court's admittedly discretionary ruling in not affording notice pursuant to Local Rule 12.1, which requires "good faith consultation" about scheduling before noticing a hearing. Meck. Cnty. Loc. R. 12.1.

¶ 85 Defendants did not seek substituted or replacement counsel in the three months after their counsel had withdrawn and the motion for summary judgment was filed. Defendants were on notice to seek replacement counsel, if they deemed it prudent. Defendant Obaika is not a licensed attorney and the trial court correctly ruled he could not represent the LLC at the hearing.

¶ 86 Defendants did not retain replacement counsel after withdrawal of prior counsel or after the motion for summary judgment was filed. "The 10-day notice required by Rule 56 can be waived by a party." *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 667, 248 S.E.2d 904, 907 (1978). Defendants failed to seek new counsel after withdrawal or in the face of a dispositive motion. They waived notice and cannot show any abuse of discretion by the trial court by their failure to do so and appear *pro se*. Obaika, a non-lawyer, cannot represent the LLC in court against Plaintiff's claims or assert any of the LLC's counterclaims. The trial court's order is properly affirmed.

IX. Conclusion

¶ 87 Our Supreme Court has held that when the parties have only moved for partial summary judgment, it is not an abuse of discretion or reversible error for the trial court to grant summary judgment on all claims, if both parties are given the prior opportunity to submit evidence on all claims pending before the trial court and no genuine issues of material fact exist. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 212, 258 S.E.2d 444, 448 (1979).

¶ 88 Defendants and Plaintiff were given the opportunity to submit evidence of all the claims brought and pending before the trial court. Defendants had the opportunity to seek replacement counsel for months after prior counsel had withdrawn by court order, but failed to do so. Defendants failed to provide any evidence to support their claims during discovery through the properly scheduled hearing. Any purported error on the timing of the Plaintiff's Supporting Affidavit was waived.

¶ 89 The issues before the court were questions of law on the applicability of a written lease, guaranty, and contract documents. Defendant LLC's admitted material breaches thereof, and Obaika's unconditional guaranty were not in dispute. Plaintiff's efforts to mitigate Defendants' breaches and damages were not shown to be unreasonable. The trial court's discretionary rulings and the summary judgment entered is not affected by error of law and is properly affirmed. I respectfully dissent.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF
v.
MOUNTAIN VILLAGES, LLC; AND ENTEGRA BANK, DEFENDANTS

No. COA21-684

Filed 1 November 2022

Eminent Domain—just compensation—prescriptive easement determination—evidentiary support

In a condemnation action, the trial court did not err by determining that defendant (owner of the commercial property that was the subject of the taking) failed to meet its burden of demonstrating that it had acquired a prescriptive easement in a nearby vacant lot—to which defendant did not have legal title but which was used by its tenants for parking—where competent evidence supported the court's findings of fact, which in turn supported its conclusions of law. The doctrine of judicial estoppel did not apply to prevent the Department of Transportation from disputing the existence of the easement at a hearing because its estimated sum of just compensation in its pleadings—which included the prescriptive easement under an extraordinary assumption—was not relevant to the issue of title and because the Department never took a position that defendant had any ownership interest in the vacant lot and thus did not contradict itself.

Appeal by Defendant Mountain Villages, LLC, from order entered 28 July 2021 by Judge Jacqueline D. Grant in Jackson County Superior Court. Heard in the Court of Appeals 7 June 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Liliana R. Lopez, for Plaintiff-Appellee Department of Transportation.

The Van Winkle Law Firm, by Jonathan H. Dunlap and Jackson Bebber, for Defendant-Appellant Mountain Villages, LLC.

COLLINS, Judge.

¶ 1 Defendant Mountain Villages, LLC, appeals from the trial court's order determining, inter alia, that Mountain Villages failed to meet its burden of establishing that it has acquired a prescriptive easement. We affirm.

I. Background

¶ 2 Plaintiff Department of Transportation ("DOT") initiated a condemnation action on 14 August 2015 in Jackson County Superior Court against Defendants Mountain Villages, LLC,[1] and Entegra Bank[2] by filing a complaint and Declaration of Taking and Notice of Deposit, seeking to acquire a portion of Defendants' property ("subject property"). The subject property is commercial property comprised of retail businesses and several residential units. Directly across from the subject property was a vacant lot (the "Parking Island"), which was used by Defendants and Defendants' customers for parking, and as a general parking area for carpooling by other people in the area. Lori Richards, owner and manager of Mountain Villages, believed that when she purchased the subject property, she also owned the Parking Island and had the right to have customers park on it. However, the Parking Island was actually owned by Samuel and Michelle Hopkins.

¶ 3 Entegra Bank filed its answer on 29 June 2016 and Mountain Villages filed its answer on 29 July 2016. Prior to initiating condemnation, DOT negotiated with Defendants to acquire the subject property and had the subject property appraised by M. Sean Ward. Based on Ward's determination of just compensation, DOT deposited the sum of $393,450 with the Jackson County Superior Court as its estimate of just compensation for the taking of the subject property, which included the Parking Island.

¶ 4 In his appraisal, Ward noted that he valued the subject property "under the following extraordinary assumptions:"

> The subject property has benefitted from the use of a parking area that is owned by the adjacent property

1. Defendant Mountain Villages, LLC, was known as Kokopelli Village, LLC, when it purchased the subject property in 2003; Kokopelli Village, LLC, changed its name to Mountain Villages, LLC, sometime after 2010.

2. Entegra Bank is not a party on appeal.

> owner, Mr. Hopkins . . . . As a result of the project, the adjacent property utilized as a parking area will no longer be available for use by the subject property owner. In this instance, I have appraised the subject property under the extraordinary assumption that the area utilized for parking prior to the project was for use by the subject owner under a prescriptive easement. Note that this decision was made by the client's legal advisor, and as a result, I have utilized the extraordinary assumption that the prescriptive easement is in place as of the date of this appraisal.

Ward further provided that "[i]f any of the noted extraordinary assumptions . . . proves to be false, I reserve the right to amend my value estimate(s) and the results of this report are null and void."

¶ 5 On 11 May 2017, DOT filed a plat "of the land taken and such additional area as may be necessary to properly determine the damages," pursuant to N.C. Gen. Stat. § 136-106(c). On 25 October 2019, Defendants moved for leave to amend their answers to add counterclaims for inverse condemnation; the trial court allowed the amendments by order. In May 2021, Mountain Villages moved the trial court to "hear and determine any and all issues raised by the pleadings other than the issue of damages," pursuant to N.C. Gen. Stat. § 136-108 (the "section 108 hearing"). Mountain Villages also moved the court to cause DOT "to amend its pleadings to conform to the evidence, deposit with the Court the estimated amount of compensation for the additional, inverse, taking, [and] for the recovery of expenses[.]" The section 108 hearing took place on 30 June 2021.

¶ 6 After the hearing, the trial court entered an order on 28 July 2021 granting in part and denying in part Mountain Villages' motion. The trial court concluded, in pertinent part, that Mountain Villages "has failed to meet its burden of establishing a prescriptive easement" and that a "jury shall determine the just compensation the Defendant is entitled to receive for the taking of a portion of their property by [DOT] as enumerated in the [DOT's] Complaint and Declaration of Taking."

II. Discussion

¶ 7 Mountain Villages argues that the trial court erred by determining that Mountain Villages did not have a prescriptive easement over the Parking Island, and thus was not entitled to compensation for its taking.

A. Jurisdiction

¶ 8 The trial court's order, which determines the title or area taken in this condemnation action, is an interlocutory order that affects a substantial right. *See N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005) ("[I]nterlocutory orders concerning title or area taken must be immediately appealed as 'vital preliminary issues' involving substantial rights adversely affected." (citations omitted)). Immediate appeal therefore lies to this Court, pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a) & (b).

B. Standard of Review

¶ 9 Issues under the purview of N.C. Gen. Stat. § 136-108 are decided by a judge sitting without a jury. *See* N.C. Gen. Stat. § 136-108 (2015) ("After the filing of the plat, the judge . . . shall . . . hear and determine any and all issues raised by the pleadings other than the issue of damages[.]"). "[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether the conclusions of law were proper in light of such facts." *Anthony Marano Co. v. Jones*, 165 N.C. App. 266, 267-68, 598 S.E.2d 393, 395 (2004) (citation omitted). Unchallenged findings of fact are binding on appeal. *Lab. Corp. of Am. Holdings v. Caccuro*, 212 N.C. App. 564, 567, 712 S.E.2d 696, 699 (2011). "The trial court's conclusions of law are reviewed de novo, wherein this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Stikeleather Realty & Invs. Co. v. Broadway*, 241 N.C. App. 152, 160, 772 S.E.2d 107, 113 (2015) (quotation marks and citation omitted).

C. Analysis

1. Challenged Findings of Fact

¶ 10 Mountain Villages argues that findings of fact 15(e), 15(g), and 19 are unsupported by the evidence.

a. Finding 15(e)

¶ 11 Finding 15(e) states:

> Mr. Day advised Ms. Richards of the fact that [Mountain Villages] did not have any ownership interest, easement, or legal rights in the Parking Island when he initially met with her to discuss compensation for the area of [Mountain Villages'] property that would be taken for the highway/bridge project.

¶ 12 At trial, the following exchange took place between DOT's counsel and Jacob Day, a right-of-way agent employed with DOT, upon Day's direct examination:

> [Counsel]: So you personally spoke with Ms. Richards?
>
> [Day]: Yes, ma'am.
>
> . . . .
>
> [Day]: I was the agent for this claim.
>
> [Counsel]: The agent, okay. And at any point did you tell her that she did not own the parking island?
>
> [Day]: Yes. On the initial contact, when I was explaining the project and the impacts to the property, the issue was brought up about the parking in the gravel island.
>
> [Counsel]: Who brought that up; do you recall?
>
> [Day]: I did. I brought it up. Because based off of our research, when we get a set of plans, there was a severed piece of property that was in between these roads that an island was created. Well, our plans were unclear about ownership, and we got our location and surveys unit to do extensive deed research on that. And when they gave us their results, it was the Hopkinses that owned the actual property. And that had been in their family for years.
>
> [Counsel]: So did your office do that deed research?
>
> [Day]: No. The location survey's office did that, provided that. The Department of Transportation did that.
>
> [Counsel]: But do you get the results of those deeds?
>
> [Day]: Yes.
>
> [Counsel]: Okay. And you're stating that the result that you received from the location and survey unit is that Mr. Hopkins owned that parking island?
>
> [Day]: Correct.
>
> [Counsel]: And you told Ms. Richards this?

> [Day]: Yes, ma'am.
>
> [Counsel]: And what was her reaction?
>
> [Day]: She was surprised. She thought that she had ownership of that.
>
> [Counsel]: To your knowledge, does it appear in her chain of title that she owns it?
>
> [Day]: Not to my knowledge, no. There was nothing that we found in writing that gave her rights to that.
>
> [Counsel]: Have you personally looked through those deeds and title work?
>
> [Day]: I have.
>
> [Counsel]: And is it your testimony that you never found in her chain of title that she owned that parking island?
>
> [Day]: To the best of my knowledge, we never found it. I never found it.
>
> [Counsel]: To the best of your knowledge, was there any indication that she perhaps owned an easement to that parking island?
>
> [Day]: I never found any legal rights to that.
>
> [Counsel]: And you indicate that you spoke with her in 2014?
>
> [Day]: Correct.

Additionally, on re-direct, the following exchange took place:

> [Counsel]: I've just got a couple quick questions for you. And did you explain -- when you told Ms. Richards that she didn't, and I'm using quotes here, own the parking island, did you explain the difference in fee simple ownership and easements?
>
> [Day]: I tried to convey that, but, yes, you are correct. We explained that the Hopkinses owned the actual land that she was using.
>
> [Counsel]: When you say owned, you mean the fee ownership, right?

[Day]: It was in their deed, yes.

¶ 13 This testimony is competent evidence to support the trial court's finding of fact 15(e) that Day told Richards that she did not have any ownership interest, easement, or legal rights in the Parking Island.

b. Finding 15(g)

¶ 14 Finding 15(g) states:

> When Mr. Day was a student at Western Carolina University, he and other students also used the Parking Island for parking. He was never told he couldn't use the Parking Island.

¶ 15 It is true that there is no record support for the non-material portion of the finding that Day "was a student at Western Carolina University." However, Day did testify on direct examination that he used the Parking Island while he was a student in high school:

> [Counsel]: Where are you from?
>
> [Day]: I am from the Sylva area as well.
>
> [Counsel]: Okay.
>
> [Day]: I lived in Sylva all my life just, basically, five miles north of Cullowhee.
>
> [Counsel]: Born and raised in Sylva?
>
> [Day]: Born and raised.
>
> [Counsel]: So are you familiar with this project or, I'm sorry, with this property?
>
> [Day]: Yes.
>
> [Counsel]: And the surrounding area?
>
> [Day]: Correct.
>
> [Counsel]: And have you ever used that traffic island parking island?
>
> [Day]: I have, yes.
>
> [Counsel]: Okay. How many times have you used it?
>
> [Day]: Oh, a handful of times. It had been a while, but I know growing up, in high school, we used to meet there and carpool and fish. And I know family

> members have lived in the area, live in Cullowhee, and we would carpool from there and friends who have used that area to get out and tube down the river.
>
> . . . .
>
> [Counsel]: Have you ever been told by anyone that you can't do that?
>
> [Day]: I personally have not, no.

¶ 16 Day's testimony supports the substance of finding 15(g) that Day used the Parking Island while in school, knew friends and family members who used the Parking Island to meet for carpooling, and was never told that he could not use the Parking Island.

c. Finding 19

¶ 17 Finding 19 states:

> There is no evidence that any signs were ever placed on the Parking Island indicating that parking was for the customers of [Mountain Villages] or any other entity.

¶ 18 Mountain Villages argues that "everyone who testified at the hearing testified that Mountain Villages had signage on the Parking Island" and claims that this finding of fact is directly contradicted by Documentary Exhibit 118; Richards' testimony; and the testimony of Mr. Jeffrey Brown,[3] a civil engineer who testified at trial about the parking conditions on the Parking Island.

¶ 19 Documentary Exhibit 118 is a photograph of a truck parked in the Parking Island next to a sign for Suds Your Duds Laundromat. The sign indicates the name of the laundromat and its services, and it has an arrow on top pointing across Old Cullowhee Road in the direction of the laundromat. The sign contains no language about parking.

¶ 20 Richards testified that there were signs around the Parking Island "to point to where the building was, as people came around the corner, so they could see that we were there. So kind of advertising." Richards acknowledged that there was "signage" around the Parking Island but did not testify that the signage contained any parking information. When asked on cross examination if there was "signage on the Parking Island saying that it was for customers only at any point," Richards responded,

---

3. The parties stipulated to Brown's expertise in civil engineering and his admission as an expert witness.

"I don't remember" and "We may have. I just can't remember clearly if we did."

¶ 21 Brown testified that, upon examining the Parking Island prior to construction, there was "ample parking" directly across from the laundromat and music store. Brown further testified that he saw one sign posted on the Parking Island; upon being shown Documentary Exhibit 118, Brown explained that the photo exhibit showed "an advertisement for the laundromat. It's their sign." Brown further explained that "[t]here is an arrow leader pointing from the parking area to the laundromat on the top [of the sign], and then it says Suds your Duds Laundromat[.]" Brown testified that he did not see any other signs for any other business on the Parking Island.

¶ 22 The Documentary Exhibit 118, Richards' testimony, and Brown's testimony show that the signs did not contain parking information and support finding 19 that there is no evidence that signs were ever placed indicating that parking was for customers of Mountain Villages' business.

¶ 23 This competent record evidence supports the challenged findings of fact 15(e), 15(g), and 19, and those findings are thus binding on appeal. *See Jones*, 165 N.C. App. at 267-68, 598 S.E.2d at 395. Moreover, as Mountain Villages did not challenge any of the remaining findings of fact, the trial court's remaining findings are also binding on appeal. *See Lab. Corp. of Am. Holdings*, 212 N.C. App. at 567, 712 S.E.2d at 699.

2. Additional Evidence

¶ 24 Mountain Villages argues that the trial court erred by failing to consider the following evidence: the estimated sum of just compensation; the affidavit of Mr. Troy Burns, a prior owner of the subject property, which was presented in an effort to tack his alleged period of adverse possession of the Parking Island to Mountain Villages' alleged period for the required prescriptive period of 20 years; and certain testimony and exhibits regarding ownership of the Parking Island and enforcement of the parking spaces on the Parking Island.

a. Estimated Sum of Just Compensation

¶ 25 Mountain Villages argues that the trial court erred by failing to consider the sum of money deposited by DOT upon its initiation of the condemnation action as that sum speaks directly to the issue of title and interests taken by DOT. This argument lacks merit.

¶ 26 When condemnation of land becomes necessary, the DOT shall institute a civil action by filing a complaint and a declaration of taking.

N.C. Gen. Stat. § 136-103(a) (2015). The complaint shall contain "[a] prayer that there be a determination of just compensation in accordance with the provisions of this Article." *Id.* § 136-103(c)(6) (2015). Attached to the declaration shall be "[a] statement of the sum of money estimated by said [DOT] to be just compensation for said taking." *Id.* § 136-103(b)(5) (2015). "The filing of said complaint and said declaration of taking shall be accompanied by the deposit of the sum of money estimated by said [DOT] to be just compensation for said taking[.]" *Id.* § 136-103(d) (2015). "In the event the amount of the final judgment is less than the amount deposited . . . , [DOT] shall be entitled to recover the excess of the amount of the deposit over the amount of the final judgment and court costs incident thereto[.]" N.C. Gen. Stat. § 136-121 (2015).

¶ 27 DOT's initial deposit was an *estimated sum* for just compensation. DOT is not bound by its estimate; DOT asks for a determination of just compensation in accordance with the statute and is entitled to recover any excess of the amount of the deposit over the amount of the final judgment. As the deposited sum is not relevant to the issue of title and interests taken by DOT, the trial court did not err by failing to consider the sum as evidence of Mountain Villages' interest in the Parking Island.

b. Burns' Affidavit

¶ 28 Mountain Villages argues that the trial court erred by failing to consider the affidavit of Burns, a prior owner of the subject property.

¶ 29 "Our Court reviews the trial court's ruling on the admissibility of affidavits for an abuse of discretion." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 225, 768 S.E.2d 582, 595 (2015) (quotation marks and citation omitted). Furthermore, the "appellant must show not only that the trial court abused its discretion in striking an affidavit, but also that prejudice resulted from that error." *Id.* at 226, 768 S.E.2d at 596 (quotation marks and citation omitted).

¶ 30 Burns' affidavit was presented in an effort to tack his alleged period of adverse possession of the Parking Island to Mountain Villages' alleged period of adverse possession for the required prescriptive period of 20 years.

¶ 31 The trial court found as follows:

> [Mountain Villages] presented the affidavit of Troy Burns during the hearing in an effort to establish privity with the prior owner of the subject property so [Mountain Villages] could tack successive adverse possession of the Parking Island in the aggregate for

> the prescriptive period of twenty years. However, the affidavit of Mr. Burns was executed one day prior to the hearing. There is no evidence that [DOT] was provided notice of [Mountain Villages'] intention to use the affidavit or the particulars of the affidavit, sufficiently in advance of the hearing so as to provide the [DOT] with a fair opportunity to prepare to meet the statement.

¶ 32 Here, the trial court apparently excluded Burns' affidavit because it was executed only one day prior to the section 108 hearing, DOT was not given notice of the intention to use Burns' affidavit, and DOT did not have a fair opportunity to prepare to meet the statement. Despite moving for the section 108 hearing in May 2021, Defendant presented Burns' affidavit for the first time during the hearing. Defendant claims that it was unaware DOT was going to contest the prescriptive easement. However, the purpose of the section 108 hearing is to "hear and determine *any and all issues* raised by the pleadings other than the issue of damages," N.C. Gen. Stat. § 136-108 (emphasis added), and the issue of whether Defendant had acquired a prescriptive easement to the Parking Island was raised in DOT's pleadings.

¶ 33 We cannot say that the trial court's exclusion of Burns' affidavit was an abuse of discretion. *Supplee*, 239 N.C. App. at 225, 768 S.E.2d at 595. Moreover, even if the trial court had abused its discretion in excluding Burns' affidavit, Defendant has failed to show any resulting prejudice. Burns' affidavit does not show that he owned the Parking Island for a length of time over 20 years or that Burns' use of the Parking Island was anything but permissive. *See id.* at 227, 768 S.E.2d at 597 (concluding that "even assuming *arguendo* that the trial court abused its discretion . . . , [the plaintiff] has failed to show any resulting prejudice").

c. Other Evidence

¶ 34 Further, while Mountain Villages has provided examples of evidence that it believes should have been included in the trial court's order, and argues that the trial court erred in failing to consider such evidence, we note that the trial court is not required to recite all of the evidentiary facts before it. *See Tolbert v. Hiatt*, 95 N.C. App. 380, 385, 382 S.E.2d 453, 456 (1989). "The mere introduction of evidence does not entitle the proponent to a finding thereon, since the [trial court] must pass on its weight and credibility[.]" *See Long v. Long*, 71 N.C. App. 405, 407, 322 S.E.2d 427, 430 (1984) (citation omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 52 (2015).

¶ 35 Here, after making relevant findings as to ownership and use, the trial court concluded that Mountain Villages "failed to present sufficient evidence establishing that its use of the Parking Island was not permissive" and that the evidence was insufficient to establish either that Mountain Villages sought permission to use the Parking Island or that Hopkins ever objected to Mountain Villages' use of the Parking Island. As the trial court made sufficient findings of fact to resolve the ultimate issue of whether Mountain Villages met its burden of establishing that it acquired a prescriptive easement, it did not need to restate all of the evidence presented. *Tolbert*, 95 N.C. App. at 385, 382 S.E.2d at 456.

3. Challenged Conclusions of Law

¶ 36 Mountain Villages next argues that the findings of fact do not support conclusions of law 5 and 7. The challenged conclusions state:

> 5. [Mountain Villages] has failed to present sufficient evidence establishing that its use of the Parking Island was not permissive. "Mere permissive use of a way over another's land cannot ripen into an easement by prescription no matter how long it continues." *Yadkin Valley Land Co. v. Baker*, 141 N.C. App. 636, 638, 539 S.E.2d 685, 688 (2000) (citing *Dickinson v. Pake*, 284 N.C. 576, 581, 201 S.E.2d 897, 900 (1974)). "Furthermore, any such use is presumed to be permissive unless that presumption is rebutted by evidence to the contrary." *Id.*
>
> . . . .
>
> 7. [Mountain Villages] failed to present sufficient evidence that it made repairs or improvements on the Parking Island of such a nature as to put the owner of the Parking Island on notice that [Mountain Villages'] use of the Parking Island was being made under claim of right. In order to establish a hostile use or that use is being made under claim of right, there must be "notice to the true owner of the existence of the alleged easement." *Id.* [at 640, 539 S.E.2d at 688.]

Essentially, Mountain Villages argues that the trial court's findings of fact do not support conclusions that Mountain Villages failed to present sufficient evidence that its use of the Parking Island was not permissive and was being made under a claim of right.

¶ 37 To establish an easement by prescription, a claimant must prove that "(1) the use is adverse, hostile or under claim of right; (2) the use has been open and notorious such that the true owner had notice of the claim; (3) the use has been continuous and uninterrupted for at least twenty years; and (4) there is substantial identity of the easement claimed through the prescriptive period." *Yadkin Valley Land Co., L.L.C. v. Baker*, 141 N.C. App. 636, 639, 539 S.E.2d 685, 688 (2000) (citation omitted). "Prescriptive easements are not favored in the law, and the burden is therefore on the claiming party to prove every essential element thereof." *Id.* (citation omitted). "The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears." *Dickinson v. Pake*, 284 N.C. 576, 580, 201 S.E.2d 897, 900 (1974) (citations omitted). "A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription." *Id.* at 581, 201 S.E.2d at 900 (citation omitted).

¶ 38 Here, the following findings of fact support the conclusion that Mountain Villages failed to prove that its use of the Parking Island was anything other than permissive:

> 7. The subject property is described in Exhibit B as *"being that tract of land described in a deed dated February 3, 2003 to Kokopelli Village, LLC (n/k/a Mountain Villages, LLC) and recorded February 7, 2003 in Book 1178, Page 243, Jackson County Registry. . . . Also being that land identified as Tax PIN No. 7559-35-9606 as is shown in the Jackson County Tax Office"*
>
> 8. The description of the "area taken" in Exhibit B and the "Court Map" of the subject property, generated pursuant to N.C. Gen. Stat. § 136-106, compiled on November 9, 2015, and filed with the Jackson County Clerk of Court on May 11, 2017, do[es] not include a description or any calculations for what the parties call a "Parking Island" or "Traffic Island", formed by the intersection of Aztec Drive, Old Cullowhee Road, and a short connecting road.
>
> 9. The "Parking Island" or "Traffic Island" (hereinafter "Parking Island") was owned by Samuel R. Hopkins.
>
> 10. Plaintiff DOT acquired a right of way to the "Parking Island" from Samuel Hopkins via a "Deed

for Highway Right of Way", recorded in the Jackson County Register of Deeds on May 26, 2015, Book 2079, Pages 624-627.

11. The DOT Right of Way Unit Review Certification, dated December 5, 2014, contains the following language in the section entitled "Extraordinary Assumptions/Limiting Conditions":

> *"The subject property has benefitted from the use of a parking area that is owned by the adjacent property owner, Mr. Hopkins, and is identified as a portion of Jackson County PIN 7559-45-0855. As a result of the project, the adjacent property utilized as a parking area will no longer be available for use by the subject property owner. In this instance, I have appraised the subject property under the extraordinary assumption that the area utilized for parking prior to the project was for use by the subject owner under a prescriptive easement. Note that this decision was made by the client's legal advisor, and as a result, I have utilized the extraordinary assumption that the prescriptive easement is in place as of the date of this appraisal."*
>
> *"A portion of the subject's parking area is a gravel area that is un-marked, which makes a calculation of actual parking spaces difficult to determine. In this instance, the subject property has been appraised under the extraordinary assumption that the subject had access to a minimum of 18 parking spaces, for commercial use only, prior to the proposed project. After the project, I have estimated that the subject will have access to approximately 7 commercial parking spaces."*

12. The DOT Right of Way Unit Review Certification, dated October 4, 2017, contains the following language:

> *"A Key extraordinary assumption is applicable. An 'island' formed by the intersection of Aztec Drive and Old Cullowhee Road, and a short*

> *connecting road, has been used by the owners of the subject property for many years as a parking lot. Deed information indicates that this property is actually owned by [Samuel Hopkins] . . . . However, the NC Attorney's General office has determined that a prescriptive easement exists, entitling the owner of the subject to use of this area. Thus, the analysis is based on the extraordinary assumption that the owner of the subject property has the right to use this offsite area for parking before acquisition of the right-of-way, and that this area will be eliminated after right-of-way acquisition and construction of the proposed road/bridge project."*

. . . .

16. No deeds or recorded easements were introduced as evidence showing a conveyance to [Mountain Villages] of any interest in the Parking Island.

17. There is no evidence that permission was ever sought by [Mountain Villages] to use the Parking Island or that Mr. Hopkins ever consented to or objected to [Mountain Villages'] use of the Parking Island.

18. There is no evidence that any signs were ever placed on the Parking Island restricting parking to certain guests or customers.

. . . .

20. Over the years, the public has used the Parking Island for parking and general uses not limited to the businesses operated on the subject property.

21. [Mountain Villages] presented the affidavit of Troy Burns during the hearing in an effort to establish privity with the prior owner of the subject property so [Mountain Villages] could tack successive adverse possession of the Parking Island in the aggregate for the prescriptive period of twenty years. However, the affidavit of Mr. Burns was executed one day prior to the hearing. There is no evidence that [DOT] was provided notice of [Mountain Villages'] intention to use

> the affidavit or the particulars of the affidavit, sufficiently in advance of the hearing so as to provide the [DOT] with a fair opportunity to prepare to meet the statement.

¶ 39 These findings show that, at a minimum, Mountain Villages failed to establish that its use of the Parking Island has been "adverse, hostile or under claim of right"; that Mountain Villages' use of the Parking Island has "been open and notorious such that the true owner had notice of the claim"; or that Mountain Villages' use of the Parking Island "has been continuous and uninterrupted for at least twenty years[.]" *Yadkin*, 141 N.C. App. at 639, 539 S.E.2d at 688. Accordingly, the findings of fact support the trial court's conclusions of law 5 and 7, as well as the trial court's unchallenged conclusion of law 8, which concluded that Mountain Villages "has failed to meet its burden of establishing it has acquired a prescriptive easement."

D. Judicial Estoppel

¶ 40 Mountain Villages argues that DOT should be judicially estopped from claiming that Mountain Villages does not have a prescriptive easement over the Parking Island. Mountain Villages asserts that DOT's pleadings contained a statement of just compensation, including compensation for the prescriptive easement, and that the pleadings are inconsistent with DOT's representation at the hearing that Mountain Villages did not own the easement.

¶ 41 Judicial estoppel is an equitable, gap-filling doctrine that " 'seeks to protect courts, not litigants, from individuals who would play fast and loose with the judicial system,' and [it] is an inherently flexible and discretionary doctrine." *Beroth Oil Company v. N.C. Dep't of Transp.*, 256 N.C. App. 401, 417, 808 S.E.2d 488, 501 (2017) (quoting *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 26, 591 S.E.2d 870, 887 (2004)). Because "judicial estoppel protects the courts . . . , a court, even an appellate court, may raise judicial estoppel on its own motion." *Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co.*, 369 N.C. 500, 506-07, 797 S.E.2d 264, 269 (2017) (quotation marks, brackets, and citations omitted).

¶ 42 Our Supreme Court has enumerated three factors "that typically inform the decision whether to apply the doctrine" of judicial estoppel in a particular case:

> First, a party's subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in

> persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 28-29, 591 S.E.2d 870, 888-89 (quotation marks and citations omitted). Our appellate courts have noted that only the first factor is essential. *See Causey v. Cannon Surety, LLC*, 269 N.C. App. 134, 142, 837 S.E.2d 414, 419 (citing *Whitacre*, 358 N.C. at 29 n.7, 591 S.E.2d at 888 n.7).

¶ 43 First, as explained above in Section C(2)(a), DOT's estimated sum of just compensation is not relevant to the issue of title and interests taken by DOT. DOT's pleadings, which contained the estimated sum of just compensation for the subject property and included the prescriptive easement in the estimate under an extraordinary assumption, were not inconsistent with its position at the section 108 hearing that Mountain Villages did not have a prescriptive easement over the Parking Island.

¶ 44 The doctrine of judicial estoppel is further inapplicable in this case because DOT did not take any other subsequent position on a factual issue that was clearly inconsistent with its earlier position. *See Whitacre*, 358 N.C. at 29, 591 S.E.2d at 889. The record and exhibit evidence show that DOT's position has been that, from the time of initiation of the condemnation action, the Parking Island was not owned by Mountain Villages but was instead owned by the Hopkins. In its pleadings, DOT filed a plan sheet that shows the parcels of land around and including the Parking Island. The Hopkins are the owners of parcel 6, and the DOT's plan sheet shows that parcel 6 includes the Parking Island. DOT also filed a plat with the trial court, as required by N.C. Gen. Stat. § 136-106(c), which shows Mountain Villages' property boundaries and outlines the bounds of the areas taken by DOT. The plat does not show the Parking Island as part of Mountain Villages' property and does not indicate that Mountain Villages had any ownership interest in the Parking Island.

III. Conclusion

¶ 45 As there is competent evidence to support the trial court's findings of fact, and the findings of fact support the conclusions of law, the trial court did not err in determining that Mountain Villages has failed to meet its burden of establishing that it has acquired a prescriptive easement over the Parking Island. The trial court's order is affirmed.

AFFIRMED.

Judges ARROWOOD and GORE concur.

LouEve, LLC, Plaintiff
v.
TERRY RAMEY, Defendant

No. COA22-46

Filed 1 November 2022

1. Appeal and Error—petition for writ of certiorari—no notice of appeal—no extraordinary circumstances

In a summary ejectment action, where the trial court granted a motion for summary judgment against defendant, ordered him to pay attorney fees, and subsequently denied his Civil Procedure Rule 60(b) motion for relief from those orders, and where defendant filed a notice of appeal only from the order denying his Rule 60(b) motion, the Court of Appeals denied defendant's petition for a writ of certiorari seeking review of the summary judgment order and corresponding attorney fees order. A writ of certiorari is not intended as a substitute for a notice of appeal, and defendant failed to show the existence of extraordinary circumstances justifying issuance of a writ of certiorari.

2. Civil Procedure—Rule 60(b)—summary judgment and attorney fees—notice of hearing—trial court's discretion

In a summary ejectment action, the trial court did not abuse its discretion by denying defendant's Civil Procedure Rule 60(b) motion for relief from the trial court's orders awarding summary judgment and attorney fees in favor of plaintiff. Defendant did receive notice of the summary judgment hearing—even though his attorney's office overlooked the notice of the final hearing date, which

it received eight days in advance of the hearing—and it was within the trial court's discretion to consider the short notice due to calendaring issues arising from COVID precautions and to conclude that defendant failed to allege the sort of extraordinary circumstances compelling relief under Rule 60(b). Further, the trial court properly exercised its discretion in concluding that an appeal—not a Rule 60(b) motion—was the proper mechanism to challenge the alleged legal error in the order awarding attorney fees.

3. Landlord and Tenant—subject matter jurisdiction—landlord-tenant relationship—disputed question of fact—meaningful appellate review

In a summary ejectment action, the Court of Appeals declined to consider defendant's argument regarding his motion to dismiss the action for lack of subject matter jurisdiction (which he filed after summary judgment was awarded in favor of plaintiff) because the existence of the landlord-tenant relationship was a question of fact, which the trial court could not have resolved at the summary judgment hearing because defendant did not appear. The disputed factual questions prevented the Court of Appeals from engaging in meaningful appellate review, and defendant should have addressed this issue to the trial court through a Civil Procedure Rule 60(b)(4) motion.

Appeal by defendant from judgment entered 22 April 2021 and order entered 27 April 2021 by Judge Donna Forga and order entered 1 July 2021 by Judge Thomas G. Foster, Jr., in Haywood County District Court. Heard in the Court of Appeals 23 August 2022.

Matney & Associates, P.A., by David E. Matney, III, for plaintiff-appellee.

Ferikes & Bleynat, PLLC, by Edward L. Bleynat, Jr., and Matthew J. Giangrosso, for defendant-appellant.

DIETZ, Judge.

¶ 1 Defendant Terry Ramey appeals from the trial court's orders granting a motion for summary judgment against him, awarding attorneys' fees against him, and denying his motion for relief from those orders under Rule 60(b).

¶ 2 As explained below, although Ramey addressed the merits of all three orders in his appellant's brief, Ramey's notice of appeal only referenced the denial of the Rule 60 motion.

¶ 3 Ramey also petitioned for a writ of certiorari, asking this Court to address the other orders for which he did not file a notice of appeal. Because this civil case does not involve the sort of extraordinary circumstances justifying a writ of certiorari, we deny the petition and address only Ramey's appeal from the Rule 60(b) order. Under the narrow standard of review applicable to that issue, we hold that the trial court was within its sound discretion to deny relief under Rule 60(b) and therefore affirm the trial court's order. We decline to address Ramey's argument concerning the trial court's subject matter jurisdiction because that issue involves fact questions that must be presented to the trial court through an appropriate motion under Rule 60.

Facts and Procedural History

¶ 4 In 2016, Defendant Terry Ramey entered into an oral month-to-month lease with Lou Roman to rent property owned by Plaintiff LouEve, LLC. After Roman's death in December 2019, Ramey ceased making rent payments. In February 2020, Ramey received notice of lease termination from LouEve, demanding that Ramey vacate the property on or before 29 February 2020.

¶ 5 In May 2020, LouEve filed this summary ejectment action. Following a hearing in small claims court, a magistrate dismissed LouEve's complaint and LouEve appealed to Haywood County district court.

¶ 6 In September 2020, the trial court held a hearing and entered judgment in favor of LouEve, ordering Ramey to pay $9,000 in rent arrears and vacate the property. Ramey was not present at the hearing and did not put on a defense.

¶ 7 Ramey later filed a motion for a new trial and relief from the judgment asserting that he "did not receive the notice of hearing, was not aware of the time or date of the hearing and was not present in court." The trial court granted the motion, vacated the judgment, and ordered a new trial during the next available session of court.

¶ 8 LouEve again filed a motion for summary judgment in January 2021. LouEve initially set a hearing on the motion for 22 February 2021 and sent notice of the hearing to Ramey, but the trial court continued the hearing to 29 March 2021 at Ramey's request. The court later continued the hearing again, without setting a new hearing date. Then, on 5 April

2021, the trial court issued a calendar setting the hearing on LouEve's motion for summary judgment for 13 April 2021.

¶ 9 During this time period, as courts addressed the impact of the COVID pandemic, the Haywood County district court had a standing order or memorandum stating that there would be no in-court calendar calls to set hearing dates for trials and other matters. Instead, for each term of court, the trial court published a calendar listing the cases that would be heard during that term with the applicable dates and times of hearings. The trial court notified parties in pending cases of these calendars by sending an email to counsel.

¶ 10 As Ramey's counsel later explained to the trial court, counsel was on secured leave on 5 April 2021, the day the trial court sent the email with the calendar setting this matter for a hearing. As counsel further explained, the staff person at counsel's office responsible for reviewing the calendars overlooked the addition of this case to the calendar:

> During this vacation on April 5th, the first day that I was on secured leave, Haywood County district court published this district court calendar with -- well, first they published the calendar where these matters did not appear. We did get that calendar in my office, and our administrative staff person looked at it and said there's nothing on here for any of the attorneys in our firm, okay.
>
> Later that day, at 2:54 p.m., they published an amended calendar, and our administrative staff looked at it again and said, oh, this is the one we got earlier, glanced at it quickly, said there's nothing on here for any attorneys.
>
> Unfortunately, our staff person missed the fact that these two matters were added on to that amended calendar that, again, was published on April 5th around 3:00 p.m. the day the trial court issued the calendar for 13 April 2021.

¶ 11 On 13 April 2021, the trial court held the scheduled hearing. Ramey and his counsel again were not present and did not put on a defense.

¶ 12 On 22 April 2021, the trial court entered an order granting LouEve's motion for summary judgment. The trial court ordered Ramey to vacate the property within ten days and to pay LouEve "$1000 for each month from and including the month of January 2020, through April 2021, and

continuing on through and including each month until Defendant has removed all his property." On 27 April 2021, the trial court entered an order awarding LouEve attorneys' fees.

¶ 13 Ramey did not appeal the trial court's judgment or the award of attorneys' fees. Instead, on 3 May 2021, Ramey filed a Rule 60(b) motion for relief from the trial court's orders on the ground that he did not receive proper notice of the summary judgment hearing. Later, on 29 June 2021, Ramey filed a motion to dismiss the proceeding for lack of subject matter jurisdiction, arguing that LouEve was not a party to the oral lease agreement. The motion further asserted that the case was moot because Ramey already had vacated the property. There is no indication in the record that the trial court ruled on this motion.

¶ 14 After a hearing, the trial court entered an order denying the Rule 60(b) motion. Ramey timely appealed this order, stating in the notice of appeal that the appeal was "from the Order Denying Defendant's Motion for Relief From Judgment and Order (Rule 60) entered on 1 July 2021."

Analysis

I. Appeal from the summary judgment and attorneys' fees orders

¶ 15 **[1]** We begin by addressing Ramey's attempt to appeal from the trial court's summary judgment order and corresponding attorneys' fees order. Ramey acknowledges that he did not file a notice of appeal from these two orders. Nevertheless, he fully briefed the issues in his appellant's brief and filed a petition for a writ of certiorari together with his appellant's brief, asking this Court to review the merits of those two orders.

¶ 16 Ramey correctly acknowledges that we lack appellate jurisdiction to review these two orders absent use of an extraordinary writ. *Raymond v. Raymond*, 257 N.C. App. 700, 703, 811 S.E.2d 168, 170 (2018). The failure to timely file a notice of appeal is a jurisdictional default which "precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008). Because Ramey filed a notice of appeal only with respect to the Rule 60(b) order, we can review the trial court's other orders only if we exercise our discretion to issue a writ of certiorari. N.C. Gen. Stat. § 7A-32.

¶ 17 But, importantly, a "writ of certiorari is not intended as a substitute for a notice of appeal. If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of

noticing appeals." *State v. Bishop*, 255 N.C. App. 767, 769, 805 S.E.2d 367, 369 (2017). Although we routinely issue writs of certiorari to review untimely appeals in criminal matters (because of Sixth Amendment concerns), it "is less common for this Court to allow a petition for a writ of certiorari where a litigant failed to timely appeal a civil judgment." *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018). We ordinarily allow such petitions only where "there are wide-reaching issues of justice and liberty at stake" and "the issues on appeal are meritorious." *Doe v. City of Charlotte*, 273 N.C. App. 10, 23, 848 S.E.2d 1, 11 (2020).

¶ 18 As explained in more detail below, this case does not involve any vital issues of justice or liberty, and it is not apparent from the record that Ramey has any meritorious defenses. Ramey's entire argument on appeal turns on the alleged failure to provide adequate notice of the hearing. Absent some evidence that, with proper notice, the outcome of this proceeding would have been different, we are not persuaded that the notice issue on its own justifies the extraordinary use of certiorari. Moreover, as explained below, Ramey in fact received notice of the hearing more than a week in advance. His argument is not that he had no notice, but that the notice he received is inconsistent with the trial court's rules of practice.

¶ 19 In short, Ramey has not shown sufficient extraordinary circumstances to justify issuance of a writ of certiorari. He is no different from countless other civil litigants whose appeals have been dismissed for failure to timely comply with the jurisdictional requirements of Rule 3 of the Rules of Appellate Procedure. *Bishop*, 255 N.C. App. at 769, 805 S.E.2d at 369. Thus, in our discretion, and in the interests of fairness and uniform application of our extraordinary writs, we deny Ramey's petition for a writ of certiorari and decline to hear his appeal from the summary judgment order and attorneys' fees order. *Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 197, 657 S.E.2d at 365.

II. Denial of Rule 60 motion

¶ 20 **[2]** Ramey next argues that the trial court erred in denying his Rule 60 motion for relief from the trial court's judgment. Ramey timely appealed this order and we therefore review it on the merits.

¶ 21 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). "Abuse of discretion is shown when 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."

Brown v. Foremost Affiliated Ins. Servs., Inc., 158 N.C. App. 727, 732, 582 S.E.2d 335, 339 (2003).

¶ 22 With respect to the summary judgment order, Ramey contends that he did not receive "requisite notice" of the hearing and that "on a motion as consequential as one for summary judgment" the lack of notice compelled the trial court to grant relief under Rule 60(b).

¶ 23 There are several flaws in this argument. First, the record indicates that Ramey received actual notice of the summary judgment hearing. Ramey acknowledged at the Rule 60(b) hearing that the court sent an email to his counsel notifying him of the hearing, but a staff person who "glanced at it quickly" overlooked that this case was set for a hearing. Moreover, Ramey acknowledges that he received the motion for summary judgment and notice of hearing from LouEve many months before the hearing date.

¶ 24 Ramey's argument focuses on the fact that the initial hearing date was continued multiple times and, when the trial court ultimately set a final hearing date, Ramey only received eight days' notice. Ramey contends that Rule 2(b) of the General Rules of Practice for the Superior and District Courts, and the trial court's own local rules, requires civil calendars to be published and distributed to parties several weeks in advance of the court date.

¶ 25 Even if we assumed that noncompliance with these general practices is an error—and this is questionable given the interruption of these general calendaring rules during this time period as a result of the COVID pandemic—the record demonstrates that the trial court considered this issue and ultimately concluded that Ramey's notice argument failed to allege the sort of extraordinary circumstances and manifest injustice compelling relief under Rule 60(b)(6). *See Gibby v. Lindsey*, 149 N.C. App. 470, 474, 560 S.E.2d 589, 592 (2002). In short, this case is a classic example of one in which, in the exercise of judicial discretion, reasonable jurists could have differing views about the appropriateness of relief under Rule 60(b). The transcript of the hearing, and the trial court's order, confirm that the court's decision to deny relief was not manifestly arbitrary and was a reasoned, discretionary decision. *Brown*, 158 N.C. App. at 732, 582 S.E.2d at 339. Accordingly, under the narrow standard of review that this Court must apply, we cannot find error in the trial court's ruling.

¶ 26 With respect to the attorneys' fees award, Ramey makes a different argument. Recognizing the exceedingly high bar for review, Ramey does not assert that the trial court's discretionary decision was manifestly

arbitrary or detached from reason. Instead, Ramey contends that the trial court "ruled under a mistaken impression" of law. Specifically, Ramey asserts that the trial court did not apply "the proper legal standards on motion for relief from judgment" because the trial judge hearing the motion deferred too much to the ruling of a previous trial judge, rather than properly exercising independent discretion.

¶ 27 The record does not support this argument. To be sure, the court initially indicated that it would sign an order vacating the attorneys' fees award and then changed positions. But the court did so because LouEve argued that Rule 60 was not the proper vehicle to correct that alleged legal error and, instead, Ramey should have appealed the underlying order to this Court. The trial court agreed and therefore denied the Rule 60 motion:

> THE COURT: Well, if you're calling it a Rule 60B – it's not even a notice issue, though, really. It's more than that. It's not a notice issue.
>
> [RAMEY'S COUNSEL]: Not on the order awarding attorneys' fees. It should be set aside because it's contrary to the law.
>
> THE COURT: I'll sign that.
>
> [LOUEVE'S COUNSEL]: But, your Honor, that's what appeals are for. That's not what Rule 60s are for. Rule 60 would show that there's some extraordinary condition.
>
> THE COURT: I don't disagree with that. The motions before the court will be denied, and you can do what you're going to have to do. That's all I can do.

¶ 28 This discussion in the hearing transcript demonstrates that the trial court understood the applicable law. This Court has long held that Rule 60(b)(6) motions "are not to be used as a substitute for appeal, and an erroneous judgment cannot be attacked under this clause." *Concrete Supply Co. v. Ramseur Baptist Church*, 95 N.C. App. 658, 660, 383 S.E.2d 222, 223 (1989). Thus, although the trial court indicated that the attorneys' fees order may be erroneous, the court properly exercised its discretion to deny relief from the judgment because the proper mechanism to challenge a legal error by the trial court is to commence an appeal.

¶ 29 We conclude by acknowledging that our application of the narrow standard of review for a Rule 60(b) motion, and our denial of the

accompanying petition for a writ of certiorari, mean this Court cannot reach the merits of the summary judgment order at the heart of this case. This is an unfortunate outcome because this Court functions as an error-correcting body whose core role is to review trial court decisions for reversible legal errors.

¶ 30 But the "public, and other jurisdictions that may be called on to recognize our State's court judgments, expect our courts to apply procedural rules uniformly to all litigants who appear before them. Thus, although we recognize that justice is best served when this Court reaches the merits of the underlying issues raised on appeal, we are obligated to enforce" procedural and jurisdictional limits on our appellate review. *Martin v. Pope*, 257 N.C. App. 641, 645–46, 811 S.E.2d 191, 195 (2018). Because Ramey did not appeal the trial court's summary judgment order, our review in this case necessarily is constrained to the trial court's discretionary decision to deny relief from that judgment.

III. Motion to dismiss for lack of subject matter jurisdiction

¶ 31 **[3]** Finally, Ramey argues that the trial court should have granted his motion to dismiss this action for lack of subject matter jurisdiction. Ramey argues that LouEve failed "to prove a landlord-tenant relationship existed" and thus the trial court had no jurisdiction in this summary ejectment proceeding.

¶ 32 As noted above, Ramey never secured a ruling on this motion in the trial court. In most circumstances, this would not be fatal to appellate review because the "question of subject matter jurisdiction may be raised at any time." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). But this particular jurisdictional issue is different. This Court has held that proof of a landlord-tenant relationship between the parties is a requirement for the trial court to exercise jurisdiction over a summary ejectment action. *Adams v. Woods*, 169 N.C. App. 242, 244, 609 S.E.2d 429, 431 (2005). As a result, this relationship must be proven in order for the plaintiff's remedy to be granted. *Id.* If "the plaintiff fails to prove the existence of a landlord-tenant relationship, the district court lacks jurisdiction to enter judgment in the proceeding." *Id.*

¶ 33 The cases on which Ramey relies involved undisputed evidence that there was no landlord-tenant relationship. *Id.*; *Coll. Heights Credit Union v. Boyd*, 104 N.C. App. 494, 497, 409 S.E.2d 742, 743 (1991). Here, by contrast, the existence of a landlord-tenant relationship is a disputed question of fact. LouEve contends, based on sworn affidavits and other evidence, that Ramey was a tenant of the property; that LouEve, LLC

owned the property; that Lou Roman was the manager of LouEve, LLC; and that Ramey entered into a lease agreement with Roman to lease the property from LouEve. Ramey contends that he entered into the lease agreement with Roman personally, not in Roman's role as owner and manager of LouEve.

¶ 34 The trial court could not have resolved this disputed issue of fact at the summary judgment hearing because Ramey did not appear—meaning the court would not have been aware the matter was disputed. But this Court also cannot resolve the question on appeal. It is a long-standing principle of appellate law that appellate courts "cannot find facts." *Duke v. Xylem, Inc.*, 2022-NCCOA-449, ¶ 24. Thus, this particular jurisdictional issue must be addressed to the trial court through an appropriate motion under Rule 60(b)(4). Accordingly, we decline to address the subject matter jurisdiction issue because disputed factual questions prevent this Court from engaging in meaningful appellate review.

Conclusion

¶ 35 We dismiss Ramey's appeal from the summary judgment order and attorneys' fees order and affirm the trial court's Rule 60(b) order.

DISMISSED IN PART; AFFIRMED IN PART.

Chief Judge STROUD and Judge ZACHARY concur.

STATE v. AMBRIZ

[286 N.C. App. 273, 2022-NCCOA-711]

STATE OF NORTH CAROLINA
v.
GERARDO AMBRIZ, DEFENDANT

No. COA21-674

Filed 1 November 2022

1. Drugs—trafficking in methamphetamine—by possession—by transport—conspiracy—sufficiency of evidence

In a prosecution arising from a drug deal, where the State presented substantial evidence of each element of trafficking in methamphetamine by possession of 400 grams or more, trafficking in methamphetamine by transport of 400 grams or more, and conspiracy to traffic in methamphetamine by possession, the trial court properly denied defendant's motion to dismiss all charges arising from a drug transaction. Testimony from two law enforcement officers and a co-defendant supported the State's theory that defendant acted in concert and conspired with other participants in a prearranged methamphetamine deal by communicating with various middlemen in advance of the transaction and by traveling with the others by car to multiple locations in order to drop off the drugs and to pick up money.

2. Constitutional Law—right to speedy trial—Barker factors—five-year delay—two mistrials and pandemic—no prejudice shown

In a prosecution for multiple drug charges spanning over five years from the time of defendant's arrest, during which defendant's first two trials ended in a mistrial due to a hung jury and proceedings were subsequently delayed due to Covid-19 pandemic court restrictions before defendant was convicted in his third jury trial, and during which defendant filed multiple motions to dismiss based upon a violation of his constitutional right to a speedy trial, the trial court did not err by concluding there was no speedy trial violation based on its analysis of the *Barker v. Wingo*, 407 U.S. 514 (1972), four-factor balancing test. Although the lengthy delays were significant and defendant vigorously asserted his right to a speedy trial throughout the proceedings, there were multiple valid reasons for the delays (including a complex investigation, lengthy preparation of transcripts of communications from the drug deal, and prosecution of several defendants in sequence); there was no evidence that the State willfully or negligently delayed the proceedings; and there

was no actual, substantial prejudice to defendant's ability to present a defense.

Appeal by defendant from judgment entered 28 May 2021 by Judge Alyson A. Grine in Superior Court, Guilford County. Heard in the Court of Appeals 22 March 2022.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant.

STROUD, Chief Judge.

¶ 1 Gerardo Ambriz ("Defendant") appeals from a judgment entered upon jury verdicts finding him guilty of one count of trafficking in methamphetamine by possession, one count of trafficking in methamphetamine by transportation, and one count of conspiracy to traffic in methamphetamine by possession. Defendant argues the State's evidence was insufficient to support his convictions and that he was denied the speedy trial as guaranteed under our state and federal Constitutions. Because the State presented sufficient evidence to submit Defendant's charges to the jury, and because the trial court did not err by denying Defendant's speedy trial motions, we conclude the trial court committed no error.

I. Background

¶ 2 The State presented evidence from two law enforcement officers and one of Defendant's co-defendants, who pled guilty and agreed to testify in exchange for a possibly reduced sentence. The State's evidence tended to show that on 6 February 2016, a drug deal involving a trafficking quantity of methamphetamine was scheduled to take place in Greensboro, North Carolina. This deal was prearranged between Mr. Gomez, a police informant, and Mr. Gomez-Macedo, whose street name was "Paco." Paco was connected "to the Atlanta, Georgia, area, [and] knew people in that area that could bring drugs" to Greensboro; he was to provide nearly five kilograms of methamphetamine. On 6 February 2016, the informant and Paco met at a La Fiesta Restaurant in Greensboro. At the restaurant, the informant contacted his handlers with the Greensboro Police Department and worked with Detective Monge, who posed as the buyer, to show Paco $150,000 in "flash cash" to

facilitate the deal. "Flash cash" is money managed by individual police departments for the purposes of facilitating these types of transactions, because sellers in transactions of this magnitude often want to observe the money before providing drugs. Detective Monge drove the money to the La Fiesta Restaurant, where the informant and Paco observed the money. Shortly afterward, the informant and Paco learned the narcotics had been delayed in Alabama. The evidence indicated the vehicle transporting the narcotics was "broken down" or was experiencing "mechanical issues[,]" but also that the driver was stopping to rest. After it became apparent the deal would not occur that day, the informant and Paco left the La Fiesta Restaurant.

¶ 3 Detective Williams with the Greensboro Police Department testified at trial regarding communications between Defendant and Mr. Reyes, another participant in this deal with connections to the driver, the informant, and Paco. Detective Williams also testified regarding the circumstances of the deal. On 6 February, Mr. Reyes sent Defendant a file with the driver's contact information. Defendant responded and told Mr. Reyes, "cousin, tell them they're going to call him on behalf of Pitufo."[1, 2] Later that evening, Mr. Reyes asked Defendant "Are you coming here, cousin?" He then sent a text message to Defendant at 2:17 a.m. the morning of 7 February and told Defendant "he is here in Alabama, cousin. He's going to stop there and rest." Defendant responded to this message: "It is good, cousin." Defendant then sent Mr. Reyes a Georgia address later in the morning, and Detective Williams did not testify about any other text messages of note.

¶ 4 Later on 7 February, when officers began arriving at the La Fiesta in Greensboro, they noted the informant had already arrived. Shortly after arriving, Detective Williams "observed [the] informant, along with [Paco] and two other unidentified Hispanic males" exit the La Fiesta Restaurant. These two individuals were later identified as Mr. Reyes and Defendant. The group left La Fiesta and shortly afterward the driver arrived in a "gray Toyota Prius" registered in Georgia. When the Prius arrived, Defendant and Mr. Reyes got into the Prius while the informant and Paco got into the informant's rental vehicle, a "gold or tan Chevrolet Suburban." These two vehicles then "traveled in tandem or one behind

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1. The text messages the State's witnesses testified about were originally in Spanish. The text messages were translated as part of the State's investigation. We discuss the text messages as translated and testified to by the State's witnesses.

2. The Greensboro Police Department did not identify anyone as "Pitufo" during their investigation.

the other, the Suburban leading the way[,]" until they arrived at a "public storage facility" approximately five minutes from the La Fiesta Restaurant where the informant had rented a unit.

¶ 5 The driver testified about the events inside the storage facility. Upon arriving at the storage unit, the driver "backed up the car inside so the cameras wouldn't see, and Leo [Reyes] told the young man, 'Get out and get the drugs out.'" The driver identified the "young man" as Defendant. But Defendant was unable to exit the Prius because the driver "had activated the child locks, and because [Defendant] couldn't get out and [the driver] wanted it to be fast, [the driver] was the one that took the drugs out." After dropping the drugs off at the storage unit, the driver, Reyes, and Defendant left and drove to a nearby gas station.

¶ 6 Reyes and Defendant rode to the gas station with the driver inside the Prius. The driver of the Suburban waited at the storage facility for "approximately ten minutes" then drove to the gas station where Reyes and Defendant got into the Suburban. Both vehicles then left the gas station separately, and officers followed the Suburban to another nearby restaurant. While at that restaurant, the informant called the officers, pretending to arrange delivery of the money. Eventually, the driver of the Suburban returned to the storage unit where Defendant and the other participants in the drug deal were arrested.

¶ 7 Defendant was indicted for one count of trafficking in methamphetamine by possession, one count of trafficking in methamphetamine by transport, and one count of conspiracy to traffic in methamphetamine by possession. Defendant was tried three times for these offenses. The first two trials from 3 April 2018 to 6 April 2018 and 19 August 2019 to 26 August 2019 ended in deadlocked juries. Defendant's third trial began on 24 May 2021 and a jury found Defendant guilty on all charges on 28 May 2021. Defendant gave notice of appeal in open court, and a judgment was entered the same day.

¶ 8 The procedural history of this case for purposes of Defendant's speedy trial claim is laid out separately below.

II. Analysis

¶ 9 Defendant makes two arguments on appeal. First, he contends the trial court erred by denying his motion to dismiss because there was insufficient evidence to support his convictions. Next, he argues the trial court erred by denying his motions to dismiss based upon violations of his right to a speedy trial.

A. Sufficiency of the Evidence

¶ 10 **[1]** Defendant first argues the State presented insufficient evidence to show he participated in the methamphetamine deal. Defendant made a general motion to dismiss at the close of State's evidence, and therefore we address each of defendant's convictions. *See State v. Glisson*, 251 N.C. App. 844, 847, 796 S.E.2d 124, 127 (2017) (This Court has "precedent holding that a general motion to dismiss for insufficiency of the evidence preserves all issues regarding the insufficiency of the evidence, even those issues not specifically argued before the trial court[,]" and a general "motion to dismiss require[s] the trial court to consider whether the evidence was sufficient to support each element of each charged offense.").

¶ 11 In ruling on a motion to dismiss:

> the trial court must determine whether the State has presented substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator. If substantial evidence of each element is presented, the motion for dismissal is properly denied. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. It is immaterial whether the substantial evidence is circumstantial or direct, 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. The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury.

State v. Shelman, 159 N.C. App. 300, 304-05, 584 S.E.2d 88, 92 (2003) (quotations, citations, and alterations omitted).

¶ 12 "In determining whether the State has presented sufficient evidence to support a conviction, 'the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State.'" *Id.* at 305, 584 S.E.2d at 92 (quoting *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002)). Any "[c]ontradictions and discrepancies must be resolved in favor of the State . . . ." *Id.* (alteration in original) (quoting *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984)). "However, '[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.'" *State v. Loftis*, 185 N.C. App. 190, 196,

649 S.E.2d 1, 6 (2007) (alteration in original) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). On appeal, "[w]hether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss *de novo*." *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016) (italics added).

1. Trafficking by Possession

¶ 13 Defendant moved to dismiss the offense of trafficking in methamphetamine by possession of 400 grams or more of methamphetamine. Defendant argues "[t]he State did not present substantial evidence that [Defendant] possessed the drugs." He also argues the State conceded Defendant never actually possessed the drugs, and "[t]he State failed to establish [Defendant] had constructive possession" of the drugs. The State argues theories of constructive possession and acting in concert for this offense. The State contends Defendant's proximity to the drugs combined with his attempted exit from the car to put the drugs in the storage locker constituted constructive possession of the drugs. The State also argues Defendant, the driver, and various middlemen in this case "all acted in concert to transport, possess, and sell the methamphetamine." Because there was substantial evidence to show that Defendant was acting in concert with the other participants of this methamphetamine deal, the trial court did not err by denying Defendant's motion to dismiss.

¶ 14 The State was required to present "substantial evidence of each essential element" of trafficking in methamphetamine by possession. *Shelman*, 159 N.C. App. at 304, 584 S.E.2d at 92. "To convict a defendant of [trafficking in methamphetamine by possession], the State must prove the [D]efendant (1) knowingly possessed . . . methamphetamine, and (2) that the amount possessed was greater than 28 grams." *Id.* at 305, 584 S.E.2d at 93; *see* N.C. Gen. Stat. § 90-95(h)(3b) (2016). "The 'knowing possession' element of the offense of trafficking by possession may be established by a showing that . . . (2) the defendant had constructive possession, or (3) the defendant acted in concert with another to commit the crime." *See State v. Reid*, 151 N.C. App. 420, 428, 566 S.E.2d 186, 192 (2002) (quotation omitted) (applying North Carolina General Statute § 90-95(h)(3) in a cocaine trafficking case). "Constructive possession [of a controlled substance] occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the [controlled] substance." *State v. Alston*, 193 N.C. App. 712, 715, 668 S.E.2d 383, 386 (2008) (alteration in original) (quoting *State v. Wilder*, 124 N.C. App. 136, 139-40, 476

S.E.2d 394, 397 (1996)). "As to the [State's acting in concert theory], [a] defendant acts in concert with another to commit a crime when he acts in harmony or in conjunction . . . with another pursuant to a common criminal plan or purpose." *Reid*, 151 N.C. App. at 429, 566 S.E.2d at 192 (second alteration and ellipsis in original) (internal quotations omitted).

¶ 15 Because the State presented "relevant evidence that a reasonable mind might accept as adequate to support [the] conclusion" that Defendant knowingly possessed the methamphetamine under an acting in concert theory, *Shelman*, 159 N.C. App. at 304, 584 S.E.2d at 92, we do not need to address Defendant's constructive possession argument. Viewed "in the light most favorable to the State," *id.* at 305, 584 S.E.2d at 92, the State's evidence tended to show Defendant was acting in concert with the other methamphetamine deal participants. State's evidence showed the following sequence of events: (1) Reyes, an apparent middleman, notified Defendant early in the morning on 7 February, the day of the deal, that the driver bringing the drugs was stopping to rest in Alabama; (2) as testified to by Detective Williams this message was consistent with the 6 February meeting between the informant, and the Atlanta connection, Paco; (3) later that day Defendant met with Reyes and the driver at the La Fiesta Restaurant in Greensboro; (4) Defendant rode together with Reyes and the driver to the storage unit to drop off the methamphetamine; (5) Reyes instructed Defendant to transfer the methamphetamine from the car to the storage unit but Defendant was stopped by the child locks on the driver's vehicle; (6) Defendant left the storage unit with Reyes and the driver for a nearby gas station where Defendant and Reyes transferred to another vehicle, a Suburban driven by the informant, in which they travelled to a nearby restaurant with the informant and Paco to wait for the money; and (7) then Defendant travelled with the group back to the storage unit where they were apprehended by police. Viewed "in the light most favorable to the State," a "reasonable inference[]" drawn from this evidence is that the group, including Defendant, was working together to sell the methamphetamine. *Shelman*, 159 N.C. App. at 305, 584 S.E.2d at 92. Defendant, the driver, and the various middlemen were working together "pursuant to a common criminal plan or purpose" to sell nearly five kilograms, well over 28 grams, of methamphetamine. *Reid*, 151 N.C. App. at 429, 566 S.E.2d at 192. There was substantial evidence to show, as argued by the State, "that Defendant was an active participant in the drug trafficking and sale." Both the "knowing possession" and possession amount elements of trafficking by possession are supported by substantial evidence.

¶ 16 Because there was substantial evidence of each essential element of the trafficking by possession offense, the trial court committed no error in denying Defendant's motion to dismiss as to this offense.

2. Trafficking by Transport

¶ 17 Defendant was also tried for and moved to dismiss the offense of trafficking in methamphetamine by transport of 400 grams or more of methamphetamine. Defendant's argument here is similar to his argument as to the trafficking by possession offense. Defendant argues "[t]he State did not present substantial evidence that [Defendant] acted together with others with a common purpose to transport the drugs" and the State argues there was substantial evidence to support an acting in concert theory for trafficking by transportation. Defendant also argues the State "relied on speculation and ambiguous facts" to show Defendant was merely present at the transaction and nothing more than a "passive observer" of the methamphetamine deal. Because the same substantial evidence supporting the trafficking by possession offense also supports this trafficking by transport offense, the trial court did not err in denying Defendant's motion to dismiss.

¶ 18 The elements of this offense are similar to trafficking by possession. "To convict a defendant of [trafficking in methamphetamine by transportation], the State must prove the [D]efendant (1) knowingly . . . transported methamphetamine, and (2) that the amount possessed was greater than 28 grams." *Shelman*, 159 N.C. App. at 305, 584 S.E.2d at 93; *see* N.C. Gen. Stat. § 90-95(h)(3b). The "knowing possession element of" trafficking by transport can be proved by an acting in concert theory, and "[a] defendant acts in concert with another to commit a crime when he acts 'in harmony or in conjunction . . . with another pursuant to a common criminal plan or purpose.'" *Reid*, 151 N.C. App. at 428-29, 566 S.E.2d at 192 (citation omitted).

¶ 19 The same evidence above, considered "in the light most favorable to the State," constitutes "evidence that a reasonable mind might accept as adequate to support [the] conclusion" that Defendant knowingly transported methamphetamine in connection with this drug deal. *Shelman*, 159 N.C. App. at 304-05, 584 S.E.2d at 92. The evidence indicated Defendant was engaged in regular communication with one of the middlemen while the driver was on his way to North Carolina with the methamphetamine, and Defendant was present with the driver and middlemen while the methamphetamine was being exchanged for the $150,000. If not for the child locks on the driver's vehicle, Defendant, instead of the driver, would have taken the methamphetamine from the

trunk and placed it in the storage unit. A "reasonable inference[]" drawn from all the State's evidence is that the group, including Defendant, was working together to transport and sell the methamphetamine. *Shelman*, 159 N.C. App. at 305, 584 S.E.2d at 92.

¶ 20 For the same reasons as above, the trial court committed no error in denying Defendant's motion to dismiss as to this offense.

3. Conspiracy to Traffic by Possession

¶ 21 The third offense Defendant was tried for and moved to dismiss was conspiracy to traffic in methamphetamine by possession. Defendant argues the State's circumstantial evidence, and any related inferences, are insufficient to support a conviction. The State argues the sum of the evidence "point[s] unerringly to the existence of a conspiracy." We again disagree with Defendant. The trial court did not err in denying Defendant's motion to dismiss.

¶ 22 This Court in *State v. Glisson* summarized the State's burden to show a criminal conspiracy well:

> "A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful way." *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 617 (1984) (citation omitted). To prove the crime of conspiracy, "the State need not prove an express agreement;" rather, "evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citation omitted). "The existence of a conspiracy may be established by direct or circumstantial evidence, although it is generally established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Worthington*, 84 N.C. App. 150, 162, 352 S.E.2d 695, 703 (1987) (internal quotation marks and citations omitted). "In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals." *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985) (citations omitted).

Glisson, 251 N.C. App. at 848, 796 S.E.2d at 128 (addressing the sufficiency of evidence to support a conviction for felonious conspiracy to traffic opium).

¶ 23 Here, as in *Glisson*, "the State presented evidence of indefinite acts amounting to substantial evidence that Defendant conspired with" the other participants of this deal to traffic methamphetamine. *Id.* The State's evidence showed Defendant and Reyes, a middleman, were texting each other the morning of the methamphetamine deal and these texts refer to the delivery being delayed in Alabama. Defendant then met Reyes and the driver at the La Fiesta in Greensboro before travelling together to the public storage facility. At the public storage facility, Defendant attempted to take part in dropping off the methamphetamine but was unable to do so because he was locked in the back seat. Defendant continued to travel with Reyes to a nearby gas station where he transferred to another vehicle in which he rode together with the informant, Reyes, and Paco to a nearby restaurant to wait for the money to arrive. Defendant ultimately returned to the storage unit with the group before being apprehended by the police.

¶ 24 Defendant argues his "presence alone does not support a conspiracy," and the text messages are too "unrelated to this deal" to evidence an agreement between him and any other participant in the methamphetamine deal. "[T]he trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State." *Shelman*, 159 N.C. App. at 305, 584 S.E.2d at 92 (quoting *Kemmerlin*, 356 N.C. at 473, 573 S.E.2d at 889). Each of these acts "might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *Glisson*, 251 N.C. App. at 848, 796 S.E.2d at 128 (quoting *Worthington*, 84 N.C. App. at 162, 352 S.E.2d at 703). The State presented sufficient "relevant evidence that a reasonable mind might accept as adequate to support [the] conclusion" that the drug deal participants, including Defendant, had "a mutual, implied understanding" to traffic the methamphetamine. *Shelman*, 159 N.C. App. at 304, 584 S.E.2d at 92 (first quote); *Glisson*, 251 N.C. App. at 848, 796 S.E.2d at 128 (second quote). The State's evidence "[gave] rise to a reasonable inference of guilt" and was "properly submitted to the jury[.]" *Shelman*, 159 N.C. App. at 305, 584 S.E.2d at 92 (second alteration in original) (quotation omitted).

¶ 25 The State presented substantial evidence to show Defendant was part of a criminal conspiracy to traffic methamphetamine. The trial court did not err in denying Defendant's motion to dismiss.

B. Speedy Trial Motions

¶ 26 **[2]** Defendant argues both his federal and state constitutional rights to a speedy trial were violated. He argues "the trial court committed constitutional error in failing to dismiss" his case based upon each of his four speedy trial motions. (Capitalization altered). The State argues no speedy trial violation occurred and proposes a novel rule for measuring the time periods of delays to determine whether a violation has occurred.

> We review an alleged violation of a defendant's Sixth Amendment right to a speedy trial de novo. *State v. Wilkerson*, 257 N.C. App. 927, 929, 810 S.E.2d 389, 391 (2018). In reviewing the denial of a motion to dismiss for a speedy-trial violation, "[w]e review the superior court's order to determine 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." *Id.* (citation and internal quotation marks omitted). In reviewing the conclusions of law, we "consider the matter anew and substitute our judgment for that of the trial court." *State v. Johnson*, 251 N.C. App. 260, 265, 795 S.E.2d 126, 131 (2016) (citation omitted).

State v. Spinks, 277 N.C. App. 554, 561, 2021-NCCOA-218, ¶ 20. "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding[s]." *State v. Newborn*, 279 N.C. App. 42, 49, 2021-NCCOA-426, ¶ 24 (quotation omitted).

¶ 27 The timeline for this case is complex, with several distinct periods of time for consideration based upon Defendant's arrest, his speedy trial motions, the two declared mistrials, and the ultimate trial in which Defendant was convicted. The State's arguments rely on these separate time periods. The dates of note for purposes of this analysis are as follows:

- **7 February 2016:** Defendant was arrested in connection with the methamphetamine deal. He was later indicted on 2 May 2016.
- **6 July 2017:** The trial court held Defendant's first "status hearing." Defendant rejected the

State's first plea offer and asserted his right to a jury trial at this hearing.

- **13 November 2017:** The trial court held Defendant's second "status hearing." Defendant rejected a second plea offer and reasserted his right to a jury trial at this hearing.
- **30 January 2018:** Defendant was represented by counsel but filed a *pro se* motion asserting his right to a speedy trial.
- **12 February 2018:** Defendant filed his first speedy trial motion through counsel asserting violations of his right to a speedy trial under both our state and federal Constitutions. This motion was heard before the trial court 6 March 2018. The trial court entered an order without findings of fact on or about the same day denying Defendant's motion.
- **3 April 2018 through 6 April 2018:** On 3 April 2018 Defendant's counsel filed another written motion "renew[ing] and maintain[ing]" his first speedy trial motion. Our record and transcripts do not show if or when the renewed motion was heard by the trial court. Defendant's first trial was held. Defendant's first trial ended in a mistrial on 6 April 2018 due to a hung jury. The trial court entered an order 27 April 2018 declaring the mistrial.
- **October 2018:** Defendant, again acting *pro se*, sent an undated letter to the court and reasserted his right to a speedy trial. The court responded 31 October 2018 and informed Defendant as to the proper procedure for filing motions.
- **Approximately 23 April 2019:**[3] Defendant filed his second speedy trial motion through counsel. This motion was heard 6 May 2019. The court then entered a written order denying the motion without findings on 7 May 2019.

3. The file stamp on Defendant's second speedy trial motion is illegible.

- **7 August 2019:** Defendant filed a third speedy trial motion through counsel. The trial court denied the third motion by an order entered 23 August 2019. This order included findings of fact.
- **19 August 2019 through 26 August 2019:** Defendant's second trial started on 19 August 2019 and ended in a mistrial due to a hung jury on 26 August 2019. The court entered an order the same day declaring the mistrial.
- **March 2020 through Fall 2020:** The Covid-19 pandemic shut down many court proceedings, including jury trials, and caused significant delays in trial court proceedings.[4]
- **8 January 2021:** Defendant filed his fourth and final speedy trial motion through counsel. This motion was denied by a written order entered 16 February 2021. The order did not include findings of fact.
- **24 May 2021:** Defendant's third and final trial begins.
- **28 May 2021:** Defendant was convicted during his third jury trial and a judgment was entered as addressed above.

¶ 28 The parties agree on the framework for a speedy trial analysis and the standard of review but dispute how to weigh the factors in the analysis.

> [T]he United States Supreme Court identified four factors "which courts should assess in determining whether a particular defendant has been deprived of his right" to a speedy trial under the federal Constitution. These factors are: (1) the length of the

4. The Chief Justice of the Supreme Court of North Carolina first issued emergency directives postponing proceedings and limiting district and superior court proceedings to remote proceedings on 13 March 2020. Order of the Chief Justice Emergency Directives 1 to 2 (13 March 2020). Proceedings were repeatedly postponed through 2020. *See, e.g.*, Order of the Chief Justice Emergency Directives 1 to 7 Postponing Court Proceedings until June 1 (2 April 2020); Order of the Chief Justice Emergency Directives 9 to 16 (21 May 2020); Order of the Chief Justice Extending Emergency Directives 9-15, 20-22 (15 August 2020). Several of the emergency directives were extended well into 2021. *See, e.g.*, Order of the Chief Justice Extending Emergency Directives 3, 5 (4 June 2021).

> delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) whether the defendant has suffered prejudice as a result of the delay.

State v. Flowers, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997) (quoting *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972)). Our appellate courts follow the Supreme Court of the United States's analysis in *Barker v. Wingo* when reviewing speedy trial claims under both our state and federal Constitutions. *See id.* (citing *State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994) ("We follow the same analysis when reviewing such claims under Article I, Section 18 of the North Carolina Constitution.")).

> The right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

State v. McKoy, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978) (citing *Barker*, 407 U.S. 514, 33 L. Ed. 2d 101).

> No single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in [both] Constitution[s]."

Id. (quoting *Barker*, 407 U.S. 514, 33 L. Ed. 2d 101).

¶ 29 Here, Defendant filed two *pro se* motions and four motions through counsel to dismiss based upon a violation of his right to a speedy trial.

The first two orders denied his first and second motions without findings of fact, the third order denied his third motion with findings of fact, and the fourth order denied his fourth motion without findings of fact. Defendant argues "[t]he failure of the trial courts in both the first and second speedy trial hearings to make any findings or conduct any analysis would normally require remand." But Defendant also argues no remand is needed because "the State has already had ample opportunity to explain the delays at multiple hearings . . . [and] asks this Court to find his right to [a] speedy trial was violated without resorting to remand." The State argues remand is unnecessary because we "review[] speedy trial motions *de novo*, substituting [our] judgment for the trial court[,]" and all four *Barker* factors "clearly favor the State."

1. Appellate Review

¶ 30 Because three of the four orders denying Defendant's motions were made without findings of fact, we first must determine whether we may review all four of Defendant's motions or if we are required to remand for additional findings. *See State v. Sheridan*, 263 N.C. App. 697, 705, 824 S.E.2d 146, 152 (2019) (remanding for "a proper *Barker v. Wingo* analysis and appropriate findings" where the "record on appeal [was] insufficiently developed" for review by this Court); *State v. Wilkerson*, 257 N.C. App. 927, 937, 810 S.E.2d 389, 396 (2018) ("A full evidentiary hearing is required in order for the superior court to hear and make an appropriate assessment of Defendant's arguments."); *State v. Howell*, 211 N.C. App. 613, 711 S.E.2d 445 (2011) (remanding because the trial court "reached its Sixth Amendment ruling under a misapprehension of the law and without conducting a complete analysis, including consideration of all the relevant facts and law in [the] case").

¶ 31 Trial courts are not always required to enter written findings when analyzing speedy trial motions:

> In ruling on a motion for a speedy trial the trial court is not always required to conduct an evidentiary hearing and make findings of facts and conclusions of law. *See State v. Dietz*, 289 N.C. 488, 495, 223 S.E.2d 357, 362 (1976). In those instances, however, when the motion to dismiss for denial of a speedy trial is based on allegations not "conjectural and conclusory [in] nature," an evidentiary hearing is required and the trial court must enter findings to resolve any factual disputes and make conclusions in support of its order. *Id.* When there is no objection, evidence at the

> hearing may consist of oral statements by the attorneys in open court in support and in opposition to the motion to dismiss. *See State v. Pippin*, 72 N.C. App. 387, 397–98, 324 S.E.2d 900, 907 (findings properly based on oral arguments of attorney where opposing party did not object to procedure), *disc. rev. denied*, 313 N.C. 609, 330 S.E.2d 615 (1985).

State v. Chaplin, 122 N.C. App. 659, 663, 471 S.E.2d 653, 656 (1996).

¶ 32 Here, Defendant only challenges the lack of findings in the orders from the first speedy trial hearing on 6 March 2018 and second speedy trial hearing on 6 May 2019. He challenges findings and conclusions in the trial court's written order addressing his third speedy trial motion, and he simply describes the trial court's 16 February 2021 order denying his fourth motion.

a. First Speedy Trial Motion

¶ 33 Defendant's first motion was filed on 30 January 2018. Although he was represented by counsel, he filed a handwritten, *pro se* motion asserting his right to a speedy trial. He filed his first speedy trial motion by counsel on 12 February 2018, which was appropriately filed and served upon the State. The trial court heard the motion filed by counsel on 6 March 2018 and entered an order denying the motion on or about the same day. We first note that a defendant is not permitted to proceed both *pro se* and by counsel, so defendant's initial *pro se* motion was subject to dismissal for this reason alone. But even if we consider the initial *pro se* motion as a properly filed motion, these motions simply recount the fact that Defendant had been arrested, was incarcerated, and "his lengthy pretrial confinement is oppressive and prejudicial in that he has been deprived of his freedom for approximately two years without trial." In his first motion filed by counsel, Defendant then quotes *State v. Johnson*, 3 N.C. App. 420 (1969), and *State v. Chaplin*, 122 N.C. App. 659 (1996), yet fails to articulate why these cases apply to the circumstances surrounding his incarceration at the time either motion was made. He fails to allege "factual allegations necessary to support his contentions of unnecessary and deliberate delay on the part of the prosecution, or of actual prejudice[,]" *State v. Goldman*, 311 N.C. 338, 346, 317 S.E.2d 361, 366 (1984), and his motion is "conjectural and conclusory [in] nature[.]" *Chaplin*, 122 N.C. App. at 663, 471 S.E.2d at 656. Thus, the trial court did not err by denying the first speedy trial motions without making findings of fact.

¶ 34 Defendant then renewed his first speedy trial motion filed through counsel by another written motion filed the first day of his first trial, 3 April 2018. The record is unclear if, when, and how this motion was denied. Defendant's trial proceeded and ended in a mistrial due to a hung jury 6 April 2018. The trial court entered an order 27 April 2018 declaring the mistrial.

b. Second Speedy Trial Motion

¶ 35 After his first mistrial, in October 2018 Defendant sent an undated letter addressed to Judge Lindsay Davis Jr. to the Guildford County Courthouse and reasserted his right to a speedy trial. The court responded 31 October 2018 by letter informing Defendant that the addressee of his letter, Judge Davis, had retired and that "[f]uture communications with the Court must be in the form of motions or other appropriate pleadings filed with the Clerk of Court and served on the District Attorney." The court also informed Defendant, "[i]t is inappropriate to write ex parte letters to any individual presiding judge. No judge is allowed to speak with you about your case except in open court." The letter also gave Defendant information on how to dismiss his court-appointed attorney and information on how to file a motion.

¶ 36 Defendant then filed his second speedy trial motion through counsel on or about 23 April 2019. This motion again asserted his right to a speedy trial, quoted *Johnson* and *Chaplin*, and failed to allege "factual allegations necessary to support his contentions of unnecessary and deliberate delay on the part of the prosecution, or of actual prejudice." *Goldman*, 311 N.C. at 346, 317 S.E.2d at 366. Defendant's motion simply stated he had been arrested and imprisoned, that he had filed speedy trial motions, that he had been tried, and that he continued to maintain his innocence. He again quoted *Johnson* and *Chaplin*, asserted his "lengthy pretrial confinement is oppressive and prejudicial in that he has been deprived of his freedom for three years and two months without resolution[,]" but failed to allege any deliberate delay by the prosecution or actual prejudice as required by *Johnson* or *Chaplin*.

¶ 37 The trial court held an evidentiary hearing and then entered an order on 7 May 2019 denying Defendant's motion "without prejudice at this time." This order did not include findings of fact, but it stated that "the Defense may refile the Motion after August 15, 2019." The trial court also continued trial to 22 July 2019.

¶ 38 Upon a review of the record, disregarding Defendant's *pro se* motions, we find Defendant's second speedy trial motion filed by counsel was "conjectural and conclusory [in] nature," and the trial court was

not required to make findings of fact. *Chaplin*, 122 N.C. App. at 663, 471 S.E.2d at 656 (quoting *Dietz*, 289 N.C. at 495, 223 S.E.2d at 362); *Goldman*, 311 N.C. at 346, 317 S.E.2d at 366. The motions filed by counsel recounted a simple history of Defendant's arrest and imprisonment, made a bare assertion of his right to a speedy trial, and lacked factual allegations sufficient to show a violation of his speedy trial right. Even so, for each motion the trial court held evidentiary hearings and Defendant received the opportunity to present arguments and provide evidence in the form of oral statements by his attorney. We find no error by the trial court in failing to enter findings of fact and conclusions of law as to the first and second speedy trial motions.

c. Third Speedy Trial Motion

¶ 39 After hearing Defendant's third speedy trial motion, the trial court entered an order with findings of fact and conclusions of law. The initial four findings addressed the dates of Defendant's arrest and the charges against him, as addressed above. The trial court then found and concluded:

> 4. Defendant was one of four co-defendants.
>
> 5. Up through May, 2017, the state was preparing for the trial of one of the co-defendants, which included a lengthy process by the North Carolina Administrative Office of the Courts of transcribing recorded contact between certain of the co-defendants and an informant, with the process of transcription taking, as it was described to the State at the hearing on this motion, taking up to one hour for every minute of the recording transcribed.
>
> 6. The co-defendant's case came on for trial on May 8, 2017, and the co-defendant pled guilty during the trial.
>
> 7. The Defendant rejected a plea offer on or about July 6, 2017, and the State began efforts to schedule a trial, which required coordination of witnesses from numerous jurisdictions and several law enforcement agencies. These witnesses included a witness from the Drug Enforcement Administration and an expert witness from the DEA forensic lab in Miami, Florida.

8. Defendant was presented with a second plea offer, which he rejected on or about November 13, 2017.

9. Defendant filed his first speedy trial motion on February 12, 2018.

10. Defendant's trial commenced on April 3, 2018, and ended in a mistrial on April 6, 2018.

11. Transcripts of the trial proceedings were requested, and, through no delay attributable to the District [A]ttorney's [O]ffice, these transcripts took eight months to prepare, and were obtained at the end of 2018.

12. Defendant filed his second speedy trial motion on or about April 23, 2019, which was heard and denied, without prejudice to refile at a later time, by the Honorable William Wood.

13. During the intervening time period, the State was awaiting the resolution of a motion for appropriate relief filed in a co-defendant's matter, to determine whether a trial proceeding against defendant should be joined with those matters in the event the motion for appropriate relief was granted.

14. The State is now indicating that it is ready to proceed with trial during this session of Court.

15. The delays in these matters being reached for trial are not purposeful or oppressive, are not owing to any neglect of the District Attorney, and are not intended to hamper the defense or gain a tactical advantage in these matters.

The trial court then made conclusions of law, addressing each of the *Barker* factors, and denied Defendant's motion.

¶ 40 "In reviewing the denial of a motion to dismiss for a speedy-trial violation, '[w]e review the superior court's order to determine 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.'" *Spinks*, ¶ 20 (quoting *Wilkerson*, 257 N.C.

App. at 929, 810 S.E.2d at 391). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding[s]." *Newborn*, ¶ 24. Competent evidence for purposes of a speedy trial motion "may consist of oral statements by the attorneys in open court in support and in opposition to the motion to dismiss." *Chaplin*, 122 N.C. App. at 663, 471 S.E.2d at 656 (citing *Pippin*, 72 N.C. App. at 397–98, 324 S.E.2d at 907 (summarizing discussion from *Pippin* as "findings properly based on oral arguments of attorney where opposing party did not object to procedure")).

¶ 41 Although Defendant's brief states he challenges some of the trial court's findings of fact as unsupported by the evidence, his entire argument challenging the findings is that Findings 5 through 7 are "partially unsupported and incomplete;" Finding 11 is "unsupported and inapposite;" Finding 13 is "incorrect and based on misstatements of the prosecutor;" and Finding 15 is "unsupported and incorrect." Defendant does not address *how* the trial court's findings were incomplete, unsupported, or incorrect. Since he has made no substantive argument regarding these findings, he has waived any challenge to these findings and we will consider them as binding on appeal. N.C. R. App. P. 28(b)(6) ("An appellant's brief shall contain . . . An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.") *See Yeun-Hee Juhnn v. Do-Bum Juhnn*, 242 N.C. App. 58, 62-63, 775 S.E.2d 310, 313-14 (2015) ("However, defendant fails to set forth any specific challenges to the findings of fact and instead presents a broad argument which merely contends that 'the evidence at trial [did] not support a finding that [defendant] acted in bad faith, warranting the imputation of income to [defendant.]' It is well established by this Court that where a trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. . . . As defendant has failed to articulate challenges to these specific findings of fact, we find these findings to be not only binding on appeal, but also supported by competent evidence demonstrating that defendant did indeed act in bad faith regarding his income." (internal citation omitted)).

¶ 42 Defendant also contends that the trial court's conclusions of law do not properly address the *Barker* factors and the trial court erred by denying his motion. We will discuss the trial court's conclusions of law in our *de novo* review of the trial court's order ruling on the third speedy trial motion below.

d. Fourth Speedy Trial Motion

¶ 43 As discussed above, the trial court had entered an order addressing Defendant's third speedy trial motion in August 2019; Defendant filed his fourth motion on 8 January 2021. This motion recites the history of the case, including the prior motions to dismiss and the trial court's rulings upon those motions, and alleges that "a transcript of the witness testimony from the second trial [in August 2019] has been ordered by Judge Stuart Albright." This motion alleged additional delay since the mistrial in August 2019; that his motion to unsecure his bond "so that he may begin his federal sentence while the third trial is pending" was denied in October 2019; and repeated general allegations of prejudice and anxiety from the continued pretrial confinement. We also note Defendant did *not* make any allegations as to any delay in 2020 based upon the suspension of some trial court proceedings, including jury trials, due to the emergency directives from the Covid-19 pandemic.

¶ 44 The trial court held a hearing on 16 February 2021 and entered an order denying Defendant's fourth motion without making findings of fact. In his brief Defendant simply notes "[t]here were no written findings[,]" before again arguing the *Barker* factors cut in his favor. Additionally, there were no disputed facts at the fourth speedy trial hearing and the court did not need to "resolve any factual disputes and make conclusions in support of its order." *Chaplin*, 122 N.C. App. at 663, 471 S.E.2d at 656. At the hearing, Defendant's counsel introduced his motion and the *Barker* analysis, then State's counsel recounted the procedural history of this case and the cases of the co-defendants. Defendant did not object to the procedure used by the trial court, nor did he argue that the State's proffered reasons for delay were incorrect or false. Even when the prosecutor stated, as to State's preferential order of prosecuting the four co-defendants, that "[Defendant's Counsel] and his client, [Defendant,] certainly tacitly consented to the approach on the State's part[,]" Defense counsel did not object. The trial court did not err in failing to enter findings of fact or conclusions of law as to Defendant's fourth motion.

¶ 45 Because the trial court did not err by holding four hearings to consider Defendant's motions, or by failing to make written findings after the first, second, and fourth hearings, we find no error as to the procedures used by the trial court to hear Defendant's speedy trial motions. Findings were not required in the first, second, and fourth orders, and the order entered upon the third motion adequately addressed any disputed facts. We will now address Defendant's challenges to the trial court's

conclusions of law in the order entered after hearing of the third speedy trial motion as well as the trial court's denial of Defendant's fourth and last speedy trial motion.

2. Substantive Review of Denial of Defendant's Speedy Trial Motions

¶ 46 Because Defendant's motions were "conjectural and conclusory [in] nature," and because "[t]he information before the trial court is not in dispute" as to the first, second, and fourth hearings, "the failure of the trial court to making findings of fact does not prevent review by this Court" and we now turn to the *Barker* factors. *Chaplin*, 122 N.C. App. at 663-64, 471 S.E.2d at 656 (citing *Harris v. North Carolina Farm Bureau Mut. Ins. Co.*, 91 N.C. App. 147, 150, 370 S.E.2d 700, 702 (1988)); *Harris*, 91 N.C. App. at 150, 370 S.E.2d at 702 ("[R]emand to the trial court is not necessary if the facts are not in dispute and if only one inference can be drawn from the undisputed facts."). Defendant argues throughout his brief that all four Barker factors weighed in his favor at the time each motion was made, and these factors weighed progressively more heavily in his favor as time passed.

a. Length of the Delay

¶ 47 "The United States Supreme Court has found post-accusation delay 'presumptively prejudicial' as it approaches one year." *Flowers*, 347 N.C. at 27, 489 S.E.2d at 406 (quoting *Doggett v. United States*, 505 U.S. 647, 652 n. 1, 120 L. Ed. 2d 520, 528 n. 1 (1992)). "However, presumptive prejudice 'does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry.'" *Id.*; *Barker*, 407 U.S. at 530, 33 L. Ed. 2d 117 ("The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.").

¶ 48 In the trial court's order denying Defendant's third motion, the conclusions of law begin by noting the *Barker* factors. The trial court did not make a specific conclusion of law as to the first factor, the length of the delay, but clearly the trial court concluded that the length of the delay was sufficient to trigger the *Barker* inquiry, as the trial court made findings of fact and conclusions of law specifically addressing the second, third, and fourth *Barker* factors.

¶ 49 In most cases, the length of the delay is the most straightforward factor and it is generally not in dispute. Here, the situation is different

because of the various motions and the two trials ending in mistrial. The parties' interpretations of our case law diverge as to how we should consider the length of the delay. Defendant contends the clock continues to run from his initial arrest until his final trial; the State contends the speedy trial clock should "reset" upon each mistrial. The State argues the protection afforded a criminal defendant by his right to a speedy trial "is for a speedy *trial* not a speedy *adjudication*." (Emphasis in original.) In the State's interpretation of this factor, the lengths of delay are then: (1) 24 months between Defendant's arrest in February 2016 and his first speedy trial motion in February 2018; (2) 12 months between Defendant's first mistrial in April 2018 and his second speedy trial motion in April 2019; (3) 16 months between Defendant's first mistrial in April 2018 and third speedy trial motion in August 2019; and (4) 17 months between his second mistrial in August 2019 and final speedy trial motion in January 2021.

¶ 50 In response to State's proposed "reset upon mistrial" rule Defendant "contends the most fair approach is to calculate the length of delay from arrest to final judgment, and to consider mistrials or other similar interruptions under the 'reason for delay' factor." He argues such an approach "prevents the absurd result of a person being retried to mistrial every eleven months, never reaching a final verdict, and never qualifying for a presumptive speedy trial violation." He also argues, "[e]ven using the State's approach . . . the time period before each of the three trials was presumptively prejudicial[.]" Under Defendant's interpretation of this factor, the total delay from his arrest in February 2016 until the final adjudication of his case in May 2021 was 63 months (five years, three months), during which he filed four speedy trial motions and his first two trials were declared mistrials.

b. State v. Carvalho

¶ 51 Both parties cite our decision in *State v. Carvalho*. 243 N.C. App. 394, 777 S.E.2d 78 (2015) *cert. denied sub nom. Carvalho v. North Carolina*, ___ U.S. ___, 199 L. Ed. 2d 19 (2017). Defendant argues that "[a] mistrial does not reset the speedy trial clock."[5] The State argues "the Carvalho [C]ourt's implicit decision to not reset the timer upon both mistrials was,

5. At this point, it is important to note that Defendant introduces this *Carvalho*-based argument in a footnote. The State argues Defendant's argument should therefore be considered abandoned pursuant to Rule 28. Because Defendant addressed *Carvalho* both in this footnote in his primary brief and again at oral argument, and because we find *Carvalho* useful to our discussion regarding the case at bar and to State's proposed rule regarding the resetting of "the speedy trial clock," we will address Defendant's argument.

at most, dicta, and does not preclude this Court from fully addressing the issue now." (Original emphasis.)

¶ 52 The facts of the underlying offenses in *Carvalho* are not pertinent to this appeal, but the procedural history of that case is. In *Carvalho*, the defendant was arrested on 16 November 2004 and indicted for two separate murders on 3 January 2005. *Carvalho*, 243 N.C. App. at 395, 777 S.E.2d at 80-81. The defendant was tried for the second of these murders in 2009, and the trial court declared a mistrial due to a deadlocked jury. *Id.* at 395, 777 S.E.2d at 81. The defendant was retried in 2010 and a second mistrial was declared due to a deadlocked jury. *Id.* The defendant then "filed a motion to dismiss the charges based upon a speedy trial violation on 3 December 2012 . . . ." *Id.* at 397, 777 S.E.2d at 82. Similar to the case at bar, "Defendant asserted he was denied his constitutional right to a speedy trial due to the overall length of his imprisonment, as well as a lack of evidence sufficient to obtain a conviction due to [a State witness]'s unwillingness to testify." *Id.* "On 6 June 2013, the trial court held a hearing on Defendant's motion to dismiss and entered an order denying Defendant's motion on 2 January 2014." *Id.* at 398, 777 S.E.2d at 82.

¶ 53 The defendant was then tried for the first of the two murders and robbery with a firearm on 7 October 2013. *Id.* at 399, 777 S.E.2d at 83. "The trial court declared a mistrial after the jury deadlocked. Six months later, Defendant was tried a second time for the murder . . . and robbery with a firearm on 1 April 2014." *Id.* "Defendant moved to dismiss the charges at the close of the State's evidence, and again at the close of all of the evidence. The trial court denied Defendant's motions." *Id.* The defendant was ultimately found guilty of both offenses 7 April 2014. *Id.* "[A]lmost nine years elapsed between the time the State indicted Defendant in 2004 and the time of the June 2013 hearing on his motion to dismiss [based upon a speedy trial violation.]" *Id.* at 401, 777 S.E.2d at 84.

¶ 54 The State asserts the Court in *Carvalho* did not discuss in great detail how the issue of this nine-year delay impacts the *Barker* analysis. In *Carvalho*, this Court noted the one-year "presumptively prejudicial" rule as to post-accusation delay and then determined the nine-year "delay clearly passes the demarcation into presumptively prejudicial territory and triggers the *Barker* analysis." *Id.* at 401, 777 S.E.2d at 84 (citing *Flowers*, 347 N.C. at 27, 489 S.E.2d at 406). The Court then immediately concluded its analysis of this factor with: "The almost nine-year delay . . . 'is not *per se* determinative of whether a speedy trial violation has occurred,' and requires careful analysis of the remaining factors." *Id.* (quoting *Webster*, 337 N.C. at 678-79, 447 S.E.2d at 351). As argued by the State, "the Carvalho [C]ourt's implicit decision to not reset the timer

upon both mistrials . . . does not preclude this Court from fully addressing the issue now." (Original emphasis.)

¶ 55 Additionally, the 9-year timeline in *Carvalho* as to speedy trial motions and mistrials is distinguishable from the timeline in the present case. In the present case, Defendant was arrested on 7 February 2016 and filed a speedy trial motion 24 months later. Defendant renewed this motion on 3 April 2018 and the first mistrial was declared on 27 April 2018 after a jury deadlock. After the first mistrial Defendant filed two more speedy trial motions; his second motion was filed on or about 23 April 2019, his third motion on 7 August 2019. Then, Defendant's second trial ended in a mistrial because "the jury is hopelessly deadlocked . . . ." Defendant's fourth and final "Motion to Dismiss for Violation of Speedy Trial Right" was filed 8 January 2021 before he was ultimately convicted in his third jury trial and a judgment was entered 28 May 2021. (Capitalization altered.)

¶ 56 In *Carvalho*, the defendant did not file his "motion to dismiss the charges based upon a speedy trial violation [until] 3 December 2012[.]" *Id.* at 397, 777 S.E.2d at 82. The defendant did not file his motion to dismiss until *after* both mistrials were declared as to the second murder, and before his trial for the first murder and robbery had even began. *See id.* at 395-99, 777 S.E.2d at 81-83. The defendant did not assert his right until 2012, over eight years after his initial arrest in connection with the first murder and over two years after the two mistrials in connection with the second murder. *See id.* at 402-403, 777 S.E.2d at 85. Defendant notes the Court in *Carvalho* "count[ed the] full nine-year interval between indictment and final trial, which included two mistrials, when analyzing [the] speedy trial claim." But Defendant does not note, as discussed above, that most of this delay was due to the fact the defendant waited years to assert his right to a speedy trial.

¶ 57 Whether we use the State's "reset" rule or not, the delay was sufficient to trigger a speedy trial inquiry. As Defendant noted, and as in *Carvalho*, "the time period before each of the three trials was presumptively prejudicial[.]" We decline to adopt State's proposed "reset" rule. Whether we consider the delay as 12, 16, 17, 24, or even 63 months, the "post-accusation delay [is] 'presumptively prejudicial'" because each of these time periods is at least one year. *See Carvalho*, 243 N.C. App. at 401, 777 S.E.2d at 84 (citing *Doggett*, 505 U.S. at 652 n. 1, 120 L. Ed. 2d at 528 n. 1).

¶ 58 As discussed below, the reasons for each delay are more significant than merely the fact that a mistrial occurred, so we will consider the substance of the State's contentions under the second *Barker* factor.

Regardless of whether we follow the State's or Defendant's approach to measuring time for the purpose of a *Barker* analysis, the analysis was triggered, and the prejudicial effect of the delay(s) is addressed in more detail below. *See id.* at 400-401, 777 S.E.2d at 84.

c. Reason for the Delay

¶ 59 The trial court concluded "As to the second Barker factor, the reasons for the passage of time in this case between indictment and trial is not due to any negligence or willfulness of the State. The defendant does not allege in his motion nor provide any evidence of any willfulness or intentional delay by the State."

¶ 60 The trial court's conclusion as to the reasons for the delay is supported by the evidence and findings of fact. On *de novo* review, we agree the second *Barker* factor does not particularly favor either party. At best, it slightly favors the defendant, but there was also no showing of any deliberate delay by the State.

> Generally, the defendant "bears the burden of showing the delay was the result of *neglect* or *willfulness* of the prosecution." *Wilkerson*, 257 N.C. App. at 930, 810 S.E.2d at 392 (citation and internal quotation marks omitted). However, a "particularly lengthy" delay "creates a prima facie showing that the delay was caused by the negligence of the prosecutor." *State v. Strickland*, 153 N.C. App. 581, 586, 570 S.E.2d 898, 902 (2002), *cert. denied*, 357 N.C. 65, 578 S.E.2d 594 (2003).

Spinks, ¶ 26 (emphasis in original). "Upon a prima facie showing of prosecutorial neglect by a lengthy delay, 'the burden shifts to the State to rebut and offer explanations for the delay.'" *Id.* ¶ 27 (quoting *Wilkerson*, 257 N.C. App. at 930, 810 S.E.2d at 392). "Once the State offers a valid reason 'for the lengthy delay of [the] defendant's trial, the burden of proof shifts back to the defendant to show neglect or willfulness by the prosecutor.'" *Id.* (alteration in original) (quoting *Strickland*, 153 N.C. App. at 586, 570 S.E.2d at 902). "The State is allowed good-faith delays which are reasonably necessary for the State to prepare and present its case, but is proscribed from purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort." *Id.* ¶ 28 (quoting *Wilkerson*, 257 N.C. App. at 930-31, 810 S.E.2d at 393).

¶ 61 Defendant argues that this factor cuts in his favor at the time he made each motion. As addressed above, if we take Defendant's measure of 63

months for a speedy trial delay then Defendant undoubtably shows a "particularly lengthy delay." *Id.* ¶ 26. Even taking the more State-friendly measurement of 24 months between arrest and Defendant's first speedy trial motion we find a "prima facie showing that the delay was caused by the negligence of the prosecutor." *Id.* ¶ 26 (quoting *Strickland*, 153 N.C. App. at 583, 570 S.E.2d at 902). The State does not make arguments specifically rebutting whether the initial delay "create[d] a prima facie showing that the delay was caused by the negligence of the prosecutor[,]" *id.*, and instead cites *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003), to argue "[o]nly after the defendant has carried [t]his burden of proof . . . must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence." The trial court's uncontested findings of fact address the reasons for each delay, and none indicated negligence or willful delay by the State.

¶ 62 The trial court's findings establish Defendant was arrested and charged on 7 February 2016 and was later indicted on 2 May 2016. "Defendant was one of four co-defendants[,]" and through May 2017 "the state was preparing for the trial of one of the co-defendants, which included a lengthy process . . . of transcribing recorded contact between certain of the co-defendants and an informant," and this transcription took approximately "one hour for every minute of the recording transcribed." On 8 May 2017 the co-defendant pled guilty during his trial, and on 6 July 2017 Defendant rejected his first plea offer. The State began scheduling Defendant's trial, "which required coordination of witnesses from numerous jurisdictions and several law enforcement agencies . . . includ[ing] a witness from the Drug Enforcement Administration and an expert witness from the DEA forensic lab in Miami, Florida." Defendant rejected a second plea offer around 13 November 2017, then filed his first speedy trial motion on 12 February 2018.

¶ 63 "Neither a defendant nor the State can be protected from prejudice which is an incident of ordinary or reasonably necessary delay[,]" *State v. Armistead*, 256 N.C. App. 233, 239, 807 S.E.2d 664, 669 (2017) (quoting *Johnson*, 275 N.C. at 273, 167 S.E.2d at 280), and Defendant waited 24 months after his arrest before filing his speedy trial motion. Some amount of this delay was "incident of ordinary" trial preparation, because it simply takes time for a case to progress from indictment to trial. As the State notes, and as the trial court's unchallenged findings of fact in its third order establish, Defendant's charges arose out of a complex investigation involving several law enforcement agencies which resulted in prosecution of several defendants. Defendant was also offered two plea deals, and over half of the delay was caused by the prosecution of

the co-defendant and the transcription of recorded contact between the participants of the drug deal.

¶ 64 While the 24-month period between Defendant's arrest and first motion may be "presumptively prejudicial," the State made a sufficient showing to rebut the Defendant's initial showing. The burden then shifted back to Defendant "to *show* neglect or willfulness by the prosecutor." *Strickland*, 153 N.C. App. at 586, 570 S.E.2d at 902-03 (emphasis added). As to the delay between Defendant's arrest and first speedy trial motion, he has failed to make this showing.[6] *Spinks*, ¶ 26 (quoting *Wilkerson*, 257 N.C. App. at 930, 810 S.E.2d at 392); *Spivey*, 357 N.C. at 117, 579 S.E.2d at 254 (quotation omitted) ("[I]n assessing defendant's speedy trial claim, we see no indication that court resources were either negligently or purposefully underutilized."). There is no evidence the State intentionally delayed Defendant's trial; there is ample evidence the State was preparing to prosecute Defendant. The State has "fully explain[ed] the reason for the delay." *Farmer*, 376 N.C. at 415, 852 S.E.2d at 341.

¶ 65 The delay between Defendant's first mistrial and second speedy trial motion is also "an incident of ordinary or reasonably necessary delay." *Armistead*, 256 N.C. App. at 239, 807 S.E.2d at 669. The trial court's unchallenged findings establish, after Defendant's first trial, "[t]ranscripts of the trial proceedings were requested, and, through no delay attributable to the District [A]ttorney's [O]ffice, these transcripts took eight months to prepare, and were obtained at the end of 2018." Defendant then filed his second speedy trial motion in April 2019. Between his second and third speedy trial motion in August 2019, "the State was awaiting the resolution of a motion for appropriate relief filed in a co-defendant's matter, to determine whether a trial proceeding against defendant should be joined with those matters in the event the motion for appropriate relief was granted." Ultimately, the trial court found "[t]he delays in these matters being reached for trial are not purposeful or oppressive, are not owing to any neglect of the District Attorney, and are not intended to hamper the defense or gain a tactical advantage in

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6. Defendant also argues that prosecutorial preference in the order in which coconspirators are tried is not a legitimate and valid reason for the delay between his arrest and trial and fault can be attributed to the prosecutor. But, "[t]his court has also recognized that there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Spivey*, 357 N.C. at 121, 579 S.E.2d at 256 (discussing prosecutorial preference in trying a backlog of murder cases in the speedy trial context) (quotations omitted).

these matters." The record also indicates the case was continued from February to April 2019 at the agreement of both parties.

¶ 66 For 10 of the 12 months between Defendant's first trial and second speedy trial motion, and 10 of the 16 months between Defendant's first trial and third speedy trial motion, the State could not calendar Defendant's case. If we were to follow Defendant's rule for calculating speedy trial delays, the delay between his arrest and second motion is 38 months and the delay between his arrest and third motion is 42 months. We have already determined the delay leading to the first trial did not violate Defendant's speedy trial rights, and during the delay leading to the second trial 8 months were occupied waiting on transcripts, "through no delay attributable to the District attorney's office"; the proceedings were continued for two months; and between Defendant's second and third motion the State "was awaiting the resolution of a motion for appropriate relief . . . to determine whether a trial proceeding against defendant should be joined" with a co-defendant's matter. Defendant again fails to show "the delay was the result of neglect or willfulness of the prosecution." *Spinks*, ¶ 26 (emphasis omitted) (quotation omitted). Defendant was then tried again at the 42-month mark of his incarceration, resulting in the second mistrial.

¶ 67 The delay between the second and third trials is justified largely by truly neutral factors. The delays prior to the first and second trial may still be considered here. But the second trial took place in August 2019. The third trial occurred in May 2021. During a large portion of 2020, most of the time period between these two trial dates, the Covid-19 pandemic caused significant shutdowns and backlogs in our judicial system. These shutdowns were required by Executive Orders issued by the Governor of North Carolina and by Emergency Directives issued by the Chief Justice of the Supreme Court of North Carolina.[7]

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7. The Chief Justice of the Supreme Court of North Carolina issued multiple orders postponing proceedings, including jury trials, by thirty days in response to the Governor's declaration of a state of emergency due to Covid-19. *See* Order of the Chief Justice Emergency Directives 1 to 2 (13 March 2020); Order of the Chief Justice Emergency Directives 9 to 16 (21 May 2020); Order of the Chief Justice Extending Emergency Directives 9 to 16 (20 June 2020); Order of the Chief Justice Extending Emergency Directives 9-15, 20 (20 July 2020); Order of the Chief Justice Extending Emergency Directives 9-15, 20-22 (15 August 2020); Order of the Chief Justice Extending Emergency Directives 2-6, 8-15, 18, and 20-22 (15 September 2020); Order of the Chief Justice Extending Emergency Directives 2-5, 8-15, 18, and 20-22 (14 December 2020). These orders may be found on the North Carolina Judicial Branch's website at: https://www.nccourts.gov/covid-19. In early 2021 the Chief Justice allowed proceedings to resume on a county-by-county basis depending upon the current state of Covid-19 cases in that county. *See* Order of the Chief Justice Extending Emergency Directives 2, 3, 5, 8, 11, 12, 14, 15, 21 (14 January 2021).

¶ 68 A lengthy delay alone will not weigh against the State, but Defendant is required to show "purposeful" delays or "those which the prosecution could have avoided by reasonable effort." *Spinks*, ¶ 28; *Spivey*, 357 N.C. at 121, 579 S.E.2d at 256 ("Indeed, defendant relies solely on the length of delay and ignores the balancing of other factors. In light of these reasons, we conclude that the delay was caused by neutral factors and that defendant failed to carry his burden to show delay caused by the State's neglect or willfulness."). Defendant did not make any allegations of delay based upon Covid-19 shutdowns and did not demonstrate the prosecutor here could have avoided any delay caused by the pandemic, and this delay will not weigh against the State. *Cf. Farmer*, 376 N.C. at 416, 852 S.E.2d at 341-42 (discussing how some neutral factors, like crowded criminal case dockets, weigh against the State because the State has a "more authoritative role in the delay"). Additionally, the record indicates approximately two months of the final delay between Defendant's second and third trials was due in part due to a medical issue suffered by Defendant's own counsel.

¶ 69 While the time periods between Defendant's arrest and trials is lengthy enough to shift the burden to the State, "the State offers a valid reason 'for the lengthy delay of [the] defendant's trial, [and] the burden of proof shift[ed] back to the defendant to show neglect or willfulness by the prosecutor.'" *Spinks*, ¶ 27 (quotation omitted). With respect to each motion, Defendant has not shown any actual neglect or willfulness by the prosecutor in any of the delays between his arrest, trials, and motions. Although there are some reasons for the delay that weigh slightly against the State, the State offered valid reasons for the delay, including delays incident to normal trial procedure and delays due to the effect of the Covid-19 pandemic on our court system in 2020. This factor does not particularly favor either party, and at best it might slightly favor Defendant, at least prior to 2020.

d. Defendant's Assertion of the Right

¶ 70 As to the third Barker factor, the trial court concluded, "The defendant has first asserted the right to a speedy trial by motion on February 12, 2018, after the matter had been pending for two years, and after acquiescing to the State's approach during the prior two years of addressing the matters of the other co-defendants prior to trying the defendant's cases."

¶ 71 The third *Barker* factor favors Defendant. As the trial court noted, Defendant waited about two years to assert his right to a speedy trial, but at that point, he asserted his right to a speedy trial repeatedly. The State concedes as much.

> "A criminal defendant who vigorously asserts his right to a speedy trial will be considered in a more favorable light than a defendant who does not." *Strickland*, 153 N.C. App. at 587, 570 S.E.2d at 903. A failure to assert the right, or a failure to assert the right early in the process, weighs against a defendant's contention that his right has been violated. [*State v.*] *Grooms*, 353 N.C. [50,] 63, 540 S.E.2d [713,] 722 [(2000)].

Spinks, ¶ 33.

¶ 72 Defendant first asserted his right to a speedy trial by a *pro se* motion and letter filed 30 January 2018. His first motion filed through counsel was filed 12 February 2018. Defendant filed three additional speedy trial motions: the second motion on or about 23 April 2019, after his first mistrial; the third motion on 7 August 2019; and the fourth and final motion on 8 January 2021, between the second mistrial in August 2019 and his third trial in March 2021. Defendant also sent an undated letter to a retired judge, presumably at some point in October 2018, as we can estimate by the trial court's response. Even accepting the State's argument, citing *Spivey*, 357 N.C. at 121, 579 S.E.2d at 256, that "a represented defendant 'cannot also file motions on his own behalf or attempt to represent himself[,]'" Defendant's four motions filed through counsel unequivocally establish he "vigorously assert[ed] his right to a speedy trial . . . ." *Id.*

e. Prejudice to the Defendant Resulting from the Delay

¶ 73 "As to the fourth Barker factor," the trial court concluded, "the alleged delay has not caused any significant prejudice to defendant, and the defendant has not alleged specific prejudice, such as any alleged unavailability of witnesses given the passage of time, in his motion."

¶ 74 We agree that the final factor favors the State:

> Prejudice "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532, 92 S. Ct. at 2193, 33 L.Ed.2d at 118. The identified interests the constitutional right to a speedy trial protects are: (1) avoiding prolonged imprisonment; (2) reducing anxiety of the accused; and (3) creating the opportunity for the accused to assert and exercise their presumption of innocence. *See id.* The last of these interests is the most important aspect to the speedy trial right,

> "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

Carvalho, 243 N.C. App. at 403, 777 S.E.2d at 85. "A defendant must show actual, substantial prejudice." *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257.

¶ 75 Defendant has not shown "actual, substantial prejudice." *Id.* The first two interests protected by the right to a speedy trial are evident in nearly all incarcerations. Defendant was imprisoned for several years awaiting trial for the offenses he was ultimately convicted upon, and this imprisonment undoubtably caused significant "anxiety of the accused." *Carvalho*, 243 N.C. App. at 403, 777 S.E.2d at 85. But from arrest through conviction Defendant received three opportunities "to assert and exercise [his] presumption of innocence." *Id.*

¶ 76 Defendant admits his defense was not prejudiced by any delay, "because he did not call witnesses; he instead relied on the fact that the State had no evidence of his participation." Defendant argues he "should not be punished due to the arbitrary factor that his defense was not damaged by the passage of time." Additionally, Defendant argues he was prejudiced because he was "unjustly locked away, unable to work and see and support his family." The State cites *Farmer* and argues "Defendant only cite[s] generalized concerns surrounding detention" and "[t]hese are the exact arguments our Supreme Court already said were not sufficient."

¶ 77 As to Defendant's argument that his incarceration was prejudicial because he was "unjustly locked away, unable to work and see and support his family[,]" Defendant is required to allege more than simple separation from his family, or the type of separation inherent to pretrial detention. *See Spinks*, ¶ 38 (discussing *State v. Washington*, 192 N.C. App. 277, 292, 665 S.E.2d 799, 809 (2008)). Defendant has not alleged any reason why separation from his family was particularly prejudicial as a result of the delays before his trial. He has not argued how that separation affects any of the interests protected by the right to a speedy trial above the prejudice inherent in every pretrial incarceration. Defendant instead makes a bare assertion that separation from his family was "unjust . . . given the weakness of the State's case . . . ." This argument falls short of "actual, substantial prejudice." *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257.

¶ 78 Defendant also argues that he is prejudiced because none of his time spent in State jail will count against his future federal sentence. Defendant does not expand upon this argument. We find this argument

unpersuasive. It is not uncommon for a criminal defendant to serve consecutive sentences for multiple offenses or for a defendant to be prosecuted by both State and Federal authorities. And, as we discussed above, the State's evidence was sufficient to convict Defendant on all three charges. Although "[t]he fact a defendant is already incarcerated while awaiting trial 'does not mitigate against his right to a speedy and impartial trial[,]'" *Wilkerson*, 257 N.C. App. at 934, 810 S.E.2d at 395 (quotation omitted), Defendant does not explain how this future sentence constitutes prejudice protected against by his right to a speedy trial. He does not allege the possibility of a concurrent sentence being lost, or an increase in his present imprisonment, or any worsening of the conditions of his imprisonment due to the "pendency of another criminal charge outstanding against him." *Id.* (quoting *Smith v. Hooey*, 393 U.S. 374, 378, 21 L. Ed. 2d 607, 611 (1969)). The fact that Defendant will have to serve a federal sentence in addition to his state sentence does not constitute "actual, substantial prejudice" as Defendant presents it to us. *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257.

¶ 79 As to Defendant's argument that he "should not be punished due to the arbitrary factor that his defense was not damaged by the passage of time[,]" we do not find that Defendant is being punished because this case took several years and multiple trials to resolve or because he did not present evidence in his defense. Defendant has failed to show any prejudice that is not inherent to all pretrial detentions, and ultimately the only showing of prejudice is Defendant's lengthy incarceration alone. While we acknowledge the oppressive and anxiety-inducing nature of pretrial incarceration, it is not enough by itself to show "actual, substantial prejudice." This factor weighs in favor of the State.

f. Weighing the Factors

¶ 80 The reasons for the delay were not solely the fault of the State. Defendant has not presented evidence to show the delay was due to "neglect or willfulness by the prosecutor." *Spinks*, ¶ 27 (quotation omitted). While *Farmer* indicates the State bears some burden for the exercise of prosecutorial preference in the order Defendant and co-defendants were tried, *see Farmer*, 376 N.C. at 416, 852 S.E.2d at 342, "[t]his Court has also recognized that there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Spivey*, 357 N.C. at 121, 579 S.E.2d at 256 (quotations omitted) (discussing the effect of prosecutorial preference in trying capital versus noncapital murder cases).

¶ 81 "No one factor is determinative of a speedy-trial violation; 'they must all be weighed and considered together[.]'" *Spinks*, ¶ 41 (alteration in original) (quotation omitted). Here, the balance of the factors weighs in favor of the State. Defendant has failed to show purposeful, neglectful, or willful delay by the prosecutor. Defendant has also failed to show "actual, substantial prejudice" as a result of any delay. *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257. Upon *de novo* review, we hold the trial court did not err in balancing the *Barker* factors as to any of Defendant's motions and denying his motions to dismiss based upon denial of his right to a speedy trial.

III. Conclusion

¶ 82 We conclude the State presented sufficient evidence to convict Defendant on each charge and the trial court did not err in denying Defendant's motions to dismiss based upon his assertion of a denial of his right to a speedy trial. The trial court committed no error.

NO ERROR.

Judges TYSON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
BILLY EDWARDS, DEFENDANT

No. COA22-41

Filed 1 November 2022

Indictment and Information—legal entity capable of owning property—public school—relation back to county board of education

An indictment charging defendant with felony larceny was sufficient to impart jurisdiction upon the trial court to accept his guilty plea because, although the indictment did not explicitly name a legal entity capable of owning property, the name "Graham County Schools" with the addition of the specific location—"Robbinsville Elementary School"—imported the Graham County Board of Education, which was a legal entity authorized by the General Assembly to own property.

STATE v. EDWARDS

[286 N.C. App. 306, 2022-NCCOA-712]

Appeal by Defendant from order entered 11 September 2020 by Judge William H. Coward in Graham County Superior Court. Heard in the Court of Appeals 24 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Billy Edwards appeals from an order denying his motion for appropriate relief. Defendant asserts the trial court improperly denied his MAR because the State's felony larceny indictment failed to allege a legal entity capable of owning property. We affirm the trial court's order.

I. Factual and Procedural History

¶ 2 On 13 June 1994, Defendant was indicted for breaking and entering, felony larceny, and felony possession of stolen goods. The indictment alleged Defendant broke into a building occupied by Graham County Schools and stole a television, VCR, and microwave. Graham County Schools was named as the owner of the property. On 14 December 1995, Defendant pled guilty to felony larceny and was sentenced to three years in prison.

¶ 3 Almost twenty years later, Defendant was indicted for possession of stolen goods or property and safecracking. Defendant was subsequently indicted as a habitual felon. The habitual felon indictment included the 14 December 1995 felony larceny conviction as one of the qualifying convictions. A jury found Defendant guilty of possession of stolen goods or property and felonious safecracking. Defendant pled guilty to obtaining a habitual felon status. Defendant was sentenced to a minimum of eighty-four months in prison.

¶ 4 Defendant appealed the ruling, and this Court reversed the conviction for felonious safecracking, vacated the consolidated judgment, and remanded the case for resentencing. *See State v. Edwards*, 252 N.C. App. 265, 2017 WL 897711 (March 7, 2017) (unpublished). The trial court entered a judgment and found Defendant guilty of possession of stolen goods and for attaining habitual felon status.

¶ 5 On 11 May 2020, Defendant filed an MAR asserting that the trial court lacked jurisdiction to accept Defendant's 14 December 1995 felony larceny plea. Defendant claimed the trial court lacked jurisdiction because the indictment "did not identify the victim as a business or other entity capable of owning property." Additionally, since the felony larceny conviction was one of three convictions included on Defendant's habitual felon indictment, Defendant argued the habitual felon conviction should be vacated and Defendant should be resentenced pursuant only to the charge of possession of stolen goods.

¶ 6 On 11 September 2020, the trial court entered an order denying Defendant's MAR. The trial court determined that the victim named in the indictment—"Graham County Schools"—clearly "implie[d] the statutorily-required ownership by the Graham County Board of Education."

¶ 7 On 21 May 2021, Defendant filed a petition for writ of certiorari, which was granted.

II. Analysis

¶ 8 Generally, "appellate courts review trial court orders deciding motions for appropriate relief to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Hyman*, 371 N.C. 363, 382, 817 S.E.2d 157, 169 (2018) (citations and internal quotation marks omitted). However, when a defendant's MAR only raises a legal issue, this Court reviews the challenge *de novo*. *State v. Marino*, 265 N.C. App. 546, 549, 828 S.E.2d 689, 692 (2019).

¶ 9 Here, Defendant attacks the sufficiency of an indictment, which is a question of law. *See State v. Oldroyd*, 380 N.C. 613, 2022-NCSC-27, ¶ 8 (citation omitted) ("When a criminal defendant challenges the sufficiency of an indictment lodged against him, that challenge presents this Court with a question of law which we review de novo."). We therefore employ a *de novo* standard in our review.

¶ 10 "It is well settled 'that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.'" *State v. Campbell*, 368 N.C. 83, 83, 772 S.E.2d 440, 443 (2015) (quoting *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citations omitted)). Indictments function 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). While indictments "must satisfy both the statutory strictures of N.C.G.S. § 15A-924 and the constitutional purposes which indictments are designed to satisfy[,]" these strictures are not intended "to bind the hands of the State with technical rules of pleading[.]" *Oldroyd*, 2022-NCSC-27, ¶ 8 (citation omitted); *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731.

¶ 11 Defendant specifically asserts his larceny indictment is fatally defective because it failed to allege ownership by a legal entity capable of owning property. Defendant argues the use of "Graham County Schools" in his indictment renders it fatally defective because "the Graham County Board of Education is the exclusive entity capable of owning school property in Graham County." We disagree.

¶ 12 A valid larceny indictment "allege[s] the ownership of the [stolen] property either in a natural person or a legal entity capable of owning (or holding) property." *Campbell*, 368 N.C. 83, 772 S.E.2d at 443 (citations and internal quotation marks omitted). An indictment alleging ownership in an entity must indicate, if the owner is not a natural person, that the entity " 'is a corporation or otherwise a legal entity capable of owning property,' unless the entity's name itself 'imports an association or a corporation capable of owning property.'" *Id.* (quoting *State v. Thornton*, 251 N.C. 658, 661, 111 S.E.2d 901, 903 (1960).

¶ 13 In applying these rules, our Supreme Court has held that merely listing a company's name that gives no indication that it is a corporation or failing to state that it is an entity capable of owning property is insufficient for a valid larceny indictment. *See Thornton*, 251 N.C. at 662, 111 S.E.2d at 904 ("In the indictment sub judice, there is no allegation that 'The Chuck Wagon' is a corporation, and the words 'The Chuck Wagon' do not import a corporation."). On the other hand, larceny indictments have been upheld where the name of the entity relates back or "imports" an entity that can own property. *See Campbell*, 368 N.C. at 83, 772 S.E.2d at 444 (holding that alleging "a church or other place of religious worship" as the property owner is sufficient for a valid larceny indictment); *State v. Ellis*, 368 N.C. 342, 346, 776 S.E.2d 675, 678 (2015) (affirming this Court's recognition of "North Carolina State University" as an entity capable of owning property).

¶ 14 In *Campbell* and *Ellis*, the Court pointed out that the entity at issue in each case was authorized by our General Statues to own property. *See* N.C. Gen. Stat. §§ 61-2 – 61-5 (2021) (authorizing religious societies' ownership of property); *Id.* § 116-3 (authorizing "the University of North

Carolina" as an entity capable of owning property). Significant to our analysis in this case is the Court's use of section 116-3 to hold that North Carolina State University is an entity capable of owning property when the statute only states "[t]he Board of Governors of the University of North Carolina . . . [and] the University of North Carolina[,]" while North Carolina State University is a constituent institution of the University of North Carolina. *Compare id.* ("The Board of Governors of the University of North Carolina shall be known and distinguished by the name of 'the University of North Carolina' and shall continue as a body politic and corporate . . . ."), *with id.* § 116-4 ("The University of North Carolina shall be composed of the following institutions of higher education . . . North Carolina State University at Raleigh . . . ."). *Ellis* is instructive in the case before us because although the corporate body capable of owning property is the University of North Carolina, North Carolina State University falls under the corporate body as a constituent institution, yet was sufficient for a valid larceny indictment as an entity capable of owning property. *Ellis*, 368 N.C. at 346, 776 S.E.2d at 678; *see also Bd. of Governors of Univ. of N.C. v. U.S. Dep't of Lab.*, 917 F.2d 812, 816 (4th Cir. 1990) (stating that N.C. Gen. Stat. § 116-3 "constitutes the Board of Governors of UNC as 'a body politic and corporate.' It does not grant this status to any of the sixteen campuses that the Board administers." (citations omitted)).

¶ 15 Here, our General Statutes state that "[t]he board of education of each county in the State shall be a body corporate by the name and style of 'The ..... County Board of Education,' . . . [and] shall hold all school property and be capable of purchasing and holding real and personal property[.]" N.C. Gen. Stat. § 115C-40 (2021). While the Graham County Board of Education may be the corporate body capable of owning property by statute, we find this case similar to *Ellis*. The Court there found that "North Carolina State University" was sufficient as a legal entity capable of owning property. Here, we conclude that "Graham County Schools," and the addition of the specific location as "Robbinsville Elementary School," while not the corporate body "Graham County Board of Education," falls under the umbrella of the "Graham County Board of Education," like that of a constituent institution to the University of North Carolina.

¶ 16 We hold the use of "Graham County Schools," with the addition of the specific location as "Robbinsville Elementary School," in this case was sufficient for a valid larceny indictment because it "imports" the Graham County Board of Education. *Thornton*, 251 N.C. at 661, 111 S.E.2d at 903.

III. Conclusion

¶ 17 For the foregoing reasons, we affirm the trial court's order denying Defendant's MAR.

AFFIRMED.

Judges TYSON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
JONATHAN OMAR KELLY

No. COA22-70

Filed 1 November 2022

1. Appeal and Error—preservation of issues—objection to question—unresponsive answer—no motion to strike

In defendant's prosecution for robbery with a dangerous weapon, where defendant objected to the State's question concerning whether defendant fit the description of the suspect but then did not move to strike the witness's unresponsive answer giving the witness's opinion that defendant was the perpetrator, defendant waived appellate review of the issue. However, the appellate court did consider defendant's argument that the alleged error amounted to plain error.

2. Identification of Defendants—robbery with a dangerous weapon—plain error review—other evidence identifying defendant

In defendant's prosecution for robbery with a dangerous weapon, even assuming that the trial court erred by admitting a witness's testimony identifying defendant as the perpetrator, there was no plain error in light of other evidence before the jury—including surveillance video of the robbery showing the perpetrator wearing dark Adidas pants, gray high-top sneakers, and purple underwear; defendant's nearby location three hours after the robbery wearing the same clothing; defendant's possession of approximately half of the stolen money after meeting with another individual; photographs and video of the suspect during the robbery; and a video interview of defendant a few hours after the robbery.

3. Robbery—with a dangerous weapon—sufficiency of evidence—circumstantial—clothing and other circumstances

The State presented sufficient evidence to convict defendant of robbery with a dangerous weapon where surveillance video showed a person with dark Adidas pants, gray high-top sneakers, and purple underwear robbing the convenience store; defendant was found three hours later five miles away wearing the same clothing shown in the video; defendant was apprehended as he was walking away from another individual and had approximately half the amount of the stolen money; and the jury was able to compare surveillance photographs and video of the robbery suspect with a video of defendant during his police interview several hours later.

4. Robbery—with a dangerous weapon—single robbery—two employees—double jeopardy

The trial court erred by entering judgment and commitment upon two counts of robbery with a dangerous weapon where defendant committed a single robbery of a convenience store's property from its two employees.

Appeal by Defendant from judgment entered 28 January 2021 by Judge R. Kent Harrell in Pender County Superior Court. Heard in the Court of Appeals 24 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Daniel K. Covas, for the State.

William D. Spence for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Jonathan Omar Kelly appeals from judgment entered upon a jury's verdict of guilty of two counts of robbery with a dangerous weapon. Defendant argues that the trial court erred by (1) allowing the investigating detective to identify Defendant as the perpetrator, (2) denying Defendant's motion to dismiss the charges against him, and (3) entering judgment and commitment on two counts of armed robbery. There was no plain error in admitting the officer's testimony and no error in denying Defendant's motion to dismiss. The trial court did err by entering judgment and commitment on two counts of armed robbery. We arrest the judgment and remand for resentencing.

I. Factual and Procedural Background

¶ 2 Shortly before 10:00 pm on 14 October 2019, a man wearing a hooded sweatshirt, dark-colored athletic pants, and gray high-top shoes entered the Phoenix Travel Mart in Rocky Point, North Carolina. Surveillance video showed the man approach two cashiers working at adjacent cash registers, brandish a firearm, and demand money from each cashier. As the suspect reached over the counter to collect the cash, his hooded sweatshirt was raised, revealing purple boxer shorts. The suspect then exited the store and ran towards the interstate. The Phoenix Travel Mart accounting records indicated a cash shortage of $1,355.34 for that day.

¶ 3 Lieutenant James Cotton was alerted to the robbery and responded to the Phoenix Travel Mart, where he reviewed the surveillance video and interviewed witnesses. Cotton completed his investigation and left the Phoenix Travel Mart for the sheriff's office around midnight. Approximately five miles north of the Phoenix Travel Mart, Cotton observed Defendant walking north, and another individual walking south along the road. Defendant was wearing black pants with a white stripe, gray sneakers, and no shirt. Believing that Defendant fit the description of the suspect in the Phoenix Travel Mart robbery, Cotton activated his blue lights and pulled over, at which point Defendant and the other individual began walking away from each other. Cotton asked to speak with Defendant, informed Defendant that he fit the description of the suspect, and detained Defendant. Cotton then called Detective Mark Lobel, the lead detective on duty that night, to come question Defendant.

¶ 4 Lobel, who had also reviewed the surveillance footage and interviewed witnesses at the Phoenix Travel Mart, met Cotton and Defendant on the side of the road, questioned Defendant, and placed Defendant under arrest. The officers transported Defendant to the sheriff's office shortly before 3:00 am, where Defendant was placed in an interview room under video surveillance while officers processed his information and collected his clothes as evidence. A subsequent search of Defendant's clothes yielded $736 in cash.

¶ 5 Defendant was tried before a jury on 25 January 2021, where the State introduced the surveillance video depicting the robbery from the Phoenix Travel Mart as well as the surveillance video depicting Defendant in the interview room at the sheriff's office. The State also called Cotton and Lobel to testify about their investigation and interactions with Defendant. Lobel testified that, after reviewing the surveillance video of the robbery, he knew he was "looking for somebody with

dark-colored black or blue Adidas, three stripes with the Adidas symbol on the top, gray high-top sneakers and a pair of purple underwear[.]" When asked, whether he believed that Defendant fit the description of the suspect in the Phoenix Travel Mart robbery, Lobel responded, without objection, "Yes, absolutely." Lobel also testified, over Defendant's objection, that, in his opinion, "[D]efendant is the person that robbed the Phoenix Travel Mart."

¶ 6 After viewing and hearing all the evidence, the jury returned guilty verdicts on two counts of armed robbery, one for each cashier at the Phoenix Travel Mart. The trial court consolidated judgment and sentenced Defendant in the presumptive range to 72-99 months' imprisonment. Defendant timely appealed.

II. Discussion

A. Detective Lobel's Testimony

¶ 7 Defendant first argues that the trial court erred by allowing Lobel to identify Defendant as the person who robbed the Phoenix Travel Mart.

1. Preservation and Standard of Review

¶ 8 **[1]** We first address whether Defendant preserved this issue for appellate review. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]" N.C. R. App. P. 10(a)(1). "In case of a specific question, objection should be made as soon as the question is asked and before the witness has time to answer." *State v. Battle*, 267 N.C. 513, 520, 148 S.E.2d 599, 604 (1966) (citations and quotations omitted). Where the objectionable testimony takes the form of an unresponsive answer, the objection should be made through a motion to strike the unresponsive answer. *Id.* "Failure to move to strike the unresponsive part of an answer, even though the answer is objected to, results in a waiver of the objection." *State v. Chatman*, 308 N.C. 169, 178, 301 S.E.2d 71, 77 (1983) (emphasis omitted).

¶ 9 At trial, the following exchange took place during the State's direct examination of Lobel:

> [STATE]: Detective Lobel, that night did you believe that [Defendant] fit the description of the person, the suspect in the Phoenix Travel Mart robbery?
>
> [LOBEL]: Yes, absolutely.

[STATE]: And based upon your opinion, why do you believe that he fit the description?

[DEFENDANT]: Objection, your Honor, as to his opinion.

THE COURT: Ask that question again, [State].

[STATE]: Do you believe – do you have an opinion as to whether or not [Defendant] fit the description of the suspect in the Phoenix Travel Mart robbery that night?

[DEFENDANT]: Objection, your Honor.

THE COURT: Overruled.

[STATE]: Do you have an opinion?

[LOBEL]: Yes.

[STATE]: And what is your opinion?

[LOBEL]: That is the – the defendant is the person who robbed the Phoenix Travel Mart.

[STATE]: And why do you believe that?

[LOBEL]: Because if I take the full totalism of the facts of what I saw on the video which were – was the height and stature of the defendant, as seen by the video, the type of pants, which were the Adidas with three lines with the Adidas mark up towards the top, gray colored high-tops with some kind of design on the side of it, and then the pair of purple boxer shorts that were seen underneath the pants during the commission of the crime, the only thing that the defendant, when I had interaction with him, that he did not have on at that point was the gray – was the dark-colored hoodie which you guys had seen in the video cinched up along his face, and of course he didn't have the firearm in his hand or the glove on his hand at the time.

¶ 10 Lobel's answer that "the defendant is the person who robbed the Phoenix Travel Mart," was not responsive to the State's question "whether or not [Defendant] fit the description of the suspect in the Phoenix Travel Mart robbery." Although Defendant objected to the State's

question, he did not move to strike Lobel's unresponsive answer identifying Defendant as the perpetrator.[1] Accordingly, Defendant's objection is waived, and Defendant has failed to preserve this issue for appellate review. However, as Defendant has specifically and distinctly alleged the error amounts to plain error, we will review the issue for plain error. *See* N.C. R. App. P. 10(a)(4).

¶ 11 "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (citations and quotations omitted).

2. Analysis

¶ 12 **[2]** Even assuming *arguendo* that admitting Lobel's identification testimony was error, it was not plain error considering the other evidence before the jury identifying Defendant as the perpetrator. Lobel testified that, after reviewing surveillance video of the robbery, he knew he was "looking for somebody with dark-colored black or blue Adidas, three stripes with the Adidas symbol on the top, gray high-top sneakers and a pair of purple underwear." Defendant was found approximately three hours after the robbery, approximately five miles north of the Phoenix Travel Mart, wearing "black Adidas sweatpants with the three stripes down the side, the Adidas symbol up towards the upper part of the groin area, and then a gray pair of high-top sneakers with some kind of design on the side . . . [and] purple boxer shorts." When asked, whether he believed that Defendant fit the description of the suspect in the Phoenix Travel Mart robbery, Lobel responded, without objection, "Yes, absolutely."

¶ 13 Cotton, the officer who initially stopped defendant, testified that he stopped to speak with Defendant "[b]ecause he fit the general description, as far as the pants and the shoes and everything, of the suspect that was involved in the armed robbery." Cotton also testified that, just before stopping Defendant, he observed Defendant speaking with another individual. When Cotton activated his blue lights, Defendant and the other individual separated and started walking away from each

1. Defendant does not appeal the admissibility of Lobel's opinion that Defendant matched the description of the suspect. Instead, Defendant focuses specifically on Lobel's positive identification of Defendant as the perpetrator.

other. Defendant was later found to have cash in approximately half the amount stolen from the Phoenix Travel Mart.

¶ 14 Additionally, the jury saw photographs and video of the suspect during the robbery, as well as video of Defendant in the interview room only hours later, allowing it to compare the suspect's appearance and clothing with Defendant's appearance and clothing on the night of the robbery. Considering this evidence, we cannot say that the jury probably would have reached a different verdict had they not heard Lobel's objectionable testimony. Accordingly, admitting Lobel's identification did not rise to the level of plain error.

B. Defendant's Motion to Dismiss

¶ 15 **[3]** Defendant next argues that the trial court erred by denying his motion to dismiss the charges against him at the close of the evidence. We review the 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 ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion. In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. In other words, if the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Blagg, 377 N.C. 482, 487-88, 2021-NCSC-66, ¶10 (quoting *State v. Golder*, 374 N.C. 238, 249-50, 839 S.E.2d 782, 790 (2020)). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000). However, "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the

defendant as the perpetrator of it, the motion should be allowed." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980).

¶ 16 The State presented the following evidence tending to show that Defendant was the perpetrator:

¶ 17 Lobel testified that, after reviewing surveillance video of the robbery, he knew he was "looking for somebody with dark-colored black or blue Adidas, three stripes with the Adidas symbol on the top, gray high-top sneakers and a pair of purple underwear." Defendant was found approximately three hours after the robbery, approximately five miles north of the Phoenix Travel Mart, wearing "black Adidas sweatpants with the three stripes down the side, the Adidas symbol up towards the upper part of the groin area, and then a gray pair of high-top sneakers with some kind of design on the side . . . [and] purple boxer shorts." When asked whether he believed that Defendant fit the description of the suspect in the Phoenix Travel Mart robbery, Lobel responded, "Yes, absolutely."

¶ 18 Additionally, Cotton testified that he stopped Defendant "[b]ecause [Defendant] fit the general description, as far as the pants and the shoes and everything, of the suspect that was involved in the armed robbery." Cotton also testified that, just before stopping Defendant, he observed Defendant speaking with another individual. When Cotton activated his blue lights, Defendant and the other individual separated and started walking away from each other. Defendant was later found to have cash in approximately half the amount stolen from the Phoenix Travel Mart.

¶ 19 Furthermore, the jury saw photographs and video of the suspect during the robbery, as well as video of Defendant in the interview room only hours later, allowing it to compare the suspect's appearance and clothing with Defendant's appearance and clothing on the night of the robbery.

¶ 20 Viewed in the light most favorable to the State, this evidence is sufficient to persuade a rational juror to accept the conclusion that Defendant was the perpetrator.

¶ 21 Defendant argues that the State's evidence raises only a suspicion or conjecture that he was the perpetrator because "[t]here is absolutely nothing unique or distinctive about any of the items of [D]efendant's clothing[, and] these items of clothing are worn by hundreds and thousands of people." However, it is not the individual items of clothing, but the specific combination of clothing in conjunction with the other evidence presented that constitutes substantial evidence that Defendant was the perpetrator in this case.

¶ 22 For further support of his argument that the State's evidence raises only a suspicion or conjecture that he was the perpetrator, Defendant cites *State v. Stallings*, 77 N.C. App. 189, 334 S.E.2d 485 (1985); *State v. Chavis*, 270 N.C. 306, 154 S.E.2d 340 (1967); *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971); and *State v. Heaton*, 39 N.C. App. 233, 249 S.E.2d 856 (1978). The cases cited by Defendant are distinguishable from the present case because in each of those cases, the State lacked critical evidence tying the defendant to the crime. Here, the State presented substantial evidence linking Defendant to the crime. Accordingly, the trial court properly denied Defendant's motion to dismiss the charges against him. *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 ("Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty." (citation omitted)).

C. Sentencing

¶ 23 **[4]** Defendant next argues that the trial court erred by entering judgment and commitment upon two counts of armed robbery when only a single armed robbery occurred.

1. Preservation and Standard of Review

¶ 24 We note that by failing to object to the convictions or sentence on double jeopardy grounds, "[D]efendant has waived his right to raise this issue on appeal." *State v. Coleman*, 161 N.C. App. 224, 234, 587 S.E.2d 889, 896 (2003) (citation omitted). Nonetheless, we invoke Rule 2 of the North Carolina Rules of Appellate Procedure to consider the merits of Defendant's argument. *See id.* (applying N.C. R. App. P. R. 2 to review a double jeopardy issue on appeal).

2. Analysis

¶ 25 The essential elements of armed robbery are "(1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of 'firearms or other dangerous weapon, implement or means'; and (3) danger or threat to the life of the victim." *State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978); *see* N.C. Gen. Stat. § 14-87 (2019). "[W]hen the lives of all employees in a store are threatened and endangered by the use or threatened use of a firearm incident to the theft of their employer's money or property, a single robbery with firearms is committed." *State v. Potter*, 285 N.C. 238, 253, 204 S.E.2d 649, 659 (1974).

¶ 26 In *Potter*, defendant used a firearm to rob a food market, taking a total of $265 from two cash registers operated by two different employees. *Id.* at 241, 204 S.E.2d at 652. Defendant was indicted separately on two counts of armed robbery, one for each employee. Id. at 238-39, 204 S.E.2d at 650. He was convicted on both counts and sentenced to two consecutive prison terms. *Id.* at 246, 204 S.E.2d at 655. Our Supreme Court held that the two verdicts had "the same effect as if defendant had been found guilty after trial on a single indictment which charged the armed robbery" of the two employees. *Id.* at 252, 204 S.E.2d at 658. The Supreme Court modified the judgment and remanded the cause with instructions to enter commitment for a single armed robbery, and to adjust the sentence accordingly. *Id.* at 254, 204 S.E.2d at 659.

¶ 27 Here, as in *Potter*, Defendant took a single employer's property from two of its employees. Also, as in *Potter*, Defendant was charged with, and convicted of, two counts of armed robbery, one for each employee. Following *Potter*, the trial court should have entered judgment and commitment upon only one count of armed robbery. Although Defendant's convictions were consolidated into one judgment, and Defendant was sentenced within the presumptive range, "the separate convictions may still give rise to adverse collateral consequences." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987). Furthermore, "we cannot assume that the trial court's consideration of [the second count] had no effect on the sentence imposed." *State v. Mulder*, 233 N.C. App. 82, 95 n. 5, 755 S.E.2d 98, 106 n. 5 (2014) (arresting judgment and remanding for resentencing even though the original sentence was within the presumptive range for the surviving conviction). Accordingly, we remand this issue to the trial court for resentencing, with an instruction to arrest judgment on one of the convictions.

III. Conclusion

¶ 28 For the reasons set forth above, the trial court did not plainly err by admitting Lobel's identification. Nor did the trial court err by denying Defendant's motion to dismiss at the close of the evidence. The trial court erred, however, by issuing a judgment and commitment upon two counts of armed robbery. The matter is remanded to the trial court for resentencing, with an instruction to arrest judgment on one of the convictions.

NO PLAIN ERROR AND NO ERROR AT TRIAL; REMANDED WITH INSTRUCTIONS FOR RESENTENCING.

Judges HAMPSON and JACKSON concur.

STATE v. LUCAS

[286 N.C. App. 321, 2022-NCCOA-714]

STATE OF NORTH CAROLINA
v.
DANIEL LUCAS, DEFENDANT

No. COA21-685

Filed 1 November 2022

1. Probation and Parole—warrantless search—premises—unmarried couple—reasonable belief of officers

In denying defendant's motion to suppress evidence obtained during a warrantless search of his home pursuant to his live-in girlfriend's probation supervision, the trial court did not err by concluding that the probation officers had a reasonable belief that defendant's home was his probationer girlfriend's "premises" subject to warrantless searches as a condition of her probation. The girlfriend had consistently provided defendant's address as her premises to probation officers, defendant did not object to a previous warrantless search of his home as part of the girlfriend's supervision, defendant said he "understood" when officers told him they were about to perform the warrantless search at issue, and the officers reasonably concluded that a prior disagreement between defendant and the girlfriend had been resolved and that the girlfriend was back residing in defendant's home.

2. Search and Seizure—search warrant—probable cause—search of residence—operative and competent facts

In denying defendant's motion to suppress evidence obtained during a warrantless search of his home pursuant to his live-in girlfriend's probation supervision, the trial court did not err by concluding that the search warrant, which was obtained after the warrantless search, was issued on a sufficient showing of probable cause where the warrant was issued based on the personal observations of the police officers investigating the home and was not based upon the statements of the girlfriend—whose credibility was highly questionable—as to what she believed was in the house.

3. Probation and Parole—warrantless search of premises—directly related to purposes of probation supervision—positive drug test

In denying defendant's motion to suppress evidence obtained during a warrantless search of his home, the trial court did not err by concluding that the warrantless search was directly related to the

purposes of his live-in girlfriend's probation supervision pursuant to N.C.G.S. § 15A-1343(b)(13). The search arose from the girlfriend's positive drug screen and the subsequent discovery of drugs on her person and in her vehicle, which caused the probation officer to check the girlfriend's premises in order to determine the extent of her probation violations.

Appeal by defendant from judgments entered 2 February 2021 by Judge William H. Coward in Macon County Superior Court. Heard in the Court of Appeals 10 August 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.

Lindsay Law, PLLC, by Nicholas A. White, Mary Ann J. Hollocker, and Stephen P. Lindsay, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Daniel Lucas ("Defendant") appeals from final judgments entered upon a plea agreement to challenge the denial of his motion to suppress evidence obtained during the warrantless search of his Franklin, North Carolina home (the "Home"). On appeal, Defendant argues the search violated N.C. Gen. Stat. § 15A-1343(b)(13) because the State failed to show that the officers reasonably believed Defendant's Home was probationer Samantha Green's ("Ms. Green") premises, and that the search was "directly related" to Ms. Green's probation supervision. Defendant further argues the trial court erred in concluding the search warrant was issued on a sufficient showing of probable cause. For the reasons explained below, we affirm the order (the "Order") denying Defendant's motion to suppress.

I. Factual & Procedural Background

¶ 2 This case concerns the warrantless search of Defendant's Home conducted pursuant to N.C. Gen. Stat. § 15A-1343(b)(13). The search was initiated following positive drug screening and drug possession by probationer, Ms. Green, who was reported on multiple occasions by her supervising probation officer as being Defendant's live-in girlfriend. On 25 February 2019, Defendant filed a "Verified Motion to Suppress" seeking to suppress any and all evidence obtained during the search of his Home and property on or about 15 August 2018. On 12 February 2020, Defendant filed a "Supplemental Verified Motion to Suppress."

¶ 3 Beginning on 18 February 2020, Defendant's motions were heard in Macon County Superior Court before the Honorable William H. Coward, judge presiding. Testimony from the hearing revealed the following: In September of 2017, the Macon County District Court placed Ms. Green on supervised probation with a North Carolina Department of Public Safety ("DPS") probation office following the entry of a judgment against Ms. Green related to misdemeanor larceny and forgery offenses. The back of the judgment form stated the regular and special conditions of Ms. Green's probation, pursuant to N.C. Gen. Stat. § 15A-1343. The conditions included, *inter alia*, Ms. Green:

> 1. [c]ommit no criminal offense in any jurisdiction.
>
> . . . .
>
> 10. [s]ubmit at reasonable times to warrantless searches by a probation officer of [her] person and [her] vehicle and premises while [she] is present, for purposes directly related to the probation supervision, but [she] may not be required to submit to any other search that would otherwise be unlawful.
>
> . . . .
>
> 12. [n]ot use, possess, or control any illegal drug or controlled substance unless it has been prescribed for [her] by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.

¶ 4 On or about 15 September 2017, Ms. Green's supervising probation officer, Officer Alise Sutton of DPS, conducted an initial intake appointment wherein Ms. Green provided Defendant's Home address as her "premises" address. On the same date, Officer Sutton provided Ms. Green with form DCC-117 – Regular Conditions of Probation – G.S. 15A-1343, which was consistent with the regular probation conditions found on the back of the judgment form. Ms. Green initialed by each condition and signed the form.

¶ 5 Officer Sutton testified that, as a probation and parole officer, her duties include making unannounced visits at probationers' homes and

performing discretionary warrantless searches of probationers' homes. A warrantless search by a probation officer is usually a "plain view" search of the home unless something suspicious is found, in which case, a "deeper search" may be performed by the officer. Early on in a probation case, a probation officer determines the areas of the residence in which the probationer does not have access or does not have a privacy interest. As part of a probation case plan, a probation officer performs an initial visit to a probationer's residence, or "home contact," "to determine if the defendant [is] home." Additionally, a probation officer conducts regular, at least once per month, "offender management contacts" in the probation office, and the first question the probation officer asks the probationer is whether their address has changed.

¶ 6 On 17 September 2017, Officer Sutton performed an initial home contact at the Home. Officer Sutton knocked on the glass door and observed Defendant approach the door, and Ms. Green head in another direction. As Ms. Green walked away, she appeared to be hiding something in the sofa. When Officer Sutton told Ms. Green she, Officer Sutton, was going to see what was hidden, Ms. Green admitted to "smoking a pill" and hiding the remaining "burnt foil" in the sofa. Officer Sutton warned Defendant, whom Officer Sutton noted in her report as being the "boyfriend who owns the house," and Ms. Green that she cannot behave in this manner during subsequent home contacts as the behavior creates a safety concern for the officer and the probationer. Officer Sutton further advised Defendant of two conditions of Ms. Green's probation: (1) that she consent to warrantless searches of her home; and (2) that she has no firearms in her home. Defendant responded he "had no problems" meeting either requirement.

¶ 7 In December 2017, a criminal judgment was entered against Ms. Green in Macon County Superior Court related to pending drug possession charges that preexisted Ms. Green's placement on regular probation. The new judgment included a conditional discharge sentence under N.C. Gen. Stat. § 90-96 as well as a probationary sentence with special conditions.

¶ 8 On 28 December 2017, Officer Sutton performed a warrantless search of Defendant's Home in the presence of Defendant and Ms. Green. During this visit, Officer Sutton walked through the general areas of the Home as well as the hallway and bedroom. Ms. Green showed Officer Sutton her daughter's bedroom and the master bedroom, which Ms. Green described as the bedroom she shared with Defendant. Ms. Green informed Officer Sutton that her friend was sleeping in her daughter's bedroom. Officer Sutton recognized the name of Ms. Green's friend

and advised Ms. Green that her friend is a "known drug user." Officer Sutton further explained that it was a violation of Ms. Green's probation for a known drug user to be in the home.

¶ 9 To balance caseloads within the probation office, Officer Sutton transferred Ms. Green's file on 8 May 2018 to Officer Christie Kinsland, who became Ms. Green's primary supervising probation officer. On 4 June 2018, Ms. Green confirmed while in Officer Kinsland's office that the Home was her residence. During June 2018, Officer Kinsland made multiple attempts to perform a "home contact" with Ms. Green. No one was available at the Home at the times of these visits.

¶ 10 On 24 July 2018, Officer Kinsland visited the Home with another officer and spoke to Defendant. Defendant was upset and advised Ms. Green was not home nor had she been home for "several nights." Officer Kinsland observed filled trash bags on the front porch, and Defendant stated he had placed Ms. Green's belongings in those trash bags.

¶ 11 On 26 July 2018, Ms. Green reported to Officer Kinsland, as instructed. She notified Officer Kinsland that she "had worked everything out" with "her boyfriend" and would be returning to his Home that night. On 29 July 2018, Officer Kinsland performed a home contact at the Home and found Ms. Green "standing in the front yard." Ms. Green reported she and Defendant "were doing a lot better and . . . were working things out." Officer Kinsland noted the trash bags of clothes were no longer visible on the porch. On 6 August 2018, Ms. Green visited Officer Kinsland's office for an offender management contact where she confirmed her address as Defendant's Home.

¶ 12 On 15 August 2018, Ms. Green reported to Officer Kinsland to submit to a drug screen. The drug screen came back "positive for cocaine, THC, and opiates." This was Ms. Green's first drug screen that Officer Kinsland had "seen . . . test positive for cocaine." Officer Kinsland performed a pat down search on Ms. Green's person because she was acting nervously, and her behavior was "off." Officer Kinsland found no drugs or contraband during this search.

¶ 13 Officer Kinsland decided to search Ms. Green's vehicle based on her suspicious behavior and drug screen results. Ms. Green admitted to having a pill in the glove compartment when Officer Kinsland asked if she had any drugs or weapons in the vehicle. After the pill was found, Ms. Green stated she had pills in her purse, located in the back seat of the vehicle.

¶ 14 While Officer Kinsland and other officers performed the search of the vehicle, Officer Sutton observed Ms. Green "put[ting] her hands

down the front of her pants." Ms. Green then pulled a "baggie full of pills" from the front of her pants. Shortly thereafter, Ms. Green claimed to the officers that she was working as an informant for Detective Matthew Breedlove of the Macon County Sheriff's Office. Officer Sutton called Detective Breedlove to the scene of the Macon County Courthouse. Detective Breedlove arrived and confirmed Ms. Green was not an informant.

¶ 15 Detective Breedlove observed the pills and "formed an opinion that [they were] an oxycodone illegal substance." Officer Kinsland and Detective Breedlove announced their plans to search Ms. Green's premises. Officers Kinsland and Sutton, Probation Officer John Coker, Detective Breedlove, and Ms. Green headed to Ms. Green's residence, the Home. When they arrived at the Home sometime between 5:00 p.m. and dusk, Defendant was on his porch, and two Hispanic males were standing by a truck in the driveway. The two men claimed to be employees of Defendant. The officers "could smell the obvious [odor] of marijuana . . . emitting from the truck." Detective Breedlove searched the vehicle and found "some green vegetable material [he] believed to be marijuana and some drug paraphernalia . . . ."

¶ 16 Officer Kinsland advised Defendant the officers were there to conduct a warrantless search of the Home as part of Ms. Green's probation, and Defendant stated he "understood." Detective Breedlove remained outside on the deck of the Home for security reasons. As the officers entered the residence, they "immediately . . . detect[ed] . . . a strong odor of marijuana." Officer Kinsland asked Ms. Green if she had any illegal drugs, controlled substances, or drug paraphernalia. Ms. Green directed Officer Kinsland to her bedroom and advised there was marijuana in the "bedside table on her side of the bed." Officer Sutton and Defendant remained in the living room during the search. Detective Breedlove then entered the residence and recovered from a nightstand in the bedroom "a small amount" of what he believed to be marijuana, based on his training and experience.

¶ 17 Officer Kinsland and Officer Coker continued to clear the residence, looking in places where a person could hide, and made their way down an unlocked stairwell leading to the basement. Defendant "saw [the officers] go down the steps." From halfway down the staircase, Officer Kinsland "saw three long guns in the corner[,] up against the wall." Officer Kinsland also found "a scale and some baggies" as she searched the room. At that point, Defendant objected to the search, contending the officers had no "right to search [the] area due to restricted access." The officers stopped the search and cleared the home while Detective

Breedlove headed to his office to prepare a search warrant. At no time prior to the search on 15 August 2018 did Defendant inform the probation officers of any area that "was off limits or [had] limited access . . . ."

¶ 18 Officer Kinsland spoke with Ms. Green while Officer Kinsland waited for Detective Breedlove to return with the search warrant. Ms. Green confided in Officer Kinsland that "there [were] pounds of marijuana in the [basement gun] safe and there was a lot of money . . . and some opiates and some Xanax . . . ."

¶ 19 Detective Breedlove submitted his search warrant application at 9:22 p.m., and the search warrant was executed at 9:50 p.m. that night at Defendant's Home. Detective Breedlove spoke with Defendant, provided him a copy of the executed search warrant, and read the warrant to him. The officers completed the search of the Home and recovered, *inter alia*, forty-two sealed, plastic freezer bags of marijuana; ammunition; a rifle; various pills; and a bag containing $42,594.00 in United States currency. Both Defendant and Ms. Green were arrested.

¶ 20 On 26 November 2018, Defendant was indicted by a Macon County grand jury on the charges of trafficking in opium or heroin, pursuant to N.C. Gen. Stat. § 90-95(h)(4); trafficking in marijuana, pursuant to N.C. Gen. Stat. § 90-95(h)(1); and knowingly and intentionally maintaining a dwelling house used for keeping and/or selling a controlled substance, pursuant to N.C. Gen. Stat. § 90-108(a)(7).

¶ 21 On 10 July 2020, the trial court entered its written suppression Order, denying Defendant's 25 February 2019 Verified Motion to Suppress and his 12 February 2020 Supplemental Verified Motion to Suppress. The trial court concluded, *inter alia*, (1) "the search of [Ms.] Green's premises was directly related to the purposes of her [probation] supervision"; (2) "the probation officers who conducted the warrantless search on August 15, 2018 reasonably believed that [Defendant's Home] was [Ms.] Green's premises"; (3) "the probation officers' viewing of [evidence, including digital scales, marijuana, baggies, and a large gun safe in Defendant's basement] was proper, and was not a violation of Defendant's statutory or constitutional rights"; and (4) the application of the search warrant complied with the applicable statutory and constitutional requirements and "was adequately supported by probable cause."

¶ 22 On 2 February 2021, Defendant pled guilty to the charges of trafficking in opium or heroin and trafficking in marijuana pursuant to a plea agreement, and the State dismissed the remaining charge. On 8 February 2021, Defendant filed written notice of appeal. We note Defendant expressly reserved his right to appeal from the Order in the plea agreement.

See State v. Pimental, 153 N.C. App. 69, 74, 568 S.E.2d 867, 870 (2002) (explaining N.C. Gen. Stat. § 15A-979(b) requires a defendant to notify the State and the trial court during plea negotiations of his or her intention to appeal from an order denying a motion to suppress to avoid waiving the right to appeal following a guilty plea), *overruled on other grounds by State v. Killete*, 2022-NCSC-80, ¶ 16.

II. Jurisdiction

¶ 23 Defendant contends "Judge Coward's order denying [his] Verified Motion to Dismiss and Supplemental Verified Motion to Dismiss is appealable to the Court of Appeals pursuant to N.C. Gen. Stat. § 15A-979(b)." We acknowledge Defendant's reference to motions to dismiss in the Statement of Grounds for Appellate Review section of his brief is a typographical error. Instead, Defendant's appeal concerns his Verified Motion to Suppress and Supplemental Verified Motion to Suppress. We agree this Court has jurisdiction to address Defendant's appeal from the Order pursuant to N.C. Gen. Stat. § 15A-979(b) (2021).

III. Issues

¶ 24 The issues before this Court are whether the trial court erred in concluding: (1) a probation officer's belief as to the location of probationer Ms. Green's premises was reasonable, thereby supporting the officers' authority to conduct a warrantless search of Defendant's Home under N.C. Gen. Stat. § 15A-1343(b)(13); (2) the search warrant was issued on a sufficient showing of probable cause where the officer did not include information about Ms. Green's credibility as an informant or the source of her information; and (3) the warrantless search of Ms. Green's premises was directly related to the purposes of her supervision, as required by N.C. Gen. Stat. § 15A-1343(b)(13).

IV. Standard of Review

¶ 25 Our Court's 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). Unchallenged findings of fact "are deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted). "Conclusions of law are reviewed *de novo* and are subject to full review." *Id.* at 168, 712 S.E.2d at 878 (citation omitted and emphasis added).

¶ 26 At a hearing on a motion to suppress, "the burden is upon the [S]tate to demonstrate the admissibility of the challenged evidence[.]" *State v. Powell*, 253 N.C. App. 590, 595, 800 S.E.2d 745, 749 (2017) (quoting *State v. Cheek*, 307 N.C. 552, 557, 229 S.E.2d 633, 636 (1983)).

V. Analysis

¶ 27 Defendant's principal argument on appeal is the trial court erred in denying his motion to suppress. The State contends Defendant gave implied consent to the search of his home, the search warrant was based on probable cause, and the search was directly related to the supervision of Ms. Green's probation; therefore, we should affirm the Order. After careful review, we agree with the State.

A. Reasonable Basis to Conduct Probationary Search of Defendant's Home

¶ 28 **[1]** Defendant challenges the portion of conclusion of law 9, which states, "the probation officers had a reasonable belief that [Defendant's Home] was [Ms.] Green's premises," as not supported by findings of fact. He also challenges finding of fact 2, which similarly states this conclusion. Because we conclude finding of fact 2 is a conclusion of law, we review it as such, concurrently with conclusion of law 9. *See State v. Campola*, 258 N.C. App. 292, 298, 812 S.E.2d 681, 687 (2018) ("If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' *de novo*.").

¶ 29 The Fourth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV; *see State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997).

¶ 30 "Consent . . . has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given." *Smith*, 346 N.C. at 798, 488 S.E.2d at 213. "The question whether consent to a search was in fact 'voluntary' or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of all the circumstances." *State v. Motley*, 153 N.C. App. 701, 707, 571 S.E.2d 269, 273 (2002) (citation omitted). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the

exchange between the officer and the suspect?" *State v. Stone*, 362 N.C. 50, 53, 653 S.E.2d 414, 417 (2007) (quoting *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 1803–04, 114 L. Ed. 2d 297, 302 (1991)).

¶ 31 A warrantless search pursuant to a probation condition has also been found to satisfy the Fourth Amendment prohibition against unreasonable searches. *United States v. Knights*, 534 U.S. 112, 121, 122 S. Ct. 587, 592, 151 L. Ed. 2d 497, 506 (2001). "Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *State v. Robinson*, 148 N.C. App. 422, 428, 560 S.E.2d 154, 158 (2002) (quoting *Knights*, 534 U.S. at 119, 122 S. Ct. at 591, 151 L. Ed. 2d at 505).

¶ 32 In North Carolina, a court may grant the condition of warrantless searches of a probationer. N.C. Gen. Stat. § 15A-1343(b)(13) (2021); *see United States v. Midgette*, 478 F.3d 616, 624 (4th Cir. 2007) (discussing how North Carolina has "narrowly tailored" the authorization of warrantless searches under N.C. Gen. Stat. § 15A-1343 to meet the State's needs of supervising probation "to promote [probationers'] rehabilitation and protect the public's safety"), *writ denied*, 551 U.S. 1157, 127 S. Ct. 3032, 168 L. Ed. 2d 749. Under the statute, a probationer must "[s]ubmit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision," as a regular condition of probation. N.C. Gen. Stat. § 15A-1343(b)(13).

¶ 33 In his first argument, Defendant does not challenge the constitutionality of N.C. Gen. Stat. § 15A-1343, nor does he contest that the warrantless search was made at a reasonable time or that Ms. Green was present for the search. Rather, he argues the probation officer's belief that his Home was Ms. Green's "premises" was unreasonable. Defendant provides three reasons as support for this argument. We consider in turn each of Defendant's arguments as to this conclusion of law.

¶ 34 First, Defendant argues "the facts and circumstances available to [Officer] Kinsland as of 15 August 2018 included notice that Ms. Green likely moved out of [his Home] because [Officer] Kinsland had formed that opinion as of 24 July 2018." We disagree.

¶ 35 While it is true the trial court found as fact that "[Officer] Kinsland concluded, from her conversation with Defendant on July 24, 2018 and from seeing the bags on the porch, that [Ms.] Green and Defendant had 'parted ways,'" the trial court also found as fact: (1) Officer Kinsland

saw Ms. Green in Defendant's front yard five days later, on 29 July 2018, during a home contact; (2) Ms. Green told Officer Kinsland during this 29 July 2018 visit that she and Defendant "were doing a lot better and were trying to work things out"; and (3) Ms. Green again verified her address as the Home on 6 August 2018. Based on the events subsequent to 24 July 2018, Officer Kinsland could reasonably conclude Ms. Green and Defendant had reconciled since 24 July 2018, and the couple continued to cohabitate in late July 2018.

¶ 36 Second, Defendant argues Officer Kinsland failed to verify Ms. Green moved back in with Defendant before 15 August 2018 by speaking with Defendant, observing Ms. Green's daughter in the house, verifying Ms. Green had a key to the house, or entering the house. We disagree and conclude such actions were not necessary for Officer Kinsland to form a reasonable belief that Defendant's Home was Ms. Green's premises.

¶ 37 Officer Kinsland not only confirmed with Ms. Green that she was living in Defendant's Home at least three times between 24 July 2018 and 15 August 2018, but Officer Kinsland performed a home contact on 29 July 2018 where Officer Kinsland found Ms. Green standing in the front yard of the Home. Additionally, Ms. Green told Officer Kinsland on a least two occasions she made up with Defendant. Therefore, it was reasonable for Officer Kinsland to conclude Defendant's Home was Ms. Green's premises on 15 August 2018.

¶ 38 Third, Defendant argues it was unreasonable for Officer Kinsland to rely on Ms. Green's assertion of her home address because "Ms. Green had proven to be untruthful and uncredible." We disagree.

¶ 39 Here, unchallenged findings of fact 9, 11, 18(a)-(f), 18(h)-(j), 18(l)-(m), 18(r), 18(t), 18(v)-(x), 18(z), 19, 33, 35, 38, and 42 demonstrate that before 15 August 2018, Ms. Green verified to her probation officer that her premises was Defendant's Home on at least nine occasions; Ms. Green had never provided an address to her probation officer other than that of the Home from September 2017 to August 2018; Ms. Green never denied living at the Home; and Ms. Green's supervising probation officer made at least one other warrantless search of the Home in the presence of Ms. Green and Defendant to which Defendant did not object. Moreover, Defendant replied he "understood" when Officer Kinsland advised him the officers were at his Home to perform a warrantless search on the evening of 15 August 2018. A reasonable person having such an exchange with another's probation officer would have notified the officer that the probationer no longer resided at the address—if that were true. *See Stone*, 362 N.C. at 58, 653 S.E.2d at 417. Based on the totality of

the circumstances, Defendant's response to Officer Kinsland indicated his implied consent to the search of his Home. *See Motley*, 153 N.C. App. at 707, 571 S.E.2d at 273. Lastly, the above findings support the conclusion "the probation officers had a reasonable belief that the [Home] was [Ms.] Green's premises"; therefore, finding of fact 2 and this portion of conclusion of law 9 are binding on appeal. *See Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

B. Substantial Basis for Concluding Probable Cause Existed

¶ 40 **[2]** Next, Defendant challenges conclusion of law 21, which provides "[t]he affidavit prepared by Detective Breedlove was adequate to establish probable cause for a search of the Defendant's residence," on the basis it is not sufficiently supported by findings of fact. Likewise, Defendant argues finding of fact 61 is not supported by competent evidence. The State contends the trial court properly concluded the search warrant was based on probable cause by considering only the facts in the affidavit that the trial court found to be "operative and competent," and excluded the remaining facts. After careful review, we agree with the State.

¶ 41 "The common-sense, practical question of whether probable cause exists must be determined by applying a totality of the circumstances test." *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 597 (2014) (citation omitted). Our Supreme Court explained that under the totality of the circumstances test,

> [t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

State v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257–58 (1984) (citation omitted).

¶ 42 "The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items

will aid in the apprehension or conviction of the offender." *Id.* at 636, 319 S.E.2d at 256 (citation omitted). "Reviewing courts should give great deference to the magistrate's determination of probable cause and should not conduct a *de novo* review of the evidence to determine whether probable cause existed at time the warrant was issued." *State v. Greene*, 324 N.C. 1, 9, 376 S.E.2d 430, 436 (1989) (emphasis added and citations omitted), *vacated on other grounds by* 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990).

¶ 43 In *State v. Stinson*, our Court considered the issue of whether the inclusion of an informant's tip without a proper basis invalidated a search warrant affidavit where the affiant also included substantial personal observations. 39 N.C. App. 313, 249 S.E.2d 891, *disc. rev. denied*, 296 N.C. 739, 254 S.E.2d 180 (1979). We reasoned it was not necessary to consider the reliability of the informant or understand where the informant obtained the information when it was clear "the affiant did not rely heavily on th[e] hearsay information, and the magistrate's finding of probable cause could not have been based primarily on the hearsay." *Id.* at 318, 249 S.E.2d at 894. "Where the affiant relies heavily on an informant's tip[,] the two-prong test of *Aguilar v. Texas*, 378 U.S. 108, [84 S. Ct. 1509], 12 L. Ed. 2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, [89 S. Ct. 584], 21 L. Ed. 2d 637 (1969), must be met." *Id.* at 317, 249 S.E.2d at 893–94; *see Illinois v. Gates*, 462 U.S. 213, 239, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (replacing the two-prong test of *Aguilar* and *Spinelli* with the totality of the circumstances test). We vacated and remanded the order suppressing evidence, concluding the personal observations described in the search warrant affidavit provided the magistrate with sufficient facts and circumstances to establish probable cause. *Stinson*, 39 N.C. App. at 319, 249 S.E.2d at 894–95.

¶ 44 In the case *sub judice*, we conclude the affiant, Detective Breedlove, did not "rely heavily" on Ms. Green's statements, and the trial court properly considered Detective Breedlove's personal observations in concluding probable cause existed. *See id.* at 318, 249 S.E.2d at 894.

¶ 45 Here, the affiant, Detective Breedlove, described his approximate fourteen years in law enforcement, including his education, training, and experience. Detective Breedlove swore to have experience in investigating the distribution of prescription medication, the manufacture of marijuana, and drug trafficking. He also swore to have "considerable training and experience in relation to the possession, sale and distribution of controlled substances in and around the Macon County and Western North Carolina area."

¶ 46 The affidavit described Detective Breedlove taking a call from Officer Sutton who told him that Ms. Green made a voluntary statement to Officer Sutton that she was in possession of a large amount of opioids and $1,000.00 in cash. Although the information from Officer Sutton was hearsay, a magistrate could have reasonably found Officer Sutton to be a credible source who obtained the knowledge regarding Ms. Green from her direct observations. *See Arrington*, 311 N.C. at 638, 319 S.E.2d at 257–58.

¶ 47 The affidavit indicated Detective Breedlove met with the probation officers and Ms. Green where they recovered a bag of pills, identified as "oxycodone hydrochloride 30 mg tablets." Detective Breedlove accompanied the probation officers to Ms. Green's residence where they conducted a warrantless search and found a plastic bag "containing green vegetable like matter in a dresser." In a downstairs room, the officers found in plain view a gun safe, "scales with marijuana," and firearms. Thereafter, the officers confirmed Defendant was "a convicted felon out of Florida."

¶ 48 Finally, the affidavit stated the probation officers "gained information from [Ms.] Green that she has known of large amounts of marijuana in the [H]ome," she "believes that . . . drugs are in the [H]ome currently," and that Defendant is a convicted felon. We note, however, the affidavit does not consider the reliability of Ms. Green or the grounds upon which she formed her belief that drugs could be found in the Home on 15 August 2018. *See Arrington*, 311 N.C. at 638, 319 S.E.2d at 257–58; *see also State v. Crawford*, 104 N.C. App. 591, 596, 410 S.E.2d 499, 501 (1991) ("If the affidavit is based on hearsay information, then it must contain the circumstances underlying the informer's reliability and the basis for the informer's belief that a search will uncover the objects sought by the police.").

¶ 49 Notwithstanding the inclusion of informant information lacking a proper basis, the affidavit demonstrates Detective Breedlove did not "rely heavily" on the hearsay information provided by Ms. Green; thus, we need not consider the propriety of these statements. *See Stinson*, 39 N.C. App. at 317, 249 S.E.2d at 893–94. Rather, Detective Breedlove details the personal observations he made as well as the direct observations of Officer Sutton, which prompted her call to Detective Breedlove. These observations provided the magistrate with a substantial basis for finding the existence of probable cause. *See Stinson*, 39 N.C. App. at 317, 249 S.E.2d at 893; *Arrington*, 311 N.C. at 638, 319 S.E.2d at 257–58.

¶ 50 Further, the trial court, which was charged with the duty of evaluating the facts and applying the appropriate legal standards, properly

disregarded the information gained from Ms. Green's hearsay statements. *See State v. McKinney*, 361 N.C. 53, 63, 637 S.E.2d 868, 875 (2006) (considering the trial court's legal and factual basis for denying the defendant's motion to suppress where the search warrant affidavit included tainted information). In its Order, the trial court made the following pertinent findings of fact:

> 59. Although the application for the search warrant contains a lot of other information, on its face, the operative and competent facts are (paraphrased):
>
> a. That in the course of a warrantless probation search of the residence of [Ms.] Green, marijuana had been found in an upstairs bedroom before there ([the Home]).
>
> b. That in the course of the warrantless probation search, probation officers had opened an interior door that allowed access to the downstairs area of the home, and downstairs they had seen "digital scales with marijuana" on a bed in the basement.
>
> c. That probation officers had seen a large gun safe in the basement.
>
> d. That the owner of the house is a convicted felon.
>
> e. That individuals in the driveway of the residence admitted to possession of marijuana in the truck parked with them in the driveway.
>
> 60. The operative and competent facts stated above are based in part on what was told to Detective Breedlove by probation officers.
>
> 61. The operative and competent facts stated above do not include, and are not based upon, statements by [Ms.] Green as to what she believed to be in the house, because she did not state how she came to know such information and her credibility is highly questionable.

¶ 51 The trial court then made the following pertinent conclusions of law:

> 21. The affidavit prepared by Defendant Breedlove was adequate to establish probable cause for a search of Defendant's residence.
>
> . . . .
>
> 23. It was acceptable for Detective Breedlove to base his affidavit on statements by fellow probation officers as to what they personally saw in plain view.
>
> 24. The court concludes that the application for the search warrant in this matter complied with the requirements of [N.C. Gen. Stat. §] 15A-244, the Fourth Amendment of the United States Constitution, Article I, Section 20 of the North Carolina Constitution, and related case law, and that the search warrant was adequately supported by probable cause.

(Citations omitted).

¶ 52 These findings and conclusions tend to show the trial court considered the facts and circumstances set forth in the affidavit, and properly determined the weight to be given to Ms. Green's statements. *See Arrington*, 311 N.C. at 638, 319 S.E.2d at 257–58. In finding of fact 61, the trial court identified Ms. Green's statements as hearsay, found Ms. Green's credibility "highly questionable," and found Ms. Green did not provide the source of her information. The officers' testimonies regarding Ms. Green and the search warrant affidavit support finding of fact 61. *See Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

¶ 53 Finding of fact 59 outlines the "operative and competent facts" considered by the trial court, which provided probable cause to believe criminal activity was afoot in the Home. *See Arrington*, 311 N.C. at 636, 319 S.E.2d at 256. Moreover, finding of fact 59 is not challenged on appeal; thus, it is "deemed to be supported by competent evidence and [is] binding on appeal." *See Biber*, 365 N.C. at 168, 712 S.E.2d at 878. Therefore, the trial court did not err in concluding Detective Breedlove's personal observations set out in the search warrant affidavit were sufficient to establish probable cause for a search of the Home. *See Arrington*, 311 N.C. at 638, 319 S.E.2d at 257–58; *Stinson*, 39 N.C. App. at 318, 249 S.E.2d at 894.

C. Warrantless Search Directly Related to Probation Supervision

¶ 54 **[3]** Finally, Defendant argues the trial court erred in concluding the warrantless search of his Home was "directly related" to the purposes

of Ms. Green's probation supervision, as mandated by N.C. Gen. Stat. § 15A-1343(b)(13). Relying on *State v. Powell*, 253 N.C. App. 590, 800 S.E.2d 745 (2017), Defendant further argues the search was unlawful because the officers' testimonies revealed their "warrantless search included *a purpose* of investigating potential criminal conduct from which new charges against Ms. Green could be derived." (Emphasis added). The State argues the warrantless search was directly related to Ms. Green's probation supervision because ascertaining whether and to what extent Ms. Green was not in compliance with the terms and conditions of her probation were the duties of the supervising probation officer. We agree with the State.

¶ 55 Under N.C. Gen. Stat. § 15A-1343, a probation officer may search a probationer's premises as a regular condition of probation when the probationer is present and "*for purposes directly related to the probation supervision* . . . ." N.C. Gen. Stat. § 15A-1343(b)(13) (emphasis added). In *Powell*, this Court interpreted the General Assembly's 2009 amendment to N.C. Gen. Stat. § 15A-1343(b)(13), changing the phrase "for purposes reasonably related to the probation supervision" to "for purposes *directly related* to the probation supervision . . . ." *Powell*, 253 N.C. App. at 599–00, 800 S.E.2d at 751 (emphasis added) ("The word "directly" has been defined as "in unmistakable terms."). The *Powell* Court explained that this amendment demonstrated the General Assembly's intent "to impose a higher burden on the State in attempting to justify a warrantless search of a probationer's home than that existing under the former language of this statutory provision." *Id.* at 600, 800 S.E.2d at 751 (emphasis removed).

¶ 56 In *Powell*, the defendant argued the trial court erred in denying his motion to suppress evidence obtained in a warrantless search of his home. *Id.* at 593, 800 S.E.2d at 748. Specifically, he argued the warrantless search was not "directly related" to the supervision of his probation, as required by N.C. Gen. Stat. § 15A-1343 (b)(13). *Id.* at 591, 800 S.E.2d at 746–47. This Court concluded the search was unlawful because the State failed to meet its burden of showing the warrantless search complied with N.C. Gen. Stat. § 15A-1343(b)(13). *Id.* at 605, 800 S.E.2d at 754. To reach that conclusion, we carefully considered the testimonies of the officers who searched the defendant's home since this was the evidence upon which the State relied to argue the search was valid. *Id.* at 595, 800 S.E.2d at 749. The testimony revealed the search of the defendant's home was initiated by a United States Marshal's Service task force as part of an ongoing operation "targeting violent offenses involving firearms and drugs." *Id.* at 604, 800 S.E.2d at 753 (emphasis removed). The record did

not show the "[d]efendant's own probation officer was even notified—much less consulted—regarding the search of [the d]efendant's home." *Id.* at 604 n.3, 800 S.E.2d at 753 n.3. Additionally, the officers were not aware of the defendant engaging in any illegal activity prior to or at the time of the search. *Id.* at 597, 800 S.E.2d at 750. Importantly, the testimony failed to show the search was "directly related" to the supervision of the defendant's probation. *Id.* at 605, 800 S.E.2d at 754. Thus, the warrantless search was investigatory in nature rather than "supervisory" and was therefore unlawful. *Id.* at 604–05, 800 S.E.2d at 754.

¶ 57 In this case, the record evidence and testimony at the suppression hearing show Ms. Green was placed on supervised probation for eighteen months in September 2017, pursuant to a judgment entered by the Macon County District Court. In December 2017, the Macon County Superior Court entered a judgment against Ms. Green for the conditional discharge of felony drug possession charges, pursuant to N.C. Gen. Stat. § 90-96(a1). The conditional discharge included twelve months of supervised probation under regular probation conditions as well as special conditions, including Ms. Green enroll in a "drug education school." On 15 August 2018, Ms. Green tested positive for cocaine, THC, and opiates—violating an express regular condition of her probation: to "[n]ot use, possess, or control any illegal drug or controlled substance . . . ." *See* N.C. Gen. Stat. § 15A-1343(b)(15) (2021). According to Officer Kinsland, Ms. Green was acting nervously and tested positive for cocaine for the first time while under Officer Kinsland's probation supervision. During the search of Ms. Green's vehicle, a bag of oxycodone pills was found on her person, which led Officer Kinsland to search Ms. Green's premises.

¶ 58 The facts of the instant case are readily distinguishable from *Powell* because here, Ms. Green's probation officer prompted the search in direct response to Ms. Green's actions, which not only violated her probation conditions but were also unlawful. Conversely, in *Powell*, a distinct law enforcement agency task force initiated the search, using "a random selection of offenders," to further its own goals. *Powell*, 253 N.C. App. at 592, 597, 800 S.E.2d at 747, 750; *see also State v. Jones*, 267 N.C. App. 615, 625–26, 834 S.E.2d 160, 167–68 (2019) (distinguishing the facts of the case from *State v. Powell* partly because the search in *Powell* was conducted by a separate law enforcement agency serving its own purpose). Furthermore, Officer Kinsland had reason to believe Ms. Green was engaging in illegal activity and violating the conditions of her probation following her positive drug screen and vehicle search. These events caused Officer Kinsland to expand the scope of her search to Ms. Green's premises to determine the nature and extent of Ms. Green's probation violations.

¶ 59 In reviewing the testimony of the officers, Detective Breedlove testified he was present at the search of the Home to both "investigate new criminal behavior" *and* "to assist probation." He did not actually take part in the search of the Home or enter the residence until contraband was found. Although the search may have served two purposes, (1) to further the supervisory goals of probation, and (2) to investigate other potential criminal behavior, we conclude the dual purpose of the search did not make the search unlawful under N.C. Gen. Stat. § 1343(b)(13).

¶ 60 When asked on cross examination if she had training as to the meaning of "directly related to the probation supervision," Officer Sutton testified:

> Well, yes. And that would be, like you said, [Ms. Green] was on probation for larcenies and for forgery. It is well established early that she had drug addiction, which that addiction could have been related to these larcenies, could have been related to these forgeries.
>
> So when [Ms. Green] presented a problem with the drug addiction, she was referred to treatment, and we made proper steps. Then on the day in question, the 15th of August when she came in and she not only failed her drug screen, but she possessed an illegal substance on her at that time, to me that just opened the door on into the residence.

¶ 61 Officer Kinsland testified it is common for probation officers to request law enforcement assistance when drugs are found or when there is evidence of a crime because probation officers cannot bring charges—they can only enter probation violations, which are later approved by the chief probation officer and served on the probationer. Officer Kinsland, Ms. Green's supervising probation officer, led the search of the Home although other officers, including Detective Breedlove and Officer Sutton, were present at the Home. Officer Kinsland testified on cross examination that she and the other officers "just upped the search" to Ms. Green's premises following the positive drug screen and the search of Ms. Green's vehicle, where "a trafficking amount" of opiate pills was found.

¶ 62 Further, we note Detective Breedlove's and the deputies' presence at the scene of the warrantless search of the premises did not invalidate the search under N.C. Gen. Stat. § 1343(b)(13). *See State v. Howell*, 51 N.C. App. 507, 509, 277 S.E.2d 112, 114 (1981) (rejecting the defendant's argument that the presence of police officers to help with

the warrantless search pursuant to N.C. Gen. Stat. § 1343(b) made the search unreasonable).

¶ 63 Lastly, Defendant does not challenge finding of fact 33, which states Officer Kinsland's purpose in performing the warrantless search of Ms. Green's premises was to "determin[e] if [Ms.] Green was trafficking in controlled substances, with the goal of minimizing recidivism and helping her successfully complete her probation . . . ." The trial court also made findings, not challenged on appeal, regarding the events that led to the officers' decision to search her premises, including the positive drug screen and vehicle search incident, which are not challenged on appeal. Therefore, these findings "are deemed to be supported by competent evidence and are binding on appeal." *See Biber*, 365 N.C. at 168, 712 S.E.2d at 878. The findings in turn support the trial court's conclusion "that the search of [Ms. Green's] premises was directly related to the purposes of her supervision." *Id*. at 168, 712 S.E.2d at 878.

¶ 64 Therefore, the trial court did not err in concluding the warrantless search of Ms. Green's premises was "directly related" to her probation supervision under Officer Kinsland. *See* N.C. Gen. Stat. § 1343(b)(13); *see also Powell*, 253 N.C. App. at 595, 800 S.E.2d at 749.

VI. Conclusion

¶ 65 We hold the trial court did not err in concluding the warrantless search of the Home was authorized by N.C. Gen. Stat. § 1343(b)(13) because the State met its burden of showing that the Home was Ms. Green's premises and that the search was directly related to Ms. Green's probation supervision. In addition, we hold the trial court did not err in concluding the affidavit prepared by Detective Breedlove was adequate to establish probable cause for a search of Defendant's Home. Accordingly, we affirm the Order.

AFFIRMED.

Judges MURPHY and JACKSON concur.

STATE v. MOORE

[286 N.C. App. 341, 2022-NCCOA-716]

STATE OF NORTH CAROLINA
v.
ERIC DOUGLAS MOORE

No. COA22-220

Filed 1 November 2022

1. Constitutional Law—effective assistance of counsel—consent to trial strategy—representation not deficient

The defendant in a first-degree murder trial received neither per se nor prejudicially ineffective assistance of counsel where he had consented to defense counsel's strategy of conceding that defendant fired the gunshot that killed the victim and of arguing that defendant was guilty only of lesser-included offenses (namely, second-degree murder). Further, defense counsel's performance was not deficient where he presented testimony showing potential shortcomings in processing the crime scene and where, at closing argument, he presented a coherent argument that the State had not met its burden of proving the premeditation and deliberation elements of first-degree murder.

2. Evidence—lay opinion—murder trial—prejudice analysis

In a first-degree murder prosecution, where defendant was charged with fatally shooting a woman he was selling drugs to, the trial court did not commit prejudicial error by allowing a detective to testify that it would have been easier for defendant to lure the woman by "continu[ing] on the normal path of drug business" than by threatening to kill her. The State did not specifically refer to the detective's testimony during closing arguments, and therefore defendant failed to show a reasonable possibility that the jury would have reached a different verdict absent the testimony.

Appeal by Defendant from judgment entered 24 May 2021 by Judge David T. Lambeth, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 4 October 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Francisco Benzoni, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Eric Douglas Moore appeals from judgment entered upon a jury verdict of guilty of first-degree murder. Defendant contends that his counsel was per se ineffective because he "implicitly admitted [Defendant's] guilt to second-degree murder[;]" that his counsel was prejudicially ineffective because he promised a defense that was not delivered, presented a "pointless" defense witness, and asserted an incoherent defense that conceded guilt without permission; and that the trial court erred by admitting certain opinion evidence. After careful review, we conclude Defendant did not receive ineffective assistance of counsel and admission of the lay witness opinion testimony did not amount to prejudicial error.

I. Procedural History and Factual Background

¶ 2 On 17 December 2018, Mary McBroom and her friend Tiyanna Love drove to the Sheetz on Alamance Road to purchase drugs from Defendant. McBroom told Love she intended to pay for the drugs with a "fake 100 dollar bill." Love "had told her not to do it but she was so desperate to do it she did it anyways." McBroom kept her car running while she walked over to Defendant's car to retrieve the drugs. After the purchase, she jogged back to the car and sped off. Defendant was accompanied by Alexxa McKnight, who was in the passenger seat during the transaction. After McBroom left, Defendant looked over at McKnight, "flashed" the money, and said "I think I just got got. This is not real." According to McKnight, Defendant appeared agitated and upset after the transaction.

¶ 3 Shortly after the transaction, McBroom and Love received text messages from Defendant with "[l]aughing emojis and saying, watch this." Defendant called McBroom but she did not answer. Around this time, Defendant called Quiana Miles, McBroom's friend with whom she was staying, via Facebook and told her that he was looking for McBroom because "she had gave him a fake -- some fake money[,]" and that "he didn't play about his money basically." McBroom and Love returned to Love's boyfriend's house and "chilled until like 3:00 -- like 4:00 or 5:00 in the morning" before McBroom went to Miles' residence on Tucker Street, where she was staying.

¶ 4 Between 4:04 A.M. and 4:21 A.M., Defendant and McBroom exchanged a series of text messages in which McBroom acknowledged that she owed Defendant money, Defendant asked when she would have it, and McBroom replied that she would try and donate plasma. From

approximately 4:22 A.M. to 5:51 A.M., McBroom called Defendant 22 times attempting to meet up with him. Defendant told McKnight and her boyfriend, Laking Crews, that he wanted to go to Tucker Street Apartments to "pick something up." Shortly after McKnight backed into a parking spot at Tucker Street, "somebody approached the back of the car on [Defendant's] side." McKnight heard a short span of dialogue and then a gunshot. McKnight was startled and drove away. After driving a short distance, Defendant told McKnight to "stop and get the 'F' out of the driver's seat." Defendant drove to the Short Stop and then his cousin's house before he "dropped himself off at home."

¶ 5 At approximately 6:18 A.M., McBroom called the police and reported that she had been shot. Officers arrived on the scene and found McBroom "laying on their back face up, not moving." McBroom ultimately died from "a penetrating gunshot wound of the torso." The autopsy revealed that there was no soot or stippling in the entrance wound, and "[t]here were no other findings that would allow determination of the range of fire."

¶ 6 Defendant was indicted for first-degree murder, and the case proceeded to trial on 18 May 2021. Prior to opening statements and outside the presence of the jury, defense counsel informed the trial court that Defendant planned to concede that he fired the shot that resulted in or proximately caused McBroom's death. Defense counsel also informed the trial court that at some point, he might argue that Defendant was guilty of lesser-included offenses. The trial court conducted a colloquy wherein Defendant indicated that he consented to this strategy.

¶ 7 During opening statements, defense counsel acknowledged that Defendant was a drug dealer and had previously sold drugs to McBroom, that Defendant met with McBroom at Tucker Street Apartments, that McBroom tried to grab drugs out of Defendant's hand and started "wrestling them out of the vehicle[,]" and that Defendant fired a shot that entered McBroom's midsection.

¶ 8 At trial, the State introduced Detective Adam Snow to testify regarding the text messages between Defendant and McBroom before the murder. Over Defendant's objection, Snow testified that, in his experience, it would be easier for somebody to lure a victim by "continu[ing] on the normal path of drug business." During his case-in-chief, Defendant introduced Ramona Rascoe, an evidence technician with the Burlington Police Department. Rascoe testified that a plastic baggie with a white powdery substance was found in the grassy area behind the apartment along the alley. Although Defendant initially intended to testify, he later

invoked his right to remain silent and not testify. When asked whether he spoke with counsel about not testifying, whether he was satisfied with his legal services, and whether the decision was in his best interest, Defendant responded, "[y]es." Thereafter, the defense rested.

¶ 9 During closing arguments, defense counsel argued that the State had not met its burden of proving premeditation and deliberation for first-degree murder. He argued that Defendant did not "express any kind of anger, hatred, ill will, spite," in any of the text messages between Defendant and McBroom, and that Defendant did not have "a premeditated and deliberated plan, to go over there and kill Mary McBroom."

¶ 10 The jury returned a guilty verdict, and Defendant was sentenced to life in prison without parole. Defendant timely appealed.

II. Discussion

A. Ineffective Assistance of Counsel

¶ 11 **[1]** Defendant argues that he received per se ineffective assistance of counsel or, in the alternative, prejudicial ineffective assistance of counsel, in violation of his Sixth Amendment right to counsel.

¶ 12 "The right to assistance of counsel is guaranteed by the Sixth Amendment to the Federal Constitution and by Article I, Sections 19 and 23 of the Constitution of North Carolina." *State v. McNeill*, 371 N.C. 198, 217, 813 S.E.2d 797, 812 (2018) (citation omitted). "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citation omitted). Defendant must satisfy a two-part test to meet this burden:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a

conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 563, 324 S.E.2d at 248 (citation omitted).

1. Per se Ineffective Assistance of Counsel

¶ 13 Defendant first contends that he received per se ineffective assistance of counsel because defense counsel "implicitly admitted Mr. Moore's guilt to second-degree murder."

¶ 14 We review per se ineffective assistance of counsel claims de novo. *See State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985).

¶ 15 A defendant claiming ineffective assistance of counsel must ordinarily show both that counsel's performance was deficient, and that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. However, "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-08. Statements by defense counsel "must be viewed in context to determine whether the statement was, in fact, a concession of defendant's guilt of a crime[.]" *State v. Mills*, 205 N.C. App. 577, 587, 696 S.E.2d 742, 748-49 (2010) (citation omitted). Where "defense counsel's statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense, *Harbison* error exists unless the defendant has previously consented to such a trial strategy." *State v. McAllister*, 375 N.C. 455, 475, 847 S.E.2d 711, 723 (2020). "[T]he trial court must be satisfied that, prior to any admissions of guilt at trial by a defendant's counsel, the defendant must have given knowing and informed consent, and the defendant must be aware of the potential consequences of his decision." *State v. Foreman*, 270 N.C. App. 784, 790, 842 S.E.2d 184, 189 (2020) (citation omitted).

¶ 16 Here, Defendant consented to counsel's strategy of admitting that Defendant fired the shot that resulted in or proximately caused McBroom's death, and arguing that Defendant was guilty of lesser-included offenses. Prior to opening statements, the trial court conducted the following colloquy with Defendant regarding trial strategy:

> THE COURT: [Your attorney] has talked to you about this issue. You've prepared your defense and what he's telling me is that you all discussed it and that you've agreed with him that your best strategy in this case is to acknowledge the fact that you did fire the

> shot but that you did so in self-defense or by accident I think is what [your attorney] said yesterday would be potentially where he sees this evidence going.
>
> And that you don't believe that you're guilty of first degree murder but it's possible that you'd be asking for some this (sic) lesser included offenses when we get to the end of this trial.
>
> Has [your attorney] discussed all of that with you?
>
> DEFENDANT: Yes.
>
> THE COURT: Okay. And do you agree and do you consent that that's a strategy that you'd like to follow to go ahead and admit -- have him admit as early as opening statements that you, in fact, fired the shot even though it wasn't on purpose potentially or it was in self-defense potentially?
>
> DEFENDANT: Yes.
>
> THE COURT: And is that a decision that you make freely, voluntarily and understandingly and of your own free will?
>
> DEFENDANT: Yes.
>
> THE COURT: All right. And do you fully consent to him taking that strategy and going ahead and throughout this trial, again, starting as early potentially as the opening statement, going ahead and letting the jury know those are the facts as you see them?
>
> DEFENDANT: Yes.
>
> THE COURT: Okay. All right. Thank you. You may have a seat.

Because Defendant consented to his counsel's implied concession of Defendant's guilt to second-degree murder, no *Harbison* error exists, and Defendant did not receive per se ineffective assistance of counsel. *Foreman*, 270 N.C. App. at 790, 842 S.E.2d at 189.

2. Prejudicially Ineffective Assistance of Counsel

¶ 17 Defendant alternatively contends that he received prejudicially ineffective assistance of counsel because defense counsel promised a defense

that was not delivered, presented a "pointless" defense witness, and asserted an incoherent defense that conceded guilt without permission.

¶ 18 "The merits of an ineffective assistance of counsel claim will be decided on direct appeal only when the cold record reveals that no further investigation is required." *State v. Friend*, 257 N.C. App. 516, 521, 809 S.E.2d 902, 906 (2018) (internal quotation marks and citation omitted). Here, we address Defendant's ineffective assistance of counsel claim because no further investigation is required to do so.

a. Self-Defense

¶ 19 Defendant first argues that counsel was prejudicially ineffective because he promised to argue self-defense in opening statements and subsequently failed to do so. Prior to opening arguments, defense counsel stated to the court:

> Your Honor, at my opening, either whether it's done now or at the State's evidence, and obviously during any closing arguments, we're going to concede that Mr. Moore actually fired the shot that resulted or proximately caused Ms. McBroom's death and I need his consent on the record and permission for me to do that. And at some point I may be arguing obviously for lesser included offenses and I want his consent to do that as well. We've discussed it. He understands that you're going to be asking him questions under oath about that.

Defendant indicated to the court that he consented to this strategy. During opening statements defense counsel stated,

> At that point, Mary McBroom tries to grab the drugs out of Mr. Moore's hand and starts wrestling them out of the vehicle. And as Mr. Moore is trying to get those drugs back from her, she reaches back like she's going to pull something out of her pocket.
>
> Now, Mr. Moore had Laking Crews' .22, pistol in the back seat of the car. He pulls it out and as she's reaching back, makes one shot and it enters her midsection. And at that point, Alexxa McKnight takes off. Mary McBroom walks off. They didn't know if she was hit or what else happened to Mary McBroom. Obviously, Ms. McBroom later calls 911 after the three left the area.

After the State rested, defense counsel indicated to the trial court, "I'll have one short witness and then the defendant is going to testify in the morning." The trial court conducted the following colloquy with Defendant to confirm that he understood his defense:

> THE COURT: [Your attorney] has been representing you and you've had time to talk to him about your defense and about the different issues in the case, right?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: He's indicating to me that it's your intention as a defendant to put on evidence, number one. And number two, as part of that evidence, actually to testify in your own defense. Is that correct?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand that, of course, the law – I'm sure [Your attorney]'s gone over this with you and you've heard me tell the jury this more than several times here this week. The law requires you to put on no defense at all, right? You can sit down and say I'm not saying a word, I'm not putting on any evidence, no defense, no witnesses, nobody, because it's solely the State's burden of proof to prove whether you're guilty or not. You understand all of those things?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand that it's your absolute right as a defendant to remain silent and not testify yourself. Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> . . .
>
> THE COURT: And then, secondly, we're not going to get to it this afternoon but I'm expecting tomorrow morning at some point, if you still want to take the stand, that you would be called to the stand by your attorney. Is that what you wish to do?
>
> DEFENDANT: Yes, sir.

> THE COURT: And is that – and testify in your own defense?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Is that a decision that you make freely, voluntarily and understandingly and of your own free will?
>
> DEFENDANT: Yes, sir.

¶ 20 On the final day of trial, however, Defendant decided not to testify, and the trial court conducted the following colloquy with Defendant:

> THE COURT: All right. I've had a pretrial conference this morning. Not pretrial. Pre-session conference this morning with the attorneys. And [your attorney] informed me, Mr. Moore, that upon reflection and upon meeting last night with [your attorney] and, again, confirming this morning with him, that you decided not to testify. Is that correct?
>
> DEFENDANT: Yes, sir.
>
> . . .
>
> THE COURT: Okay. So we went through a colloquy yesterday about – dialogue yesterday, and you told me you understood you had the right to remain silent, you understood you didn't have to call any witnesses but you were going to do so anyway and understood you had the right to testify or not to testify. That is your absolute right under the Constitution of the United States. You understand all of that?
>
> DEFENDANT: Yes.
>
> THE COURT: You told me yesterday that you had decided, and talked to [your attorney] all along about all of this, but you had decided to testify yesterday and it's my understanding now you changed your mind and decided to invoke your right to remain silent and not testify. Is that correct?
>
> DEFENDANT: Yes.

¶ 21 Defendant endorsed the strategy used by defense counsel by expressing to his counsel, which he acknowledged on the record, that he

consented to counsel putting on a self-defense defense, which included admitting that he fired the fatal shot, and that he intended to testify in his own defense. Defendant cannot now be heard to complain that this strategy was ineffective.

b. Witness Testimony

¶ 22 Defendant next contends that counsel was prejudicially ineffective because he called only one witness "whose testimony was pointless." Roscoe's testimony revealed that a plastic baggie containing a white powdery substance was discovered near the scene but was not tested in any way. Roscoe's testimony was not "pointless" because it showed potential shortcomings in processing the crime scene in that the substance was not tested for fingerprints or otherwise. *See State v. Brindle*, 66 N.C. App. 716, 718, 311 S.E.2d 692, 693-94 (1984) ("Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy and trial tactics."). Therefore, defense counsel's presentation of evidence was not deficient and did not amount to ineffective assistance of counsel.

c. Closing Argument

¶ 23 Defendant contends that counsel's closing argument was deficient and prejudicial because it "conceded guilt without permission and . . . did not outline a clear, coherent defense or contention as to verdict." Defendant mischaracterizes the nature of counsel's closing argument. As an initial matter, Defendant previously consented to arguing for lesser included offenses, and counsel's statements during closing argument did not amount to a concession of guilt to second-degree murder. During closing arguments, counsel argued, inter alia, a lack of premeditation and malice, thereby negating the essential elements of first-degree murder. When discussing the elements of second-degree murder, counsel defined "malice" as

> not only hatred, ill will, or spite, as it ordinarily is understood -- to be sure that is malice -- but it also means that condition of the mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in another's death without just cause, excuse or justification.

Defense counsel argued,

> when you consider all the evidence that you've heard, that the most that you could find Mr. Eric Moore

> guilty of in this particular case is second degree murder upon a finding of malice.
>
> And, again, you've not been presented any witnesses from the State that actually saw the exchange that went on between those two that led up to this. Didn't have somebody that saw that. And the State obviously can prove their case and the judge will instruct you about circumstantial evidence but I'm arguing to you that that doesn't mean that you fill in a lot of gaps with what you think or speculate as to exactly what happened because anybody charged with a crime is due the benefit of any reasonable doubt that you might have.

Defendant contends that, instead of this strategy, counsel could have "(1) explicitly argued for a not guilty verdict based on the State's failure to prove who the shooter was given Mary's statement ('I don't know' who shot me), the texts, the physical evidence, and the witnesses who were clearly hiding something; or (2) explicitly argued (with consent) for a second-degree verdict." However, we are not in a position to "second-guess counsel's assistance after conviction or adverse sentence . . . [and] a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *State v. Smith*, 241 N.C. App. 619, 629-30, 773 S.E.2d 114, 121 (2015) (quoting *Strickland*, 466 U.S. at 689). We conclude that defense counsel presented a coherent closing argument to negate the elements of first-degree murder, and Defendant did not receive ineffective assistance of counsel. *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248.

B. Opinion Evidence

¶ 24 **[2]** Lastly, Defendant argues that the trial court erred by admitting Snow's opinion testimony and that without his testimony, "there is a reasonable possibility the defense could have convinced the jury there was doubt as to both first- and second-degree murder."

¶ 25 "We review a trial court's ruling on the admissibility of lay opinion testimony for abuse of discretion." *State v. Belk*, 201 N.C. App. 412, 417, 689 S.E.2d 439, 442 (2009) (citation omitted).

¶ 26 Lay witness opinion testimony is "limited to those opinions or inferences which are (a) rationally based on the perception of the witness

and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2021). "In determining whether a criminal defendant is prejudiced by the erroneous admission of evidence, the question is whether there is a reasonable possibility that, had the evidence not been admitted, the jury would have reached a different verdict." *State v. Malone-Bullock*, 278 N.C. App. 736, 2021-NCCOA-406, ¶ 27 (citation omitted).

¶ 27 During Snow's testimony, the following colloquy took place:

> STATE: Regarding the discussions that occurred between Mr. Moore and Ms. McBroom after the incident at Sheetz, in your experience, would it be easier or more difficult for somebody to lure their victim to them by threats or by promises?
>
> DEFENSE: Objection.
>
> THE COURT: Overruled.
>
> SNOW: It would [be] easier to continue on the normal path of drug business. So if I'm trying to recontact somebody I had done a previous deal with, then I would continue business as usual if I want to make another attempt to contact that user.
>
> STATE: So when Ms. McBroom contacted Mr. Moore around 4:07 or afterwards that evening, had Mr. Moore said, I'm going to kill you, it's unlikely that Ms. McBroom would have made herself available to the defendant?
>
> DEFENSE: Objection.
>
> THE COURT: Overruled.
>
> SNOW: Correct.

¶ 28 Even if the testimony was erroneously admitted, its admission does not amount to prejudicial error. The State did not refer to Snow's testimony during closing arguments, but rather alluded generally to the commonsense notion that:

> If he had said, Mary, I'm going to get you; Mary, I'm going to kill you; I'm coming for you Mary, Mary would have ducked and run. She would have covered. She would have found something to do. She would have got out of the way.

> He lured her into a false sense of security. Hey, we're good. I got your back. You don't have somebody's back. You don't want to front somebody -- you're not going to front somebody anymore money when they've already stolen the drugs from your hand and ripped you off. He plays the friend card. He plays that game so that she'll come to him. And she did.

Thus, Defendant has failed to show a reasonable possibility that the jury would have reached a different verdict absent Snow's testimony. *Malone-Bullock*, 278 N.C. App. 736, 2021-NCCOA-406, ¶ 27.

III. Conclusion

¶ 29 Defendant did not receive ineffective assistance of counsel and admission of Snow's opinion testimony was not prejudicial error.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA
v.
MARK RONELL TABB, II

No. COA22-258

Filed 1 November 2022

1. Appeal and Error—preservation of issues—constitutional argument—state constitution—waiver

In a prosecution for multiple drug possession charges, defendant waived appellate review of his argument that both the actions of the officers who arrested him and the trial court's denial of his motion to suppress violated Article 1, § 20 of the North Carolina Constitution, where he did not raise his argument at trial pursuant to Appellate Rule 10(a).

2. Search and Seizure—seizure—timing—submission to show of force—plain view doctrine

In a prosecution for multiple drug possession charges, the trial court properly denied defendant's motion to suppress evidence from his arrest because defendant was properly seized where law

enforcement walked up to a stationary vehicle with its lights on and engine running at night in a parking lot known for illegal drug activity; the officers spoke separately but simultaneously with the driver and with defendant (seated on the passenger's side); and one officer, upon seeing money and a bag of marijuana on defendant's lap, commanded all occupants of the vehicle to put their hands on the dashboard and not to move. Because the driver did not submit to any show of force until the officer ordered everyone to place their hands on the dashboard, a reasonable person in defendant's position would have felt free to leave up until that moment. Further, the contraband seen on defendant's lap was admissible at trial under the plain view exception to the exclusionary rule.

3. Search and Seizure—reasonable suspicion—sight and smell of marijuana—legalization of industrial hemp—no effect

In a prosecution for multiple drug possession charges, which arose after law enforcement approached a stationary vehicle and observed defendant in the passenger seat with currency and a bag of marijuana on his lap, the trial court properly denied defendant's motion to suppress evidence from his arrest where defendant argued that the sight and smell of marijuana did not give the officers reasonable suspicion to seize his person or to search the vehicle given North Carolina's legalization of industrial hemp. Defendant's argument lacked merit where recent case precedent held that the mere smell of an intoxicating substance is sufficient to give officers reasonable suspicion and where there were other factors apart from the sight and smell of marijuana to establish reasonable suspicion to detain defendant (including the currency on defendant's lap).

Appeal by defendant from order entered 24 September 2021 by Judge Forrest D. Bridges in Forsyth County Superior Court. Heard in the Court of Appeals 4 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Liliana R. Lopez, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

TYSON, Judge.

¶ 1 Mark Ronnell Tabb II ("Defendant") appeals from judgment entered upon his guilty plea. We affirm.

I. Background

¶ 2 The facts and procedural history underlying this case are set forth in detail in this Court's prior opinion, *State v. Tabb*, 276 N.C. App. 52, 853 S.E.2d 871, 2021-NCCOA-34 (2021) (unpublished). The pertinent facts are:

> Winston-Salem Police Officers, E.W. Boyles, D.T. Rose, and M.L. Dime, were patrolling the Greenway Apartment Complex ("Greenway") on foot. Greenway is a "known area" for sales of illegal narcotics and prostitution. Police officers regularly patrolled Greenway's public areas on both foot and in their vehicles.
>
> The three officers parked their vehicles and began patrolling Greenway on foot between 11:00 p.m. and 12:00 a.m. on the night of 19 December 2017. While patrolling, the three officers observed a stationary vehicle, not parked in a parking space, but stopped in the middle of the parking lot. The vehicle was not moving, but the engine appeared to be running, and its lights were illuminated. Nothing was located in front of or behind the vehicle to limit movement or to prevent the vehicle from driving away.
>
> Officer Boyles had responded in the past to "various calls for . . . narcotics and sales of narcotics" in Greenway. Officer Boyles had observed people using narcotics in the Greenway parking lot areas. All three officers knew from their training and past experience that criminals routinely pulled into the Greenway's parking lot and stopped briefly to conduct illegal activities, including narcotics sales and prostitution.
>
> The officers observed the stationary vehicle for a period of time before approaching it together. Officer Rose testified the officers approached the stopped vehicle because of the factors above and due to the time of the night in a residential area that is known for criminal activity. As the officers approached the vehicle, they observed multiple occupants were seated inside.
>
> Officer Rose approached the stopped vehicle and knocked on the driver's side window. He testified he

observed the driver move his right hand to between the seat and the center console, as if trying to reach for or conceal something. Officer Rose asked the driver to step out of the vehicle. As soon as the door opened, Officer Rose also noticed the strong odor of marijuana emanating from inside the vehicle.

Officers Dime and Boyles approached the passengers' side of the vehicle. As Officer Boyles approached the passengers' side front door, he observed Defendant had currency displayed on his lap and also green marijuana in the areas near his waist band.

As Officer Dime approached the vehicle, he smelled a strong odor of marijuana and observed Defendant with a "bag of green vegetable matter," which he recognized as marijuana.

Officer Boyles asked Defendant to also step out of the vehicle because of the quantity of currency and marijuana he had observed upon approaching the vehicle. Officers Boyles and Dime opened the passenger's door, reached inside, and restrained Defendant's arms to prevent him from grabbing evidence, and had him to exit from the vehicle.

As Officer Dime handcuffed Defendant, he noticed a bag of white powder upon the ground next to the vehicle. Officer Dime informed Officer Boyles about the bag. Officer Boyles spotted the bag and believed it to contain powdered cocaine. Officer Boyles was concerned Defendant would attempt to kick or destroy the bag in some manner, so he moved Defendant away from the bag. Officer Boyles picked up the bag and placed it on top of the vehicle. Officer Boyles used a field kit to test the white powdery substance in the bag and it returned positive results as cocaine.

Officer Dime searched Defendant for additional drugs and weapons. Officer Dime found additional currency inside of Defendant's pocket. The three officers searched the vehicle. On the front passenger's floorboard, they found a marijuana pipe inside a box. In the backseat pocket they found a digital scale.

> On the vehicle's dashboard, the Officers found more cash. Between the front passenger's seat and console, they found loose, green marijuana.
>
> Officer Boyles spoke with Naudica McCoy, the rear seat passenger. She told Officer Boyles that day was her birthday. The driver and Defendant had given her free marijuana as a birthday present. McCoy told the officers she had purchased marijuana from Defendant in the past, but not that night. McCoy lived in Greenway apartments. She was released and free to leave and went to her home after speaking with the officers.

¶ 3 *Id.* at ¶¶ 2-12. Defendant was arrested and charged with possession with intent to sell and deliver marijuana, possession with the intent to sell and deliver, and possession of marijuana paraphernalia. Defendant was indicted for possession of marijuana up to one and a half ounces, felony possession of cocaine, and possession of marijuana paraphernalia.

¶ 4 Defendant filed a motion to suppress all evidence found and recovered from the search of Defendant and in the vehicle. The trial court denied Defendant's motion. Defendant pleaded guilty to all charges pursuant to a plea agreement, which preserved his right to appeal the trial court's denial of his motion to suppress. The trial court sentenced Defendant to a term of 6 to 17 months, suspended the sentence, and placed him on 18 months of supervised probation.

¶ 5 Defendant appealed the denial of his motion to suppress to this Court. On appeal, this Court affirmed the judgment in part and remanded to the trial court "with instructions to make a finding of fact of the sequence when Officer Rose made a show of force and the driver was seized and whether to grant or deny Defendant's motion to suppress." *Id.* at ¶ 27. Upon remand the trial court found:

> 20. Because the actions of the officer on the driver side and passenger side of the vehicle, respectively, took place in an almost completely simultaneous manner, none of the actions of any of the officers would have caused the Defendant to believe that he or the driver had been seized until Defendant was removed from the vehicle.
>
> 21. Based upon the totality of the circumstances in this case, no reasonable person in the Defendant's

> position would have concluded that he was not free to leave prior to the command by Officer Boyles to all of the vehicle, including the driver, to put their hands on (sic) the dashboard and not to move, a command that was triggered by his observation of money and marijuana on the person of the Defendant.

¶ 6 The trial court concluded Officer Boyles' actions were "independent of [ ]and not triggered by events occurring on the driver's side of the vehicle." The trial court held the detention of the driver "was reasonably related to the observations of Officer Rose." The trial court further held "the seizure of this Defendant occurred when he was removed from the vehicle, an event that occurred one or two seconds after the seizure of the driver[.]" The trial court held the search was constitutional. Defendant appeals.

II. Jurisdiction

¶ 7 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 15A-979(b) (2021).

III. Issues

¶ 8 Defendant argues the trial court erred by denying his motion to suppress the evidence obtained at the scene.

IV. Defendant's Motion to Suppress

A. Standard of Review

> The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. However, when . . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

B. Article 1, § 20 of the North Carolina Constitution

¶ 9 **[1]** Defendant argues the actions of the officers and the denial of his motion to suppress amounted to a violation of Article 1, § 20 of the North Carolina Constitution. Article 1, § 20 of the North Carolina Constitution provides:

> General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

N.C. Const. art. I, § 20.

¶ 10 Our Rules of Appellate Procedure provide: "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).

¶ 11 Our Supreme Court and this Court have consistently applied this binding precedent to dismiss unpreserved issues. "It is well settled that an error, even one of constitutional magnitude, that [the] defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Bell*, 359 N.C. 1, 28, 603 S.E.2d 93, 112 (2004) (citation and quotation marks omitted).

¶ 12 Defendant did not specifically raise an argument before the trial court invoking the North Carolina Constitution Article 1, § 20. Any appellate review of this unpreserved constitutional issue under this provision is waived. N.C. R. App. P. 10(a). Defendant's argument under this provision is dismissed. *See State v. Goncalves*, 285 N.C. App. 424, 876 S.E.2d 915, 2022-NCCOA-610 (2022) (unpublished).

C. Defendant's Seizure

¶ 13 **[2]** Defendant argues the officers' effected a suspicion-less seizure of the driver and all occupants of the car, without reasonable suspicion in violation of the Fourth Amendment.

¶ 14 "[A] person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L.Ed.2d

497, 509 (1980). A traffic stop seizes the driver within the Fourth and Fourteenth Amendments "even though the purpose of the stop is limited and the resulting detention is quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L.Ed.2d 660, 667 (1979) (citations omitted).

¶ 15 "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement, through means intentionally applied[.]" *Brendlin v. California*, 551 U.S. 249, 254, 168 L.Ed.2d 132, 138 (2007) (citations and quotation marks omitted).

¶ 16 The undisputed facts before us show the officers did not initiate a stop, the vehicle *was stationary*, *with its lights on* and its *engine running* in an *open parking lot* lane when the officers approached the vehicle together on foot. The officers, while on foot, did nothing to stop, block, nor prevent the driver from driving the vehicle away.

¶ 17 In *State v. Turnage*, a detective following a van observed the van "[s]uddenly, and without warning, . . . stop[] in the middle of [the road]." *State v. Turnage*, 259 N.C. App. 719, 720, 817 S.E.2d 1, 2 (2018). After the vehicle had stopped, the detective illuminated his vehicle's emergency lights. *Id*. He testified he did so because he did not want a car coming from the other direction of travel to hit the van stopped in the middle of the road. He also did not know whether the van had stalled and broken down. *Id*. As the detective exited his vehicle, the van sped away.

¶ 18 This Court concluded no seizure had occurred until the subsequent chase ended because "[a] vehicle inexplicably stopped in the middle of a public roadway is a circumstance sufficient, by itself, to indicate someone in the vehicle may need assistance, or that mischief is afoot." *Id*. at 725-26, 817 S.E.2d at 5.

¶ 19 This Court noted: "Police are free to approach and question individuals in public places when circumstances indicate that citizens may need help or mischief might be afoot." *Id*. (quoting *State v. Icard*, 363 N.C. 303, 311, 677 S.E.2d 822, 828 (2009)).

¶ 20 Defendant asserts he was seized the instant the driver was seized. The initial record did not show whether the driver opened his door and stepped out of the vehicle on his own violation or in response to the Officer Rose's purported "show of force or authority." *Brendlin*, 551 U.S. at 254, 168 L.Ed.2d at 138.

¶ 21 Upon remand, the trial court found: "the show of force by Officer Rose occurred before either of the passengers was seized by Officer Boyles

and/or Officer Dime." The trial court further found: "no reasonable person in the Defendant's position would have concluded that he was not free to leave prior to the command by Officer Boyles to all of the vehicle, including the driver, to put their hands on the dashboard and not to move, a command that was triggered by his observation of money and marijuana on the person of the Defendant."

¶ 22 Police officers on foot may approach a stationary vehicle with its engine running and its lights turned on in a known area for crimes after midnight to determine if the occupants "may need help or mischief might be afoot" or to seek the identity of the occupants therein or observe any items in plain view without violating our Fourth Amendment jurisprudence. *Id.*; *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889 (1968); *Turnage*, 259 N.C. App. at 725-26, 817 S.E.2d at 5.

¶ 23 "A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned." *Id.* at 254, 168 L. Ed. 2d at 138 (citations omitted). The driver did not submit to the show of authority until the command by Officer Boyles, which was triggered by the observation of money and marijuana on Defendant's person. Defendant's argument is overruled.

¶ 24 Presuming, without deciding, the driver was seized immediately upon the show of force, the discovery and admissibility is constitutionally permissible under the plain view doctrine. *State v. Crews*, 286 N.C. 41, 45, 209 S.E.2d 462, 465 (1974). It is reasonable and customary for police officers to observe the actions and behaviors of the passengers inside a vehicle while a driver is responding to requests for identification or undergoing a *Terry* safety frisk for the officers' protection. Before Officer Dime restrained Defendant, he observed the green marijuana and currency in plain view on Defendant's lap.

¶ 25 Our Supreme Court has recognized the plain view doctrine as an exception to the warrant requirement when:

> [T]he officer was in a place where he had a right to be when the evidence was discovered and when it is immediately apparent to the police that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause. The North Carolina General Assembly has imposed an additional requirement, not mandated by the Constitution of the United States, that the

> evidence discovered in plain view must be discovered *inadvertently*.

State v. Mickey, 347 N.C. 508, 516, 495 S.E.2d 669, 674 (1998) (emphasis original) (internal citations omitted).

¶ 26 The officers' discovery of the marijuana and currency on Defendant's lap as they approached outside the vehicle was immediately apparent, inadvertent, and inevitable. The officers had the lawful right to be at the Greenway and to approach the vehicle already stopped. *Id.* The officers were on foot and did not block nor do anything to prevent the driver from driving the vehicle away. Presuming, Defendant was seized when the driver's door was opened, any brief period which elapsed before Officer Dime observed Defendant with the contraband in plain view on his lap does not compel a different result. *Id.*

V. Sight of Unburnt Marijuana

¶ 27 **[3]** Defendant argues the sight of unburnt marijuana does not give officers reasonable suspicion to search a vehicle because industrial hemp has been legal in North Carolina since 2015. *See* An Act to Recognize the Importance and Legitimacy of Industrial Hemp Research, to Provide for Compliance with Portions of the Federal Agricultural Act of 2014, and to Promote Increased Agricultural Employment, S.L. 2015-299, 2015 N.C. Sess. Laws 1483. The Industrial Hemp Act "legalized the cultivation, processing, and sale of industrial hemp within the state, subject to the oversight of the North Carolina Industrial Hemp Commission." *State v. Parker*, 277 N.C. App. 531, 539, 860 S.E.2d 21, 28, 2021-NCCOA-217, ¶ 27, *disc. review denied*, 378 N.C. 366, 860 S.E.2d 917 (2021).

¶ 28 Industrial hemp is the same plant species as marijuana, and the "difference between the two substances is that industrial hemp contains very low levels of tetrahydrocannabinol ("THC"), which is the psychoactive ingredient in marijuana." *Id.* at 540, 860 S.E.2d at 28, 2021-NCCOA-217, ¶ 27 (citation omitted).

¶ 29 Defendant challenges following findings of fact:

> 11. Officers Boyles and Dime approached the vehicle essentially simultaneously to the time that Officer Rose approached the vehicle on the driver's side. Officer Boyles did not know the details of Officer Rose's observations or his interactions with the driver until after he had removed the Defendant from the vehicle and his actions toward the Defendant were not triggered by or dependent upon those

> observations and interactions, but rather were based upon Officer Boyles' approach to the vehicle and his observation of money laid out on Defendant's lap, together with green material in his waistband area, using his senses of plain view and plain smell.
>
> 12. As previously noted, Officer Boyles made these observations from the exterior of the vehicle using his flashlight to see cash and green material in plain sight and smell an odor of marijuana through a partially opened window, as he approached the vehicle.

¶ 30 Defendant asserts the alleged smell of marijuana could not have formed the part of reasonable suspicion for Defendant's seizure. Defendant was present inside the vehicle, and our Supreme Court has held the mere smell of an intoxicating substance is enough to satisfy reasonable suspicion to allow the officers to inquire further. *See State v. Kitchen*, 283 N.C. 282, 293, 872 S.E.2d 580, 587-88, 2022-NCCOA-298, ¶ 33 (2022). Defendant's argument is misplaced.

¶ 31 As in *Parker*, there was more present than just the smell or visual identification. *Id*. at 541, 860 S.E.2d at 28, 2021-NCCOA-217, ¶ 31. There was the evidence of drug distribution, the currency beside the marijuana and Defendant's possession of marijuana near his waistband.

¶ 32 Several of the officers' observations established reasonable suspicion to detain Defendant, including: (1) scent of what police believed to be marijuana; (2) Officer Boyles's observation of "green vegetable matter," what he concluded to be marijuana; (3) the location of the material the officers believed to be marijuana; and, (4) the existence of currency established reasonable suspicion to detain Defendant. *See State v. Howard*, 284 N.C. App. 357, 873 S.E.2d 767, 2022-NCCOA-476 (2022) (unpublished). Upon detention, additional evidence was observed, which provided the officers probable cause to search the vehicle. Defendant's argument is overruled.

VI. Conclusion

¶ 33 The trial court's unchallenged findings of fact on plain view and binding precedents support the trial court's conclusion to deny Defendant's motion to suppress and to allow the admission of the contraband found in Defendant's possession and later seized. The driver of the vehicle was not seized until Defendant was seized.

¶ 34 The presence of contraband and evidence of drug transactions while in plain view satisfies the plain view exception to the exclusionary

rule. Presuming an unpreserved constitutional violation occurred, any purported error was harmless beyond a reasonable doubt.

¶ 35 Defendant did not specifically raise an argument under the North Carolina Constitution before the trial court and has waived appellate review of that issue. Defendant has demonstrated no prejudice to set aside his guilty plea or to award a new trial. The trial court's order denying Defendant's motion to suppress is affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and COLLINS concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF
v.
PATRICK MICHAEL MEGARO, ATTORNEY, DEFENDANT

No. COA22-135

Filed 1 November 2022

1. Attorneys—discipline—charging excessive fees—intellectually disabled clients—evidence and findings—restitution—oral and written rulings

In a disciplinary proceeding regarding an attorney's representation of two intellectually disabled brothers (who spent over thirty years in prison for crimes they did not commit) in which the attorney was alleged to have charged excessive fees for obtaining the brothers' pardons for innocence, compensation for wrongful incarceration, and a civil suit award, the Disciplinary Hearing Commission's (DHC) order suspending the attorney's license for five years was affirmed where clear, cogent, and convincing evidence supported the DHC's findings of fact, including that the brothers had been consistently diagnosed as mentally retarded and that the attorney knew that the brothers lacked the capacity to understand the agreements through which he charged them excessive fees. The evidence also supported a restitution payment to the brothers representing the improper fees the attorney deducted from the brothers' compensation award from the Industrial Commission. Further, there was no discrepancy between the DHC's written order and oral ruling where, although the written order contained more detail, both rulings imposed the same disciplinary action and conditions.

2. Appeal and Error—preservation of issues—attorney discipline—due process and equal protection—not raised at disciplinary hearing

In a disciplinary action regarding an attorney who charged excessive fees when representing two intellectually disabled brothers who spent over thirty years in prison for crimes they did not commit, the attorney failed to preserve for appellate review his argument that the State Bar violated his constitutional rights to due process and equal protection under the law in its enforcement of the Rules of Professional Conduct, where he did not raise the argument at the disciplinary hearing.

Appeal by Defendant from order entered 27 April 2021 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 7 September 2022.

The North Carolina State Bar, by Deputy Counsel David R. Johnson, Counsel Katherine Jean, and Deputy Counsel Carmen Hoyme Bannon, for Plaintiff-Appellee.

Patrick Michael Megaro, Pro se, Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Patrick Michael Megaro appeals from an order of discipline entered by the Disciplinary Hearing Commission of the North Carolina State Bar ("DHC") suspending his law license for five years and allowing him to seek a stay of the balance of the suspension after three years if he complies with certain conditions. Because there is substantial evidence to support the DHC's findings of fact, and because the findings of fact support the conclusions of law, we affirm.

I. Procedural History and Factual Background

¶ 2 In 1983, brothers Henry McCollum and Leon Brown were convicted of the rape and murder of 11-year-old Sabrina Buie and sentenced to death. On appeal, the North Carolina Supreme Court granted McCollum and Brown new trials. *See State v. McCollum*, 321 N.C. 557, 364 S.E.2d 112 (1988). McCollum was retried and again convicted of first-degree rape and first-degree murder. The trial court arrested judgment on the rape conviction and sentenced McCollum to death for the murder conviction. At sentencing, the jury found as mitigating circumstances that McCollum "was mentally retarded, that the offense was committed

while he was under the influence of mental or emotional disturbance, that he is easily influenced by others, and [that] he has difficulty thinking clearly under stress."

¶ 3 Brown was retried, convicted of first-degree rape, and sentenced to life in prison. In the trial court's judgment, it recommended Brown receive psychological treatment in prison. On appeal, this Court found no error, but the opinion included the trial court's order denying a motion to suppress which found that Brown "has an I.Q. variously tested between 49 and 65, but has been generally classified as suffering from mild mental retardation[.]" *State v. Brown*, 112 N.C. App. 390, 393, 436 S.E.2d 163, 165 (1993).

¶ 4 In April 1995, McCollum was represented by Kenneth Rose, an attorney with the Center for Death Penalty Litigation, and attorneys from Wilmer Hale, in filing a motion for appropriate relief ("MAR"). The MAR alleged that an incriminating statement made by McCollum was unreliable due to his intellectual disabilities, which were established by opinions from four mental health professionals.

¶ 5 In January 2002, Rose represented McCollum in filing an amended MAR "based on [McCollum's] subaverage intellectual functioning and significant limitations in adaptive functioning." In support of the MAR, McCollum submitted a 2002 affidavit of Dr. Rogers in which Dr. Rogers averred that "in her 1995 testing McCollum had a full-scale IQ of 68 and significant subaverage intellectual functioning that placed him in the lowest 2-3 percent of the population in overall intellectual functioning." McCollum also submitted a 2002 affidavit of Dr. Rumer, who averred that McCollum "had a history of subaverage scores on intellectual testing with full-scale scores of 56, 61 and 69, and adaptive functioning deficits."

¶ 6 In August 2014, Rose and Vernetta Alston, also an attorney with the Center for Death Penalty Litigation, filed an MAR alleging McCollum was innocent based in part on results of DNA testing done on a cigarette butt found at the scene of the murder; the DNA did not match either brother, but instead matched an inmate "then serving a life sentence for the murder of a woman in the same area as Buie, a month after Buie's murder." Brown filed a similar MAR through separate counsel. The trial court granted McCollum's and Brown's MARs, vacated their convictions and judgments, and released them from prison after having served 31 years.

¶ 7 Attorneys Mike Lewis, Mark Rabil, and Tom Howlett agreed to represent McCollum and Brown on a contingency fee basis in civil litigation for the alleged misconduct of law enforcement officers involved in the investigation and prosecution of the brothers. Rose, Alston, and attorneys

with Wilmer Hale agreed to represent McCollum and Brown on a pro bono basis to file pardon petitions with the governor and to seek compensation in the Industrial Commission as persons wrongfully convicted of felonies, pursuant to N.C. Gen. Stat. § 148-84. On 11 September 2014, Rose and Alston filed petitions for pardons of innocence on behalf of the brothers. On 15 September 2014, Rose and Alston received notice from the Clemency Administrator that "[a]ll necessary documents have been received and this request is now being processed. You will be notified when a decision has been made on this request." After McCollum's and Brown's cases caught the attention of the media, "McCollum and Brown began receiving charitable donations and financial assistance from various sources[.]"

¶ 8 In January 2015, Kim Weekes and Deborah Pointer, who were not attorneys and who referred to themselves as "consultant advisors," contacted Brown's sister, Geraldine Brown Ransom, claiming they could help McCollum and Brown. Weekes and Pointer entered into an agreement with Ransom, who was not a guardian for either McCollum or Brown at that point, to serve as activists for the brothers and to assist with their pardon process. Weekes and Pointer notified Rose that they were authorized to represent McCollum and Brown "in all and any of the Civil/Litigation of the Pardon/Fundraising of NC matters."

¶ 9 Weekes and Pointer contacted Defendant about representing the brothers. Defendant "read news accounts of McCollum and Brown's cases, reviewed transcripts of their MAR hearings that he found online, and did preliminary research on their cases." Before Defendant met with McCollum and Brown, Pointer warned Defendant that Ransom requested that Defendant refrain from discussing money amounts in front of the brothers. Pointer also told Defendant that Ransom would give the brothers a monthly stipend. Defendant entered into a representation agreement with McCollum, Brown, and Ransom. At the time they entered into the agreement, petitions for pardons had already been filed for McCollum and Brown. The representation agreement provided the following: Defendant would collect a contingency fee of 27-33% of any monetary recovery from Robeson County, the Red Springs Police Department, and the State of North Carolina; McCollum and Brown were conveying to Defendant an irrevocable interest in net proceeds arising from any recovery; and Defendant was entitled to the contingency interest in the outcome of the case regardless of whether McCollum and Brown terminated the representation agreement.

¶ 10 Defendant began working with Multi Funding, Inc., to obtain "immediate funding through loans" for McCollum and Brown. Defendant

advanced $1,000 cash to each McCollum and Brown and facilitated the brothers each getting loans from Multi Funding for $100,000 at 19% interest, compounded every six months. Defendant ensured that Weekes and Pointer were paid $10,000 from the initial loan proceeds to the brothers. Defendant sent letters to Rose and Howlett, "warning them to never contact McCollum and Brown again as it would violate the 'rules of ethics' and would be 'actionable as tortious interference of contract.'"

¶ 11 After the governor granted pardons of innocence to the brothers, Defendant filed a joint petition in the Industrial Commission seeking compensation for McCollum and Brown, pursuant to N.C. Gen. Stat. § 148-84. The attachments to the petition were almost exclusively the work product of Rose and Alston. Defendant also filed suit in the United States District Court for the Eastern District of North Carolina on behalf of the brothers against various parties alleged to be responsible for their wrongful conviction and incarceration. In August 2015, Brown, who suffers from bi-polar disorder and schizophrenia, was hospitalized after a breakdown. Defendant filed a petition in Cumberland County to have Brown declared incompetent and proposed that Ransom be appointed Brown's guardian.

¶ 12 On 2 September 2015, after a brief hearing, McCollum and Brown were each awarded $750,000, the statutorily mandated amount of compensation under N.C. Gen. Stat. § 148-84. Defendant was issued a check for $1.5 million; Defendant took $500,000 as a contingency fee. The brothers were left with $500,000 each, and of this money:

> Defendant used nearly $110,000.00 each of McCollum and Brown's Industrial Commission award, totaling $220,000.00, to repay the loans he facilitated their obtaining . . . .
>
> Defendant charged a combined total of $21,173.88 in costs and expenses to McCollum and Brown for the Industrial Commission process. These charges included costs related to the pardon process and related to Brown's incompetency proceeding.
>
> Defendant used $25,972.14 of the Industrial Commission award to repay money he and his firm advanced to McCollum and Brown prior to their Industrial Commission award[.]

¶ 13 After these deductions, Defendant disbursed $358,363.28 to McCollum. After McCollum spent all the funds, Defendant helped

McCollum obtain a second loan for $50,000 at 18% interest, compounded every six months. Defendant facilitated McCollum obtaining a third loan for $15,000 at 18% interest, compounded every six months. After Ransom was removed as Brown's guardian for mismanaging his funds, Defendant helped Ransom "get a $25,000.00 loan from [Multi Funding] against any future recovery made by Brown, with the loan proceeds sent to [Ransom] purportedly for Brown's rent." As a result of the loan, Multi Funding perfected a lien for $25,000 against any future recovery made by Brown.

¶ 14 On 1 February 2017, Derrick Hamilton, a friend of and occasional videographer for Defendant, wired Defendant $30,000 – $20,000 of which was for McCollum's benefit and $10,000 of which was to serve as a loan for Defendant's benefit. Defendant failed to disburse the $10,000 intended for him from the trust account in a manner that identified the funds as Defendant's loan proceeds.

¶ 15 During settlement discussions with the Town of Red Springs, counsel for the Town of Red Springs raised McCollum's competence to enter into a settlement agreement. In anticipation of submitting a settlement proposal, Defendant engaged Dr. Thomas Harbin to evaluate McCollum's competency to enter into a settlement agreement. Despite contrary findings in an earlier report, Dr. Harbin concluded that "McCollum was able to manage his own financial and legal affairs, and to make or communicate important decisions concerning his person and finances."

¶ 16 In April 2017, Defendant submitted a settlement proposal for McCollum and Brown's civil suit for $500,000 each to the federal District Court. Defendant claimed that the brothers were competent to enter into the representation agreement and the settlement agreement and asked the Court to approve the settlement and Defendant's 33% fee. The proposed settlement provided that the liens securing the Multi Funding loans would be paid out of the settlement proceeds, leaving McCollum with $178,035.58 and Brown with $403,493.96. During a hearing related to approval of the proposed settlement, federal District Court Judge Terrance Boyle rejected Dr. Harbin's evaluation as unpersuasive and appointed Raleigh attorney Raymond Tarlton as Guardian Ad Litem for McCollum. Tarlton filed a motion asking the Court to determine whether Defendant's representation agreement with McCollum was valid based on McCollum's incapacity. Defendant filed a motion to discharge Tarlton as Guardian Ad Litem and to halt any further inquiry as to McCollum's competency. Judge Boyle entered an order directing Dr. George Corvin to conduct a competency evaluation for McCollum.

¶ 17 Dr. Corvin submitted a comprehensive report, finding that McCollum "clearly suffers from psychological and intellectual limitations impairing his ability to manage his own affairs and make/communicate important decisions regarding his life without the assistance of others." Judge Boyle entered an order finding that McCollum was incompetent to manage his own affairs and that the representation agreement between Defendant and McCollum was invalid. The Court approved the settlement proposal, but not Defendant's fee. Defendant was terminated as McCollum's counsel by Tarlton. Defendant's law partner filed a motion challenging Tarlton's authority to terminate Defendant. The federal District Court ordered Defendant removed from the case for good cause shown. On 29 January 2021, Dr. Corvin evaluated McCollum to determine whether McCollum was competent to enter into a representation agreement with Defendant, and whether McCollum was competent to enter into loan agreements with Multi Funding. Dr. Corvin found:

> McCollum has a well-documented and extensive psychosocial history, and he continues to exhibit considerable evidence of his well-established intellectual developmental disorders. McCollum's intellectual disorders are known to be static in nature, meaning there is no known treatment to reverse the cognitive limitations inherent in such conditions;
>
> McCollum continued to display evidence of impaired executive functioning (above and beyond that associated with his known intellectual developmental disorder) stemming from his previously diagnosed neurocognitive disorder. McCollum tends to make decisions about circumstances (and people) in a rather impulsive manner without consideration of (or adequate understanding of) the subtleties and complexities that are most commonly associated with such decisions;
>
> McCollum continues to experience symptoms consistent with a diagnosis of Post-Traumatic Stress Disorder stemming from his prior lengthy incarceration on death row after having been convicted of a crime that he did not commit. McCollum experiences intense physiological and psychological reactivity (i.e., flashbacks) when he sees police officers in his community, stating that when he sees them 'it makes

> me think of what happened to me, it scares me. It reminds me of what happened out there';
>
> McCollum has been unable to pass the written portion of the test to obtain a driver's license. McCollum agreed to 'sign the papers' to engage Defendant's representation because 'he gave us money. I agreed to sign the papers for him to handle my pardon and civil suit – because he gave us money, found me a better place. But he had me fooled.' Regarding Defendant, McCollum 'thought he was doing a good job, but I didn't know that he was taking that much money. I had no idea how much money they were supposed to take'; and
>
> McCollum remains unable to make and communicate important decisions regarding his person and his property, without the regular assistance of others. McCollum met the statutory definition of 'incompetent adult' as detailed in N.C. Gen. Stat. § 35A-1101(7) at the time that he entered into the representation agreement with Defendant and when he entered into the loans with [Multi Funding].

¶ 18 On 20 September 2018, the North Carolina State Bar filed a disciplinary action against Defendant alleging that Defendant had engaged in professional misconduct in his representation of McCollum and Brown. The case was tried before the DHC, and the DHC concluded that Defendant violated the Rules of Professional Conduct involving, inter alia, "dishonesty, excessive fees, [and] conduct prejudicial to the administration of justice." The order of discipline ("Order") suspended Defendant's law license for five years and allowed Defendant to seek a stay of the balance of the suspension after three years if he complied with certain conditions, including a $250,000 restitution payment to McCollum and Brown. Defendant filed notice of appeal.

II. Discussion

¶ 19 Defendant first contends that, "utilizing the whole record test, the findings of fact and conclusions of law in the [Order] were not supported by clear, cogent, and convincing evidence[.]" (capitalization omitted).

¶ 20 Appeals from orders of the DHC are limited to "matters of law or legal inference." N.C. Gen. Stat. § 84-28(h) (2021). We apply the "whole record test," "which requires the reviewing court to determine if the

DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law[.]" *N.C. State Bar v. Livingston*, 257 N.C. App. 121, 126, 809 S.E.2d 183, 188 (2017) (citation omitted).

> Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion. The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn. Moreover, in order to satisfy the evidentiary requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to support its findings and conclusions must rise to the standard of clear, cogent, and convincing.

N.C. State Bar v. Talford, 356 N.C. 626, 632, 576 S.E.2d 305, 309-10 (2003) (brackets, quotation marks, and citations omitted). "Clear, cogent[,] and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt." *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (1985) (citation omitted). "It has been defined as evidence which should fully convince." *Id.* (quotation marks and citation omitted). The whole record test must be applied separately to the adjudicatory phase and the dispositional phase. *Talford*, 356 N.C. at 634, 576 S.E.2d at 311.

A. Findings of Facts and Conclusions of Law

¶ 21 **[1]** Defendant first argues that "Charges 7, 8, 12, and 19" are not supported by a list of "implicit factual findings" contrived by Defendant. As Defendant's "implicit factual findings" are not facts found by the DHC, we cannot review them to determine if they were supported by the evidence.

¶ 22 Defendant does appear to argue that Finding of Fact 28 was not supported by the requisite evidence. Defendant does not challenge any of the remaining 129 findings of fact, stating that "[t]he word limit under the Rules prevents further dissection of all the factual findings in the Order of Discipline." The remaining findings of fact are thus binding on appeal. *N.C. State Bar v. Key*, 189 N.C. App. 80, 87, 658 S.E.2d 493, 498 (2008). Finding of Fact 28 states, "McCollum and Brown had been consistently diagnosed as mentally retarded with adaptive skills deficits and were unable to understand their confessions[.]"

¶ 23 The unchallenged findings of facts include the opinions of four mental health professionals establishing McCollum's intellectual disabilities in support of the 1995 MAR:

> Psychologist Dr. Faye Sultan, Ph. D., concluding, *inter alia*, that McCollum was mentally retarded with intellectual functioning falling in the range of an eight to ten-year-old, had poor reading comprehension, and was highly suggestible and subject to the influence of others, particularly authority figures;
>
> Neuropsychologist Dr. Helen Rogers, Ph. D., concluding, *inter alia*, that McCollum was mentally retarded with neuropsychological testing showing he scored in the 'impaired' or 'seriously impaired' range, his ability to understand verbal communication was severely impaired, he had cognitive impairment beyond that expected for his level of mental retardation, and he was strongly suggestible and generally not capable of understanding and weighing the consequences of his choices;
>
> Psychologist Dr. Richard Rumer, Ph. D., concluding, *inter alia*, that McCollum was mentally retarded with severely limited cognitive functioning, was susceptible to the influence of others, and demonstrated weakness in his ability to plan and carry out complex activities; and
>
> Dr. George Baroff, Ph. D., Professor of Psychology at the University of North Carolina, concluding, *inter alia*, that McCollum suffered mental retardation – placing him at the bottom 3 percent of the general population – and a neuropsychological impairment, and that he had a reading level of third grade and a listening comprehension level at first grade.

Additionally, the unchallenged finding of fact detailing Dr. Corvin's evaluation established in relevant part that

> McCollum has a well-documented and extensive psychosocial history, and he continues to exhibit considerable evidence of his well-established intellectual developmental disorders. McCollum's intellectual disorders are known to be static in nature, meaning

> there is no known treatment to reverse the cognitive limitations inherent in such conditions[.]

Other relevant unchallenged findings of fact include:

> 37. McCollum and Brown were easily manipulated and were particularly susceptible to manipulation and financial coercion, given their intellectual disabilities, decades in prison, and relative poverty.
>
> . . .
>
> 47. . . . In the second parapraph of the [Industrial Commission] petition, Defendant represented to the Industrial Commission: "At all time hereinafter mentioned, both men had and still have limited mental abilities. Mr. McCollum's Intelligence Quotient (IQ) has been scored at 56, while Leon Brown's IQ has been scored at 54. Both of these IQ scores are within the intellectually disabled range, classified by some as mild retardation.
>
> . . .
>
> 54. Defendant recognized the adaptive functioning deficiencies of his clients in Brown's incompetency petition stating: 'Both brothers need help with budgeting their monthly allowance because they are unable to understand the concept of paying utility bills and making purchases. One thing is clear: neither Leon Brown nor Henry McCollum have a concept of budgeting or spending limits, nor do they have any experience of budgeting money, let alone large sums of money.'
>
> . . .
>
> 103. As threshold matters, Judge Boyle, citing U.S. Supreme Court documentation a dissenting opinion in a U.S. Supreme Court decision denying a writ of certiorari that McCollum was mentally retarded, had an IQ between 60 and 69, had a mental age of 9-years-old, and reads at a second-grade level, raised concerns about the competency of McCollum and Brown to enter into the settlement agreement and about Defendant's conflict of interest by entering

> into representation agreements with clients who were incompetent.

¶ 24 Furthermore, the MAR transcript, which Defendant reviewed prior to meeting McCollum and Brown, supports this finding:

> Sharon Stellato, a staff member of The North Carolina Actual Innocence Commission, testified in extensive detail at the September 2, 2014 MAR hearing about the intellectual disabilities of McCollum and Brown. Consistent with the background of McCollum and Brown, Stellato noted that both had been diagnosed as mentally retarded. Testing in 1983 showed Brown's full-scale IQ was 54. Testing of McCollum at age 15 showed his full-scale IQ was 56 and his reading comprehension at the second-grade level.

¶ 25 Based on the whole record, clear, cogent, and convincing evidence supports the Order's finding of fact that "McCollum and Brown had been consistently diagnosed as mentally retarded with adaptive skills deficits and were unable to understand their confessions[.]"

¶ 26 "Charges 7, 8, 12, and 19" do not correspond to any numbered allegations in the complaint, nor do they correspond to any findings of fact or conclusions of law in the Order. Construing Defendant's brief liberally, however, "Charges 7, 8, 12, and 19" refer to the violations of the Rules of Professional Conduct set forth in Conclusions of Law 2(b), 2(c), 2(f), and 2(k), and Defendant is arguing that the findings of fact do not support these conclusions. These conclusions state:

> By entering into a representation agreement with his clients when he knew they did not have the capacity to understand the agreement, Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c) and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d);
>
> By having McCollum sign off on a settlement agreement and representing to a court that McCollum had consented to the settlement when Defendant knew McCollum did not have the capacity to understand the agreement, Defendant made a false statement to a tribunal and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation that was

> prejudicial to the administration of justice in violation of Rule 3.3(a), Rule 8.4(c), and Rule 8.4(d);
>
> By signing various Attorney Acknowledgements of Explanation of Terms to Plaintiff, Of Irrevocable Lien and Assignment to Multi Funding, Inc., claiming to Multi Funding, Inc. that he had explained the terms of the loan agreements to McCollum and Brown when they were not competent to understand those terms or enter into those agreements, Defendant made a material misrepresentation to Multi Funding, Inc. and thereby engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c);
>
> By entering into a retainer agreement with McCollum that was invalid due to McCollum's lack of competency and then arguing that McCollum was competent in an effort to protect his fee despite such arguments potentially harming McCollum's then-current claims against Robeson County, the Red Springs Police Department, and the State of North Carolina, Defendant engaged in a conflict of interest, as Defendant's representation of McCollum was materially limited by Defendant's personal interest in defending his fee, in violation of Rule 1.7.

¶ 27 The Order's findings of fact support the conclusion that Defendant knew McCollum and Brown did not have the capacity to understand the representation agreement or settlement agreement. Defendant "read news accounts of McCollum and Brown's cases, reviewed transcripts of their MAR hearings that he found online, and did preliminary research on their cases." The MAR transcripts "revealed that McCollum and Brown had low IQs and were unable to understand the confessions they were coerced into signing[.]" Defendant represented in his petition for compensation that "both men had and still have limited mental abilities. Mr. McCollum's Intelligence Quotient (IQ) has been scored at 56, while Leon Brown's IQ has been scored at 54. Both of these IQ scores are within the intellectually disabled range, classified by some as mild retardation." Defendant also acknowledged that "neither Leon Brown nor Henry McCollum have a concept of budgeting or spending limits, nor do they have any experience of budgeting money, let alone large sums of money." Dr. Corvin also concluded that McCollum "clearly suffers from psychological and intellectual limitations impairing his ability

to manage his own affairs and make/communicate important decisions regarding his life without the assistance of others."

¶ 28 Accordingly, clear, cogent, and convincing evidence supports the Order's findings of fact, and the findings of fact support the DHC's conclusions that it was dishonest for Defendant to enter into the representation agreement with McCollum and Brown; that it was prejudicial to the administration of justice for Defendant to have McCollum sign the settlement agreement and deceitful for him to represent to the Court that McCollum had consented to the settlement; and that it was dishonest for Defendant to claim to Multi Funding that he explained the terms of the loan agreements to McCollum and Brown.

B. $250,000 Restitution Payment

¶ 29 Defendant alleges that the $250,000 restitution payment to McCollum and Brown is not supported by clear, cogent, and convincing evidence.

¶ 30 The DHC is given broad disciplinary discretion. "Misconduct by any attorney shall be grounds for . . . [s]uspension for a period up to but not exceeding five years, any portion of which may be stayed upon reasonable conditions to which the offending attorney consents[.]" N.C. Gen. Stat. § 84-28(c)(2) (2021). "Any order disbarring or suspending an attorney may impose reasonable conditions precedent to reinstatement." *Id.* at § 84-28(c).

¶ 31 Defendant received $500,000 for preparing compensation petitions and attending the Industrial Commission hearing on behalf of McCollum and Brown. Defendant's attachments to the petitions for compensation were almost exclusively Rose and Alston's work product. The transcript for the Industrial Commission hearing is seven pages long and "[t]he State did not oppose compensation for McCollum and Brown[.]" A contingent fee for the representation in the Industrial Commission was improper because McCollum and Brown were "entitled to the maximum compensation authorized by N.C. Gen. Stat. § 148-84: $750,000 each." The $250,000 restitution payment ordered by the DHC is a conservative estimate of the amount Defendant collected that he was not entitled to, and a generous assessment of the value of Defendant's services in the Industrial Commission proceeding.

¶ 32 Based on the whole record, clear, cogent, and convincing evidence supports the $250,000 restitution payment to McCollum and Brown.

C. Discrepancies between Written Order and Oral Findings

¶ 33 Defendant contends that the written Order is at odds with the DHC's oral findings. This contention lacks merit.

¶ 34 After deliberations, the chair of the hearing panel announced the discipline the DHC was imposing on Defendant:

> The license of Patrick Megaro is suspended for a period of five years. He may reapply after three years with the following terms and conditions:
>
> Number one, that he pay the costs of this action;
>
> Number two, that he pay restitution in the amount of $250,000 with $125,000 going to the guardian ad litem for each of Mr. McCollum and Mr. Brown;
>
> Number three, that prior to being readmitted into practice that he complete ten hours of ethical -- ethics continuing legal education;
>
> Number four, that upon application to reinstate his license, that Mr. Megaro be supervised by an attorney that is approved by the State Bar, and that that supervision will take place for at least two years.
>
> That's the ruling of the panel.

¶ 35 There is no discrepancy between the chair's announcement and the written Order, which imposes a five-year suspension with conditions for reinstatement and permits Defendant to apply for a stay of the remainder of the suspension after three years if he satisfies the reinstatement conditions. The oral announcement of the DHC decision was not a comprehensive recitation of the 24-page Order because "[a] trial judge cannot be expected to enter in open court immediately after trial the detailed findings of fact and conclusions of law that are generally required for a final judgment." *Morris v. Bailey*, 86 N.C. App. 378, 389, 358 S.E.2d 120, 127 (1987).

¶ 36 There is no merit to Defendant's argument that the additional level of detail in the DHC's written Order is a discrepancy.

D. Equal Protection Argument

¶ 37 **[2]** Defendant contends that the North Carolina State Bar violated his rights to Due Process and Equal Protection because "the Rules of Professional Conduct [we]re selectively enforced against [him]." This constitutional question was not raised in the lower tribunal and may not be raised for the first time in this Court. *See Lane v. Iowa Mut. Ins. Co.*, 258 N.C. 318, 322, 128 S.E.2d 398, 400 (1962) (citations omitted). Defendant's equal protection argument is not properly before the Court, and we decline to address it.

III. Conclusion

The Order is affirmed.

AFFIRMED.

Judges DIETZ and CARPENTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 NOVEMBER 2022)

BODENHAMER v. BROWN-BODENHAMER 2022-NCCOA-719 No. 22-228	Surry (20CVD781)	Affirmed
IN RE C.M.W. 2022-NCCOA-720 No. 22-169	Catawba (19JA254)	Vacated and Remanded
IN RE K.M.S. 2022-NCCOA-721 No. 22-238	Forsyth (21JA89)	Affirmed
IN RE M.J. 2022-NCCOA-722 No. 22-153	Forsyth (20JA19)	Affirmed
IN RE W.C.F. 2022-NCCOA-723 No. 22-272	Wayne (21SPC50172)	Affirmed
KOONCE v. KOONCE 2022-NCCOA-724 No. 22-211	New Hanover (16CVD4038)	Affirmed
STATE v. BURGESS 2022-NCCOA-725 No. 22-120	Wake (18CRS214945-47)	No Error
STATE v. FRIDAY 2022-NCCOA-726 No. 22-53	Guilford (17CRS74394-95) (17CRS74472-73) (17CRS74737) (17CRS74753) (17CRS75293)	No Error
STATE v. GREEN 2022-NCCOA-727 No. 22-148	Rowan (18CRS1452) (18CRS51240)	Affirmed In Part; Remanded For Correction Of Clerical Error.
STATE v. HENDRIX 2022-NCCOA-728 No. 21-768	Cumberland (18CRS1587)	No Error
STATE v. HINMAN 2022-NCCOA-729 No. 22-174	Pender (17CRS50882) (17CRS50884)	No Error

STATE v. LLOYD 2022-NCCOA-730 No. 22-221	Halifax (16CRS50797) (16CRS50799)	No Error
STATE v. MODLIN 2022-NCCOA-731 No. 22-132	Beaufort (19CRS51767)	No Plain Error in Part; No Error in Part; Remanded in Part
STATE v. MOORE 2022-NCCOA-732 No. 22-368	Jones (16CRS50168) (18CRS522)	No Error
STATE v. WILLIAMS 2022-NCCOA-734 No. 22-165	Brunswick (19CRS50630) (19CRS681)	No Error
STATE v. WILSON 2022-NCCOA-735 No. 22-39	Pitt (16CRS55574)	No Plain Error in Part, Reversed in Part, and Remanded
SULLIVAN v. TRIAD HOSP. CORP. 2022-NCCOA-736 No. 22-150	Ashe (21CVS13)	Affirmed
SUNALEI PRES. PROP. OWNERS' ASS'N, INC. v. CHUBBY CUSTARD, LLC 2022-NCCOA-737 No. 22-318	Watauga (21CVS622)	Affirmed.
WILLIAMS v. N.C. DEP'T OF COM. 2022-NCCOA-738 No. 22-103	Buncombe (21CVS1281)	Affirmed
WINEBARGER v. STEEN 2022-NCCOA-739 No. 22-297	Watauga (12CVD591)	Vacated and Remanded

LUAI ABDO, PLAINTIFF
v.
KEMAL ALI JONES, DEFENDANT

No. COA22-271

Filed 15 November 2022

Discovery—sanctions—failure to provide discovery—repeated and willful failure—dismissal with prejudice

In an action that included claims against two insurance companies for underinsured motorist coverage, the trial court did not abuse its discretion by dismissing with prejudice plaintiff's complaint against one insurance company as a Rule 37 sanction for plaintiff's failure to provide all requested documents as required by a consent order, where plaintiff's failure to provide the required discovery was repeated and willful and the trial court made a finding that it considered less severe sanctions but believed that dismissal was appropriate. However, the trial court did abuse its discretion by dismissing with prejudice plaintiff's complaint against the other insurance company because that company did not file a motion to compel, join in the first company's motion for sanctions, attend the hearing, or request relief from the trial court.

Appeal by Plaintiff from order entered 28 October 2021 by Judge D. Jack Hooks, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 4 October 2022.

David J. Martin for Plaintiff-Appellant.

Sue, Anderson & Bordman, LLP, by Stephanie W. Anderson, for Unnamed Defendant-Appellee Erie Insurance Exchange.

Russ, Worth & Cheatwood, PLLC, by Philip H. Cheatwood, for Unnamed Defendant-Appellee United Services Automobile Association.

COLLINS, Judge.

¶ 1 Plaintiff Luai Abdo appeals an order granting Unnamed Defendant Erie Insurance Exchange's motion for sanctions and dismissing Plaintiff's complaint with prejudice as to Defendant Kemal Ali Jones and Unnamed Defendants Erie and United Services Automobile Association

("USAA"). Plaintiff makes no argument that the trial court erred by dismissing the complaint against Jones. After careful review, we conclude the trial court did not err by dismissing Plaintiff's complaint against Erie. However, we conclude the trial court erred by dismissing Plaintiff's complaint against USAA. Accordingly, we affirm in part and reverse in part, and remand for further proceedings.

I. Procedural History and Factual Background

¶ 2 Plaintiff was involved in an automobile accident with Jones in July 2017. In June 2020, Plaintiff filed an amended complaint against Jones, which included claims against Erie and USAA for underinsured motorist coverage. Erie answered and served its "First Request for Production of Documents" and "First Set of Interrogatories" on Plaintiff in early June. USAA answered in early July.

¶ 3 Plaintiff responded to Erie's discovery requests by the end of July but failed to provide all the requested documents. Erie notified Plaintiff by email on 31 August that his responses were deficient and requested supplemental discovery, including Plaintiff's pre-accident medical records. When Erie had not received a response to its supplemental discovery request by December 2020, Erie filed a motion to compel. Plaintiff served supplemental discovery responses in March 2021 but objected to Erie's request for pre-accident medical records. The trial court entered a Consent Order on 24 March 2021, signed by Plaintiff's attorney and Erie's attorney, ordering Plaintiff to produce the requested documents by 24 May 2021.

¶ 4 Shortly after the Consent Order was entered, Plaintiff's attorney separated from his law firm. The law firm withdrew its representation of Plaintiff, and Plaintiff's attorney individually entered a notice of appearance on Plaintiff's behalf on 12 May 2021.

¶ 5 On 25 August 2021, by which time Plaintiff still had not produced the court-ordered discovery, Erie filed an Amended Motion for Sanctions or, in the Alternative, to Dismiss for Failure to Prosecute, "pursuant to Rules 26, 33, 34, 37, and 41 of the North Carolina Rules of Civil Procedure," requesting "entry of an order dismissing [Plaintiff's] case as sanctions for failing to comply with the Court's Order to Compel Discovery or, in the alternative, to dismiss [Plaintiff's] case for failure to prosecute." The trial court heard Erie's motion on 27 September 2021. Plaintiff and Erie argued at the hearing; neither Defendant nor USAA made an appearance at the hearing.

¶ 6 By written order entered 28 October 2021 ("Dismissal Order"), the trial court found, in pertinent part:

> 11. That as of the date of the hearing on September 27, 2021, [Plaintiff] had not served the unnamed defendant with any of the documents that he agreed to provide to the unnamed defendant in the March 24, 2021 Consent Order;
>
> 12. That at the hearing of this matter, [Plaintiff's attorney] appeared and provided no evidence to the Court that he had attempted to obtain any of the documents that were agreed to in the March 24, 2021 Consent Order;
>
> 13. That [Plaintiff's attorney] has willfully failed to comply with the March 24, 2021 Consent Order;
>
> 14. That the Court has considered less severe sanctions than dismissal in ruling on these motions but believes dismissal appropriate as this matter [w]as handled by [Plaintiff's attorney] in its entirety and he has willfully failed to comply. While understanding the file was perhaps under the supervision of another partner or attorney during its tenure with the [former law firm], all official actions have been signed and handled by [Plaintiff's attorney]. Thus he has been aware at all times, even if he was subordinate while at the [former law firm]. He was certainly aware on May 12, when he filed his appearance with the Court.

Based on its findings, the trial court ordered that, "in the Court's discretion and after having considered less severe sanctions than dismissal, the unnamed defendant Erie's Motion for Sanctions is hereby GRANTED and that [Plaintiff's] Complaint is hereby dismissed with prejudice as to all defendants and unnamed defendants." Plaintiff timely appealed.

II. Discussion

¶ 7 Plaintiff argues the following: dismissal was not proper under Rule 37 because Plaintiff was not engaged in systematic violations of court orders and lesser sanctions were available; the trial court failed to make the requisite findings of fact to support dismissal under Rule 41; and the trial court erred by dismissing Plaintiff's complaint against Defendant and USAA.[1]

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1. Erie begins its brief by pointing out that, "[n]otwithstanding the fact that [Plaintiff] only presented one issue for appeal in the record for appeal, [Plaintiff] presents three

A. Rule 37

¶ 8 Rule 37 of the North Carolina Rules of Civil Procedure authorizes a trial court to impose sanctions, including dismissal, upon a party that "fails to obey an order to provide or permit discovery[.]" N.C. Gen. Stat § 1A-1, Rule 37(b)(2) (2021). "[T]rial courts are vested with broad discretion in ordering sanctions under Rule 37(b)." *GEA, Inc. v. Luxury Auctions Mktg, Inc.*, 259 N.C. App. 443, 452, 817 S.E.2d 422, 429-30 (2018) (citation omitted). "Not only is the decision to impose Rule 37(b) sanctions within the sound discretion of the trial court, but so too is the choice of Rule 37(b) sanctions to impose." *Id.* at 452, 817 S.E.2d at 430 (citation omitted).

¶ 9 "[B]efore dismissing a party's claim with prejudice pursuant to Rule 37, the trial court must consider less severe sanctions." *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 179, 464 S.E.2d 504, 507 (1995) (citing *Goss v. Battle*, 111 N.C. App. 173, 177, 432 S.E.2d 156, 159 (1993)). However, "[a] trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate." *Honeycutt Contractors, Inc. v. Otto*, 209 N.C. App. 180, 185, 703 S.E.2d 857, 860-61 (2011) (citation omitted). "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." *Hursey*, 121 N.C. App. at 177, 464 S.E.2d at 505 (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

B. Dismissal as to Erie

¶ 10 Here, Erie notified Plaintiff on 31 August 2020 that his interrogatory responses were deficient and requested supplemental discovery, including Plaintiff's pre-accident medical records; Plaintiff failed to address the deficiency in his interrogatory responses. Erie filed a motion to compel in December, and on 24 March 2021, the trial court entered a Consent Order compelling Plaintiff to produce the requested documents by 24 May 2021. When Erie filed its motion for sanctions, over three months after the Consent Order's deadline, Plaintiff had yet to produce the ordered documents. When Erie's motion for sanctions was heard on 27 September 2021, over four months after the Consent Order's deadline, Plaintiff had yet to produce the ordered documents. At the hearing on Erie's motion, Plaintiff "provided no evidence to the Court that he had attempted to obtain any of the documents . . . [.]"

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issues in his Brief." However, we note that "[p]roposed issues on appeal are to facilitate the preparation of the record on appeal and shall not limit the scope of the issues presented on appeal in an appellant's brief." N.C. R. App. P. 10(b).

¶ 11 In its Dismissal Order, after making findings of fact detailing Plaintiff's repeated failures to produce discovery and comply with the Consent Order, the trial court made a finding that it "has considered less severe sanctions than dismissal in ruling on these motions but believes dismissal appropriate as this matter [w]as handled by [Plaintiff's attorney] in its entirety and he has willfully failed to comply." Only "after having considered less severe sanctions than dismissal" did the trial court order Plaintiff's complaint dismissed.

¶ 12 Based on the facts of this case, and the trial court's consideration of lesser sanctions, the trial court's decision to dismiss Plaintiff's complaint against Eerie as a sanction for his willful failure to comply with the Consent Order was not "so arbitrary that it could not have been the result of a reasoned decision." *Hursey*, 121 N.C. App. at 177, 464 S.E.2d at 505 (citation omitted). Accordingly, Plaintiff's complaint against Erie was properly dismissed under Rule 37.

¶ 13 Because Plaintiff's complaint against Erie was properly dismissed under Rule 37, we do not address Plaintiff's argument that the trial court erred by dismissing his complaint under Rule 41.

C. Dismissal as to USAA

¶ 14 Plaintiff next argues that the trial court erred by dismissing his complaint against USAA because USAA did not file a motion to compel, join Erie's motion for sanctions, attend the hearing, or request relief from the trial court. We agree.

¶ 15 The imposition of sanctions under Rule 37 for failure to obey a court order is an abuse of discretion where there is no record evidence that the party failed to obey a court order. *See Baker v. Rosner*, 197 N.C. App. 604, 677 S.E.2d 887 (2009). In *Baker*, plaintiffs filed a complaint against multiple defendants – Prudence and Ed Rosner, Jo Faulk, and Nova Realty, Inc. – alleging fraud and unfair and deceptive trade practices. *Id.* at 605, 677 S.E.2d at 889. Plaintiffs requested certain documents be produced, and the trial court entered a consent order directing the Rosners and Faulk to produce the documents. *Id.* When the Rosners and Faulk failed to produce the documents, plaintiffs filed a motion for sanctions, pursuant to Rule 37. *Id.* The trial court entered an order allowing the motion for sanctions, ordering each defendant's answer be stricken, and entering default judgment against each defendant as to plaintiffs' claims for fraud. *Id.* at 606, 677 S.E.2d at 889. This Court concluded that the trial court abused its discretion by sanctioning Nova because plaintiffs did not seek discovery from Nova and Nova was not a party to the consent order; thus, Nova was not a disobedient party. *Id.* at 607, 677 S.E.2d at 890.

¶ 16 Although the parties in *Baker* were situated differently, *Baker*'s reasoning applies here. In this case, Erie sought discovery from Plaintiff, while USAA did not. When Plaintiff's discovery responses were deficient, Erie requested supplemental discovery; USAA did not. When Plaintiff did not respond to Erie's supplemental discovery request, Erie filed a motion to compel; USAA did not. Erie and Plaintiff signed the Consent Order compelling the production of documents; USAA was not a party to the Consent Order. When Plaintiff failed to comply with the Consent Order's deadline, Erie filed a motion for sanctions, while USAA did not. Erie attended the hearing to argue that sanctions were appropriate; USAA did not attend the hearing. The Dismissal Order granting Erie's motion for sanctions describes Plaintiff's failures to provide Erie with discovery; it makes no mention of USAA. Thus, as in *Baker*, there is no record evidence that Plaintiff violated any discovery orders as to USAA.[2] Accordingly, the trial court abused its discretion by dismissing Plaintiff's complaint against USAA.

III. Conclusion

¶ 17 Plaintiff makes no argument that the trial court erred by dismissing his complaint against Defendant. Furthermore, the trial court did not err by dismissing Plaintiff's complaint against Erie. However, the trial court erred by dismissing Plaintiff's complaint against USAA. Accordingly, the trial court's order is affirmed as to Defendant and Erie and reversed as to USAA, and remanded for further proceedings.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges TYSON and INMAN concur.

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2. USAA argues that *Yahudah Washitaw of E. Terra Indians v. PHH Mortg. Corp.*, No. 5:17-CV-00377-BR, 2017 U.S. Dist. LEXIS 210027 (E.D.N.C. Dec. 21, 2017), supports its position that it need not have moved for sanctions. That court stated, "[i]f the court dismisses a plaintiff's complaint upon a defendant's Rule 12(b)(6) motion and the same legal arguments apply to its claims against remaining defendants, the court may dismiss the complaint in its entirety." *Id.* at *4. Dismissal upon 12(b)(6) grounds is not analogous to dismissal as a sanction under Rule 37. We are neither bound by the federal district court's opinion nor persuaded to apply its reasoning here.

EIDSON v. KAKOURAS

[286 N.C. App. 388, 2022-NCCOA-741]

KRISTI C. EIDSON, PLAINTIFF
v.
THEOFANIS K. KAKOURAS, DEFENDANT

No. COA21-373

Filed 15 November 2022

1. Child Custody and Support—child support modification—calculation of income—stipulation of parties—no record evidence

In a lengthy and complex child support case, the trial court's factual finding that the parties had previously stipulated to limiting their evidence to two particular years' worth of income for purposes of calculating child support was in error where the specific terms of the oral stipulation did not affirmatively appear in the transcript or the record, and where there was no indication that the trial court contemporaneously inquired of the parties about the stipulation at the time it was made. Moreover, the trial court erred by entering a child support order that relied on the undocumented stipulation and that was based only upon the parties' past income (specifically, from seven and five years earlier) rather than their current income.

2. Child Custody and Support—child support modification—calculation of income—sufficiency of findings—evidentiary support

In a lengthy and complex child support case, the trial court's order determining child support was vacated and the matter remanded for further findings of fact regarding how the trial court calculated the parties' incomes—including why all rental expenses from defendant father's rental properties were omitted when calculating his net rental income, how the "profit" and "loan to shareholder" income for defendant's businesses was computed, and how the trial court arrived at the figures for plaintiff mother's monthly income.

3. Child Custody and Support—child support modification—substantial change of circumstances

In a lengthy and complex child support case in which only past support was still at issue, after the appellate court determined that multiple child support orders should be vacated and the matter remanded for the trial court to make additional findings regarding the parties' incomes, expenses, and the children's needs during the relevant time periods, the appellate court also held that the

trial court properly determined that there was sufficient evidence of a substantial change of circumstances justifying modification of child support in each of two prior years when the parties filed their respective motions to modify.

Appeal by defendant from orders entered 6 June 2019, 9 December 2019, 20 January 2021, and 26 March 2021 by Judge Lisa V. L. Menefee in District Court, Forsyth County. Heard in the Court of Appeals 8 February 2022.

Connell & Gelb PLLC, by Michelle D. Connell, and Fox Rothschild LLP, by Kip D. Nelson, for plaintiff-appellee.

Carolyn J. Woodruff, Jessica Snowberger Bullock, and Y. Michael Yin, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 This appeal arises from an extraordinarily protracted and contentious child support case. After trying for ten years to obtain an order establishing Father's child support obligation, the parties managed to secure several orders including a 2021 Child Support Order, but for the reasons addressed below, we must vacate that order and several others and remand for additional proceedings and entry of a new order. Most unfortunately, both children have now attained the age of 18, so the child support order on remand will be entirely for past support.

¶ 2 Defendant-Appellant ("Father") appeals from the 20 January 2021 Child Support Order ("Child Support Order") establishing permanent child support, the 26 March 2021 Amended Child Support Order ("Amended Order") correcting clerical mistakes as to the January Child Support Order, the 26 March 2021 order allowing Mother's Rule 59 motion to amend the January Child Support Order, the interlocutory 6 June 2019 Order ("2019 Order") establishing Father's income, and two orally rendered orders from 6 December 2019 denying Father's motion to change venue to Surry County and motion for reconsideration under Rules of Civil Procedure 59 and 60. Father argues the trial court erred in calculating each parent's income, erred in finding a substantial change in circumstances warranting modification of the 2011 Temporary Order establishing child support after it was deemed to have become permanent in 2014, and that the "delays in hearings and entry of an order made this case prejudicial to Appellant-Father and confused the trial court." (Capitalization altered.) We hold the trial court erred by relying

on an undocumented stipulation to calculate child support based upon the parties' incomes in 2014 and 2016 instead of using the most current income information; erred in the calculation of the parties' incomes; and did not err in finding a substantial change of circumstances justifying modification of child support from both 2014 and 2016. We also hold the delays between the evidentiary hearings and the entry of the 2021 Child Support Order did prejudice Father. We vacate the trial court's Child Support Order, Amended Order, and 2019 Order and remand for further proceedings.

I. Background

¶ 3 The parties were married in 1997; their two children were born in 1998 and 2003. The parties separated in January 2011 and divorced in 2012. By the time of this appeal, both children had reached the age of majority.

¶ 4 Litigation regarding establishment of child support began in February 2011. Both parties resided in Surry County. Mother filed a complaint in Surry County seeking child custody, child support, an interim equitable distribution, and equitable distribution. Father counterclaimed for child custody and moved to dismiss the equitable distribution claim based upon the parties' premarital agreement. On 23 February 2011, the trial court in Surry County entered a Temporary Order, without prejudice, establishing temporary custody and child support. Father was ordered to pay child support of $1300 per month, beginning 1 March 2011, with Father to be reimbursed for any overpayment if the permanent child support obligation ended up being set at less than $1300 per month. The Temporary Order also required Father to continue paying the mortgage on the family home, as well as related maintenance expenses such as insurance and taxes, so Father was paying a total of $2600 to $3000 per month under the Temporary Order.[1] The Temporary Order did not include detailed findings of fact but did include a child support calculation on Worksheet A, attached to the order. The Worksheet only contains minimal information. Worksheet A noted "Plaintiff (F)" had a gross income of $5,833 per month and "Defendant (M)" had no income; the Basic Child Support Obligation was $1,296 per month. All other fields of the Worksheet, including "adjustments," contain a "0" or "0.00%."[2] Thus, the Worksheet showed Father's child support obligation as $1,296 per month.

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1. Father's obligation to pay the mortgage and home-related expenses was stated in the Temporary Order. These numbers are based upon evidence from Father's amended Financial Standing Affidavits and arguments in our record.

2. The Worksheet erroneously listed Father as Plaintiff and Mother as Defendant but it did clearly identify the parties by their first names and as "Mother" and "Father." The parties are correctly identified on the Temporary Order itself.

¶ 5 Later in 2011 and 2012, Mother filed motions regarding custody and visitation, alleging a dispute between the parties about Father's plans to take the children on a summer trip to visit family in Greece. On 11 February 2013, the Surry County District Court began a hearing on the issue of child custody. Following a five-day trial, the trial court entered an order 16 May 2013 establishing permanent child custody. The 2013 Child Custody Order granted joint custody to the parties, with primary physical custody with Mother, and it set out detailed provisions regarding the parties' time with the children during summers, including allowing Father to take the children to Greece for four weeks during summers in even-numbered years. The Child Custody Order also decreed that:

> all other provisions of the prior Temporary Order in regards to the possession of real and/or personal properties, the payment of expenses, and the issue of child support, are not modified by the entry of this Order and are reserved by the Court for future hearing upon the scheduling of either party.

¶ 6 In September 2014, the parties entered into a Memorandum of Judgment resolving their claims regarding division of their property. In December 2014, Mother filed a "Motion to Establish Child Support" or in the alternative "Motion to Modify Child Support." She alleged the parties were still under the Temporary Order from 2011 and the Permanent Child Custody Order had been entered in 2013. She also alleged changes in circumstances since 2011, including changes in the parties' incomes, the change in the custodial schedule, and the fact that over three years had passed since the Temporary Order was entered. In addition, Father had purchased Mother's interest in the former marital home, so Father was no longer paying the mortgage and other household expenses under the 2011 Temporary Order for the benefit of Mother and the minor children.

¶ 7 In October 2015, Father filed a Motion for Judicial Appointment, requesting that the Administrative Office of the Courts appoint a judge to preside over the case due to conflicts of interest with judges in District 17B.[3] In December 2015, Father filed a Motion for Deviation from the

3. The Forsyth County trial court's order of 21 February 2017 found two judges in the Stokes/Surry Judicial District had been "conflicted out of hearing this case;" one judge was a neighbor of Mother and another had a conflict arising from his 2014 campaign. These conflicts left only two other District Court judges in District 17B available to hear the case, with only two weeks of civil court per month in the district, so the unavailability of two judges and limited court time made the case difficult to schedule.

child support guidelines, alleging Mother had been receiving substantial income from gifts or contributions and free use of credit cards. In October 2016, Father filed a motion to modify child support alleging the oldest child had attained the age of 18 and graduated from high school in 2016.

¶ 8 In January 2017, Mother filed a motion to change venue of the case to Forsyth County. She alleged the case had been pending for five years, and despite many calendar requests and notices of hearing, only a few issues had been resolved. She also noted the existence of "conflicts" regarding the judges and parties in Surry County and alleged the parties consented to a change of venue to Forsyth County. On 30 January 2017, the trial court entered a Consent Order changing venue of the case to Forsyth County.

¶ 9 On 13 February 2017, the trial court in Forsyth County held a hearing to determine if the 2011 Temporary Order should be considered as a temporary order or a permanent order. On 21 February 2017, the trial court entered an order concluding that the 2011 Temporary Order had become a permanent order ("2017 Order"), so a party must demonstrate a substantial change of circumstances from the date the order became "permanent" to modify the order. Specifically, the trial court concluded that:

> 3. By the time [Mother] filed her Motion to Establish and/or Modify Child Support on December 8th, 2014, enough time had passed such that the prior Order entered by Judge Neaves on February 23rd, 2011, had become permanent.
>
> 4. By the time [Father] filed his Motion to Modify Child Support on October 21st, 2016, enough time had passed such that the prior Order entered by Judge Neaves on February 23rd, 2011, had become permanent.

Neither party has noticed appeal from the 2017 Order, so we must review the orders on appeal in light of the 2017 Order. The trial court and parties have treated the issue of modification of child support as being modification from the 2011 Temporary Order ("the prior Order entered by Judge Neaves on February 23rd, 2011") based upon *both* dates, 2014 and 2016. It is not clear how, or why, the Temporary Order could *become* a permanent order twice, but that is what the 2017 Order says. Another possible interpretation of the Temporary Order becoming permanent *twice*, in both 2014 and 2016, would be that it became permanent in 2014; it was "modified" in 2016 and thus became permanent again; and then it would

be modifiable thereafter using 2016 as the baseline "permanent" order.[4] But that is not the interpretation of the dates of the order becoming "permanent" twice the parties and trial court used in the hearings, so we will treat the modification as being from the 2011 baseline in both 2014 and 2016, only because the 2017 Order was not appealed and that was the approach taken before the trial court.

¶ 10 In late 2017 and early 2018, both parties filed various motions regarding the child support matter and both filed updated financial affidavits. On 24 January and 11 April 2018, the trial court held hearings to determine Father's income for 2014 and 2016. Apparently, the purpose for holding a hearing to establish his income for only these particular years was to establish the baseline for consideration of the motions to modify child support, based upon the trial court's February 2017 Order which held the 2011 Temporary Order became a permanent child support order in both 2014 and 2016.[5] On 6 June 2019, the trial court entered an order establishing the parties' incomes from 2014 and 2016 ("2019 Order"). The primary focus of the 2019 Order is Father's income so it includes detailed findings of fact regarding Father's businesses, restaurants, rental properties, transfers of funds to Greece, foreign bank accounts, and other matters. In short, Father's sources of income are complex and the amounts of income vary year to year. The trial court found Father's income for 2014 as $297,618, and his income for 2016 as $345,098.

¶ 11 On 17 June 2019, Father filed a motion to change venue of the case back to Surry County and a motion for reconsideration under Rules 59 and 60. In November 2019, Mother filed a new financial affidavit. In December 2019, Father filed "Objections and Defenses" alleging discrimination based upon his national origin, as he was from Greece; he alleged that "[i]n the time-honored tradition of immigrants, Defendant

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4. We suggest that entering an order to declare one prior temporary child support order as "permanent" on two different dates without making the findings as to the relevant circumstances as of the dates of both the newly-declared "permanent" orders fails to simplify the case; here, the declaration of permanency—twice—has made our review incredibly complex. And since a modification of child support can relate back to the date of the motion to modify—unlike a child custody modification—it is not clear to us why there would ever be any need for a declaration of permanency. But neither party appealed this order, and we must proceed accordingly.

5. If the 2011 Temporary Order became a permanent order in 2016, the holding in the 21 February 2017 Order that the Temporary Order became permanent in 2014 would normally be irrelevant to our analysis. We would consider only 2016 as the baseline for modification going forward. But as noted above, we are bound by the trial court's order establishing both 2014 and 2016 as the points when the 2011 Temporary Order became permanent.

Father has remitted funds to his family in Greece and thee [sic] funds have never been available for the child's accustomed standard of living." He also alleged, as to "Due Process and Notice" that "[t]o say that the Temporary Child Support Order of Judge Neaves became permanent before its declaration as a permanent order by Judge Sipprell on February 21, 2017, constitutes a lack of notice to Defendant Father that the order had become permanent" and "[t]here should be no retroactivity prior to February 21, 2017."

¶ 12 The trial court held another hearing regarding child support on 9 and 10 December 2019. At the start of the hearing, the trial court noted there had been a "chambers meeting" with counsel and the hearing "is a continuation of child support hearing" and the "first part of the hearing" was in 2018, referring to the hearing to establish Father's income for 2014 and 2016. Counsel for each party addressed various pending motions, including Father's motions for change of venue and Father's Motion under Rule 59 and 60; the trial court orally denied the motions for change of venue and the Rule 59 and 60 motion, although no written order was ever entered. Both parties then presented evidence regarding their incomes and expenses and the expenses of the children. The trial court took the matter under advisement and did not render a ruling at the close of the trial.

¶ 13 Before the order was entered, the COVID-19 pandemic began, and Governor Roy Cooper issued various executive orders restricting activities. Some of the executive orders affected the operations of restaurants. One of the initial executive orders related to COVID-19 on 17 March 2020, Executive Order No. 118, limited the operations of restaurants to "Carry-Out, Drive-Through, and Delivery Only." Office of Governor Roy Cooper, Executive Order No. 118 (March 17, 2020), https://governor.nc.gov/media/1760/open.

¶ 14 On 5 May 2020, Father filed another Motion to Change Venue back to Surry County, alleging that neither party resides, works, or owns property in Forsyth County. He also alleged that "[d]ue to the outbreak of COVID-19, a statewide Stay at Home Order has been issued that severely limits unnecessary travel," (capitalization altered), and that the change of venue back to Surry County would reduce unnecessary travel for both parties. Father also filed a Motion to Modify Child Support. He alleged modification of child support was necessary based on substantial changes in circumstances "since the entry of said Order[6] and since the last

6. He does not clearly identify "said order" but earlier in the motion he asks to modify "a prior Order of this Court for child support." The only "prior order" is the 2011 Temporary Order, which was later deemed to be "permanent" as of 2014 and 2016.

set of hearings[.]" Father alleged specifically that the Temporary Order was entered in 2011, and "[a]n Order was entered on February 21, 2017, whereby the Temporary Order of 2011 was decreed to be permanent and modifiable." He further alleged that his income was "significantly reduced" since the entry of the Temporary Order and the prior hearings based upon COVID-19. He alleged he had to close one of his restaurants and his other restaurant was limited to only "take-out/curbside" orders. He alleged it was uncertain when his restaurants would be allowed to re-open or operate at full capacity, or if the restaurants would be able to operate at the previous capacities after the pandemic. He therefore requested the trial court to "[r]eview and re-calculate Defendant Father's child support obligations based upon the current circumstances of the parties."

¶ 15 On 23 December 2020, Father filed a Motion to Re-Open Evidence for Defendant's Current Income, "or in the alternative, grant a mistrial under Rule 59 . . . , or in the alternative, dismiss [Mother]'s Motion under Rule 41 for failure to prosecute." He alleged that the motion for modification of child support "being heard" was filed in 2014, a motion to modify was filed in 2016, and neither motion had yet been ruled upon. He alleged the hearing regarding child support started on 24 January 2018; the last day of testimony in the child support hearings was 10 December 2019. He alleged:

> Since December 10, 2019 (the last hearing date), the world has been engulfed in a GLOBAL PANDEMIC, to which the world has not experienced in a hundred years. Restaurants have particularly been devastated. This GLOBAL PANDEMIC WAS NOT PREDICTABLE OR KNOWN TO THE [FATHER] OR THE UNDERSIGNED ON December 10, 2019.

(Emphasis in original.)

¶ 16 Father then made detailed allegations regarding the effects of the COVID-19 closures on restaurants in general and his restaurants in particular, including his loss of income, increases in business expenses, lack of business interruption insurance, and reductions in profits.

¶ 17 On 20 January 2021, the trial court entered its Child Support Order. The Child Support Order notes that it is based upon the hearing held on 9 and 10 December 2019, addressing the various motions regarding child support filed by both parties, and noted that "a portion of which has already been heard on January 24 and 25, 2018 and April 11, 12 and 13, 2018." The Child Support Order includes extensive findings of fact

addressing the procedural oddities of this case as well as the incomes and expenses of the parties and children. The findings of fact address primarily income and expenses as of 2014 and 2016; none of the findings address income or expenses as of 2019. And since no evidence was taken after the December 2019 hearing dates, none of the findings address income or expenses for 2020 or 2021, including any effects of the COVID-19 pandemic closures of Father's restaurants—the restaurants the trial court found were a substantial source of Father's income based upon the evidence presented as to 2014 and 2016. Of particular note, the trial court also found:

> 18. Counsel for both parties *stipulated on the record* that the first calculation of child support should be effective in 2014, using 2014 income figures and that the second calculation of child support should be effective in 2016, using 2016 income figures.

(Emphasis added.) However, we have been unable to find any such stipulation in any part of the Record on Appeal or transcripts.

¶ 18 Mother then filed a motion for reconsideration pursuant to Rules 59 and 60 on 1 February 2021 alleging clerical errors. On 3 February 2021, Father filed his first notice of appeal, and gave notice of appeal from:

> (1) the Child Support Order signed on January 20, 2021 and entered on January 20, 2021 by the Honorable Lisa V.L. Menefee;
>
> (2) The Order signed on June 6, 2019 and entered on June 6, 2019 by the Honorable Lisa V.L. Menefee;
>
> (3) The Order of the District Court in Forsyth County orally rendered on December 9, 2019 by the Honorable Lisa V.L. Menefee denying [Father's] Motion to Change Venue filed June 17, 2019. There is no written Order entered on this Motion, nor did the Court direct one be prepared; and
>
> (4) The Order of the District Court in Forsyth County orally rendered on December 9, 2019 by the Honorable Lisa V.L. Menefee denying [Father's] Motion Pursuant to Rule 59 (1) (4) (7) (8) (9) and Rule 60(b)(1) (2) (6) filed June 17, 2019. There is no written Order entered on this motion, nor did the Court direct one be prepared.

The trial court then granted Mother's motion for reconsideration and entered an Amended Child Support Order on 26 March 2021.[7] Father filed a second notice of appeal from the Amended Order and the order allowing Mother's motion for reconsideration on 31 March 2021; the second notice of appeal also restated his first notice of appeal "for purposes of protecting the original appeal notice filed February 3, 2021[.]"

II. Jurisdiction

¶ 19 Father filed two timely Notices of Appeal, the first on 3 February 2021 and the second on 31 March 2021. The Amended Order is a final order establishing permanent child support. We recognize additional motions were filed prior to the trial court's January and March 2021 orders that were not ruled upon, including Father's 5 May 2020 motion to change venue to Surry County, Father's 5 May 2020 motion to modify child support based upon the pandemic restrictions on his restaurants, and Father's 23 December 2020 "Motion to Re-Open Evidence for Defendant's Current Income." But these pending motions or any other motions which may have been filed after appeal of the March 2021 Amended Child Support Order do not change the status of that Order as a final appealable order.

¶ 20 The 2019 Order was an interlocutory order, and Father properly preserved his right to appeal the 2019 Order after entry of the final Amended Order. This Court has jurisdiction under North Carolina General Statute § 7A-27(b)(2) to address the merits of Father's appeals. N.C. Gen. Stat. § 7A-27(b)(2) (2021) (effective 1 January 2019 to 30 June 2021).

III. Analysis

¶ 21 On appeal, the parties present various arguments regarding whether the trial court erred by establishing child support based upon the parties' incomes and expenses and the children's expenses as of 2014 and 2016—five and seven years, respectively, before the effective date of the Amended Order. Father notes child support is supposed to be based upon the income and expenses as of the time the order is effective. He notes the last evidence was taken in December 2019, prior to the COVID-19 pandemic, and his child support obligation was erroneously

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7. In the Amended Order, the trial court changed two provisions in the decretal portion of the original Child Support Order. The trial court (1) added a deadline of 20 May 2021 for payment of past-due child support payments due from 16 December 2014 through 20 October 2016 and (2) added a 240-day time frame, including a deadline of 20 September 2021, for child support payments due after 21 October 2016. The Amended Order did not address any of Father's motions filed after the December 2019 hearing. The Amended Order also made formatting changes, but no substantive changes.

based upon his 2014 and 2016 incomes, while his income was reduced by the closures and limitations of operation of his restaurants in 2020 and 2021.

¶ 22 At the outset, we will clarify what this appeal addresses and what it cannot address. This Court cannot address a motion which has not been heard and upon which the trial court has not entered an order. N.C. R. App. P. 10(a)(1). The Amended Order on appeal was entered on 26 March 2021, based upon evidence up to December 2019. On 5 May 2020, after completion of the hearings but before entry of the Child Support Order, Father filed a "Verified Motion to Modify Child Support" and on 23 December 2020 filed a "Motion to Re-open Evidence for Defendant's Current Income," (capitalization altered), due to the impact of the COVID-19 pandemic closures on his restaurants, but these motions have not been heard. Since Father filed his motion to modify child support on 5 May 2020, he still has the opportunity for the trial court to consider modification effective as of 5 May 2020. *See Chused v. Chused*, 131 N.C. App. 668, 672, 508 S.E.2d 559, 562 (1998) (quotation and citations omitted) ("A supporting parent 'has no authority to unilaterally modify the amount of the [court ordered] child support payment. The supporting parent must [first] apply to the trial court for modification.' The trial court then has the authority to enter a modification of court ordered child support, retroactive to the filing of the petition of modification."). This appeal does not address or eliminate Father's pending motion for modification or any other motions filed after this appeal was taken. Thus, we will consider Father's appeal based on what is in the record before us: the evidence and status of the case as of the 26 March 2021 Amended Child Support Order, in turn based upon evidence of income and circumstances existing as of December 2019. Our analysis does not address any of the alleged changes in income or other circumstances wrought by the COVID-19 pandemic closures; those remain for the trial court to address, if properly presented to the trial court, after this appeal is concluded.

¶ 23 For purposes of determining a substantial change in circumstances, the Temporary Order was deemed to have "become permanent" as of 8 December 2014 and as of 21 October 2016, because no party has appealed the trial court's 21 February 2017 Order establishing the permanency of the 2011 Temporary Order.[8] Thus, the 2014 and 2016 circumstances

8. There is no evidence of the parties' actual incomes or expenses in 2011 when the Temporary Order was entered and no order ever addressed the circumstances of the parties or children in 2011.

and determinations of income and child support—based upon the 2017 Order holding the 2011 Temporary Order became "permanent" as of 2014 and 2016—forms the baseline for consideration of modification based upon a substantial change of circumstances thereafter, up to and including calculations of child support for each year from 2014 through 2019, as the trial court received evidence only up to December 2019.

A. Standard of Review

¶ 24 "Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Simms v. Bolger*, 264 N.C. App. 442, 447, 826 S.E.2d 522, 527 (2019) (quoting *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002)). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision.").

¶ 25 "In a case for child support, the trial court must make specific findings and conclusions. The purpose of this requirement is to allow a reviewing court to determine from the record whether a judgment, and the legal conclusions which underlie it, represent a correct application of the law." *Simms*, 264 N.C. App. at 447, 826 S.E.2d at 527 (quoting *Leary*, 152 N.C. App. at 441-42, 567 S.E.2d at 837). Findings of fact must be supported by competent evidence. *Atwell v. Atwell*, 74 N.C. App. 231, 234, 328 S.E.2d 47, 49 (1985). Findings are "deemed to be supported by competent evidence and are binding on appeal" unless specifically challenged by an appellant. *Ward v. Halprin*, 274 N.C. App. 494, 498, 853 S.E.2d 7, 10 (2020). "In short, the evidence must support the findings, the findings must support the conclusions, and the conclusions must support the judgment . . . ." *Atwell*, 74 N.C. App. at 234, 328 S.E.2d at 49.

B. Income Determinations

¶ 26 Father asserts the trial court made multiple errors when calculating the parties' incomes and challenges specific findings of fact. Father argues the trial court erred by not using his current income, by relying upon a non-existent stipulation limiting the parties' incomes for the purposes of calculating child support, by incorrectly calculating his 2014 and 2016 income, and by incorrectly calculating Mother's income.

For the reasons below, we vacate the trial court's Child Support Order, Amended Order, and 2019 Order establishing Father's income.

1. Stipulation regarding use of incomes from 2014 and 2016

¶ 27 **[1]** We first address Father's arguments about the stipulation limiting both parties' incomes to 2014 and 2016 for purposes of calculating child support. Father also specifically challenges the findings in the trial court's January and March 2021 child support orders regarding the income stipulation as unsupported by competent evidence. Finding 18 in both child support orders states:

> Counsel for both parties stipulated *on the record* that the first calculation of child support should be effective in 2014, using 2014 income figures and that the second calculation of child support should be effective in 2016, using 2016 income figures.

(Emphasis added.)

¶ 28 Throughout the record and transcripts of the 2018 evidentiary hearings, it is apparent that counsel for both parties were limiting their inquiry into the parties' incomes to the years 2014 and 2016 according to an agreement between counsel. Presumably, the parties and court limited the income inquiry to 2014 and 2016 because these are the years Mother and Father respectively made their motions to modify child support and the court intended to calculate past-due, prospective child support, or to establish a baseline for "current income" and a child support obligation for the purposes of considering the motions to modify for the first hearings in January 2018. 2014 and 2016 are also the years the trial court deemed the 2011 Temporary Order to have "become permanent." But despite Finding 18's claim the parties had stipulated "on the record," we have searched the transcripts and record in vain for a clear stipulation of any sort. Nowhere in the record before us is there evidence of a stipulation to *establish* child support based only upon income figures from 2014 and 2016. We can glean the existence of an off-the-record agreement to limit the evidence presented at the 2018 hearing for the purpose of establishing Father's income as of 2014 and 2016, because these were the dates the 2011 Temporary Order became "permanent," by references made by counsel as to an agreement. But nowhere can we find terms of a stipulation to calculate child support entirely based upon the 2014 and 2016 numbers, let alone in 2021—five to seven years after each respective motion to modify child support.

¶ 29 Stipulations are favored, but any stipulation must be clearly shown in the record and each party must agree to its terms:

> [C]ourts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties, and such practice will be encouraged. While a stipulation need not follow any particular form, *its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them*. Once a stipulation is made, a party is bound by it and he may not hereafter take an inconsistent position.

Stovall v. Stovall, 205 N.C. App. 405, 409, 698 S.E.2d 680, 683 (2010) (emphasis added) (quotation omitted). Oral stipulations must be reduced to writing, and if not reduced to writing the stipulation "must affirmatively appear in the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into." *McIntosh v. McIntosh*, 74 N.C. App. 554, 556, 328 S.E.2d 600, 602 (1985) (discussing the procedure regarding stipulations as applied to an equitable distribution proceeding). Upon review, the record must show the trial court "read the terms of the stipulations to the parties; that the parties understood the legal effects of their agreement and the terms of the agreement, and agreed to abide by those terms of their own free will." *Id.*

¶ 30 An example of appropriate reliance on a stipulation may be found in *Estate of Carlsen v. Carlsen*. 165 N.C. App. 674, 599 S.E.2d 581 (2004). In *Carlsen*, the parties had stipulated that the decedent lacked the testamentary capacity to execute a will, trust revocation, and promissory note. *Id.* at 676, 599 S.E.2d at 583. The stipulation also stated each document was invalid, null, and void. *Id.* The trial court entered a judgment based on the stipulation invalidating the documents. *Id.* However, unlike here, the trial court's order included "the exact language of the stipulation in its entirety." *Id.* at 679, 599 S.E.2d at 585. This Court concluded "the language of the stipulation was sufficiently definite and certain to form a basis for a judicial decision." *Id.* "In such a case where the testimony is in agreement, the stipulation is clear as to its impact, and the parties were present and aware of their actions, the stipulation is valid." *Id.*

¶ 31 This case is not like *Carlsen*. There is simply no specific stipulation in the transcripts or record on appeal. We can determine, from representations by counsel for both parties in the transcripts, at some point prior to the trial court's hearings on this matter in 2018 counsel for both parties agreed to limit the court's inquiry at these evidentiary hearings to

the parties' incomes in the years 2014 and 2016. As best we can tell the parties agreed to limit their presentation of evidence on the pending motions to modify the Temporary Order to address the parties' incomes in 2014 and 2016. Since the 2011 Temporary Order had been declared permanent by 2014, Mother's 2014 motion to modify would have required an analysis into each party's "current" income and expenses and the children's needs in 2014. If the 2014 motion to modify had been timely resolved, the trial court would have been engaging in the same analysis again in 2016 after Father filed his motion to modify, so evidence regarding income, expenses, and needs as of 2016 would be required.

¶ 32 The record is replete with references to an agreement to limit the presentation of evidence at the 2018 hearings to address income in 2014 and 2016. The parties apparently agreed not to present evidence regarding the period from 2011 to 2014, after entry of the Temporary Order until the Temporary Order was declared "permanent." There are numerous statements within the transcript of the various hearings that substantially confirm the existence of an agreement. One example is:

> [MOTHER'S TRIAL COUNSEL]: Your Honor, I could be wrong, the Court has a copy of the -- *we stipulated, for the purposes of this proceeding, that we are going to move forward with evidence related to 2014 and 2016 income information for these folks.* . . . I completed my evidence as it relates to demonstration of what the income was for 2014 and 2016. *When I even tried to present any evidence about anything that occurred prior to 2014*, I received heavy objections from [Father's Trial Counsel] that it was *outside of the timeframe of the evidence that the Court asked us to present. . . . I believe that the direction that we've received from this Court and that we stipulated and agreed to, as professionals, was that we're going to limit our evidence to 2014 and 2016 income.*

(Emphasis added.) Another is:

> [MOTHER'S TRIAL COUNSEL]: Your Honor, we've been living with this case a whole lot longer than [Father's Third Trial Counsel and Appellate Counsel] has. And I would submit to the Court that in response to her motion to dismiss, with all due respect, we were here for five days presenting detailed evidence

> *with regard to the financial circumstances of these parties for two different time frames, by consent, by stipulation.*

(Emphasis added.) A third example is a statement by the trial court that: "Court had to determine the actual income of the [Father]. The attorneys representing both the [Father] and the [Mother], selected two different years that they wished [the] Court to focus on. It was 2014 and, I believe, 2016."

¶ 33 But nowhere within the transcript of the proceedings or within the Record on Appeal do we have before us the actual terms of any stipulation on how to use the income numbers from 2014 and 2016. No oral stipulation affirmatively appears in the record, nor has it been reduced to a writing. *See McIntosh*, 74 N.C. App. at 556, 328 S.E.2d at 602. We can easily infer that *some* agreement existed to limit the presentation of evidence at the 2018 hearing, but there is no indication the parties stipulated Father's income in 2014 or 2016 would be used as the basis for a child support order entered years later. On the record before us, it appears the trial court had no factual or legal basis upon which to enter an order in 2021 which set the child support obligation based upon the incomes of the parties five to seven years earlier.[9] Thus, Finding 18 is not supported by the evidence; there was no stipulation sufficiently stated in the record.

¶ 34 "It is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997) (citing *Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991)) (other citations omitted). The trial court erred by entering an order in 2021 basing child support on income determinations from 2014 and 2016 because no stipulation existed on the record to calculate child support based only upon income from those years. Although the trial court would have to address child support for each year from 2014 through 2019, the child support obligations may be different for various time periods. Here, based on the parties' motions to modify, these time periods may be from 2014 until 2016 and then from 2017 until the date of

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9. Even the parties are unable to point to a location in the record where the stipulation may be referenced. Mother argues "[t]his [stipulation] was referenced time and time again throughout the trial tribunal proceedings." However, Mother fails to cite anywhere in the record that any stipulation may be found. As noted above, any stipulation "must affirmatively appear in the record" and the trial court must have "made contemporaneous inquiries of the parties at the time the stipulations were entered into." *McIntosh*, 74 N.C. App. at 556, 328 S.E.2d at 602.

entry of the order. Based upon evidence of income and circumstances during this time period, there may be other periods for child support calculations if incomes, expenses, and needs are different in other years. As one obvious example of a change involving the needs of the children, the oldest child attained the age of 18 in 2016, and the younger child attained the age of 18 in 2021. In any event, the trial court should have used the parties' current incomes to establish child support. Even without a stipulation, it would be appropriate to use the income determinations from 2014 and 2016 as baselines for modification and to calculate child support for 2014 and 2016, but these income numbers cannot be the basis of a child support order in 2021 without a clear stipulation to use these income numbers instead of current income.

¶ 35 There are some circumstances where the trial court can use prior income to calculate current income for the purposes of child support, but specific findings of fact are required to allow use of income from prior years:

> Again, " '[i]t is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified.' " *Kaiser v. Kaiser*, [259] N.C. App. [499], [505], 816 S.E.2d 223, 228 (2018) (quoting *Ellis* [*v. Ellis*], 126 N.C. App. [362,] 364, 485 S.E.2d [82,] 83 [(1997)]). "Although this means the trial court must focus on the parties' current income, past income often is relevant in determining current income." *Id.* Under certain circumstances, " 'a trial court may permissibly utilize a parent's income from prior years to calculate the parent's gross monthly income for child support purposes.' " *Id.* (quoting *Midgett v. Midgett*, 199 N.C. App. 202, 208, 680 S.E.2d 876, 880 (2009)). For example, this Court has recognized such an approach is permissible where the income is highly variable or seasonal, or where the evidence of income is unreliable. *Id.* "What matters in these circumstances is the reason *why* the trial court examines past income; the court's findings must show that the court used this evidence to accurately assess current monthly gross income." *Id.*

Simms, 264 N.C. App. at 453, 826 S.E.2d at 530 (emphasis in original). The trial court must make specific findings to support the use of prior income in calculating current income. *See id.*; *see also Kaiser*, 259 N.C. App. at 504-505, 816 S.E.2d at 228.

¶ 36 Here, the trial court did not make findings justifying the use of Father's income five and seven years prior to entry of the Amended Order. The trial court appears instead to have relied upon an undocumented stipulation and entered an order relying upon the parties' past incomes. The trial court is permitted to determine a support obligation based on prior income only if it makes specific findings of fact justifying the use of prior income to calculate Father's past child support obligations. *See id.*; *see also Zurosky v. Shaffer*, 236 N.C. App. 219, 245, 763 S.E.2d 755, 771 (2014). These specific findings are also required to calculate past-due, prospective child support. *See Simms*, 264 N.C. App. at 453, 826 S.E.2d at 530-31 ("The use of Defendant's historical income to calculate prospective child support in the form of arrears dating back to the filing of Mother's Motion without any finding to support the use of this method was error. . . . On remand, the trial court should . . . make findings to support its use of Defendant's historical income to calculate arrearages.").

¶ 37 The trial court erred by entering the 2021 Child Support Order and Amended Order relying on 2014 and 2016 income determinations. No stipulation exists in the record to support the trial court's use of income from only these years. The 2021 child support orders are vacated and remanded for entry of a new order.

2. 2019 Order

¶ 38 **[2]** In addition to the failure of the alleged stipulation as a basis for calculating income and child support in the 2021 orders, Father challenges aspects of the 2019 Order. This Order did not establish child support or address the motions to modify but only addressed the parties' incomes for 2014 and 2016. Father also challenges specific findings from the 2019 Order and alleges the trial court made mathematical errors in calculating his and Mother's incomes. "In child support cases, determinations of gross income are conclusions of law reviewed *de novo*, rather than findings of fact." *Thomas v. Burgett*, 265 N.C. App. 364, 367, 852 S.E.2d 353, 356 (2019) (citing *Lawrence v. Tise*, 107 N.C. App. 140, 145 n.1, 419 S.E.2d 176, 179 n.1 (1992)). "If the trial court labels a conclusion of law as a finding of fact, the appellate court still employs *de novo* review." *Id.* (citing *Carpenter v. Brooks*, 139 N.C. App. 745, 752, 534 S.E.2d 641, 646 (2000); *Eakes v. Eakes*, 194 N.C. App. 303, 311, 669 S.E.2d 891, 897 (2008)).

a. Father's Rental Income

¶ 39 The trial court's findings state that it calculated Father's income "pursuant to the North Carolina [C]hild [S]upport [G]uidelines." Father argues the trial court erroneously omitted rental expenses when

calculating Father's rental income, and "Findings 34 and 35 use the erroneous rental income figures were [sic] to determine [Father]'s total annual and monthly income in 2014 and 2016." In the 2019 Order, the trial court found Father's rental income to be $64,800 in 2014 and $90,804 in 2016. Father notes that these numbers are equal to the aggregate "Gross Rent" from his properties as reflected on Schedule E of his 2014 and 2016 tax returns. Father also notes his tax returns list a number of expenses, and "the trial court failed to deduct any 'repairs, property management and leasing fees, real estate taxes, insurance, and mortgage interest' from the gross rents received." After deduction for these expenses, Father argues his rental income should have been $7,990 for 2014 and $28,272 for 2016. He contends any commingling of funds should not result in these expenses being omitted, because "the rental expenses are no less legitimate because they are paid with a source other than rental income."

¶ 40 Father cites the 2019 revision of the North Carolina Child Support Guidelines and asserts "gross income from rent is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation." (Emphasis and ellipses omitted.) Notably, the Guidelines tend to support Father's calculation, but the Guidelines also state "[o]rdinary and necessary business expenses do not include amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, *or any other business expenses determined by the court to be inappropriate for determining gross income*." North Carolina Child Support Guidelines p. 3 (2019) (emphasis added). The Guidelines also state "[e]xpense reimbursements or in-kind payments . . . received by a parent in the course of employment, self-employment, or operation of a business are counted as income *if they are significant and reduce personal living expenses*." *Id.* (emphasis added).

¶ 41 At the 2018 evidentiary hearings, a great amount of evidence detailed Father's commingling of his personal and business finances, including income and expenses from his rental properties. The trial court also found, when calculating Father's income, that "[w]ith only a few minor exceptions expenses in connection with [Father's] rental properties were in the form of loans to shareholder from [Father's businesses] to [Father]. The Court did not credit [Father] for these expenses against his gross monthly income . . . in determining his gross income." The trial court elected not to credit Father for the expenses connected to his rentals after finding a significant commingling of Father's finances and that many of Father's personal expenses were in fact paid for by

Father's businesses. For example, the trial court found "[Father] does not report cash received from rental properties. [Father's Accountant] does not break down expenditures paid with a business check to determine which portion of the payment was business related and which portion was for personal expenses if not notated by [Father]." The trial court also found:

> At times there were receipts for taxes paid from a county tax office saying "cash" but with no information as to what property taxes were being paid. For the year 2014 property taxes for [Father]'s commercial property in South Carolina were paid by KA because [Father] could not pay them from his personal account. [Father's Accountant] did not know who held the rental mortgages or how they were paid. For 2014 he never saw a receipt for insurance expenses for [Father]'s rental properties.

The trial court also found:

> What is abundantly clear is there has been a pattern of [Father] using one or both of his businesses for cash withdrawals and/or checks to pay for many of these obligations without any documentation to identify these as personal. There was a commingling of business and personal expenses when it came time to pay invoices/bills whether paid by cash or check.

The court found that Father's businesses paid for various personal and rental expenses for Father, including "lawn care for personal and rental properties" and Father's property taxes. The court also found that one of Father's businesses pays its rent directly to Father, the payment is "charged as loan to shareholder," and the rent payment is "then reversed out of loan to shareholder and treated as a rental expense." The court also found "[t]hese payments have been consistent over time, are reoccurring, are significant and reduce [Father]'s personal living expenses."

¶ 42 However, the trial court's findings do not show the trial court clearly intended to omit all rental expenses when calculating Father's net rental income. "[T]he trial court was required to explain its decision relative to the evidence of such expenses submitted by [Father]. Without any evidence indicating the trial court's contemplation of those expenses, we do not have enough findings to conduct adequate review." *Thomas*, 265 N.C. App. at 368, 852 S.E.2d at 357. Instead, the trial court omitted *all* rental expenses, including expenses like mortgage interest; this was not

discussed in the court's findings yet omitted anyway. Upon remand, the trial court should include more specific findings showing "that due regard was taken of the requisite factors[,]" and why the trial court chose not to credit Father with any rental expenses when determining his net rental income under the Guidelines. *See id.* (quoting *Burnett v. Wheeler*, 128 N.C. App. 174, 176, 493 S.E.2d 804, 806 (1997) (in turn citing *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980))).

b. Father's "Loan to Shareholder" Income

¶ 43 Father also argues his income was incorrectly calculated because shareholder loans made to Father from his businesses were double counted in the trial court's calculations as a stand-alone source of income and within the businesses' profits. Father argues "[a] loan is a borrowing from some pot of money, and in this case is from the 'Profits' of the businesses." Father argues the trial court made a mathematical error by not realizing that the loans were "just a portion of the profits which were borrowed upon."

¶ 44 At the evidentiary hearings, the court heard testimony from Father's accountant, Mr. Logeman, as to how Father removes money from his businesses to pay for his personal expenses. Mr. Logeman testified money removed from Father's businesses to pay Father's personal expenses is treated as "loans to shareholder," and Mr. Logeman determines the value of these loans by compiling receipts handed to Mr. Logeman "in a plastic grocery bag every month by [Father] along with a handwritten log of cash out prepared by [Father] every month for KA/Theo's[,]" "handwritten sales receipts for KA[,]" receipts for various personal purchases Father reimburses himself for by removing cash from his businesses' registers, discrepancies between "gross sales and taxes payable and the bank statements" for the businesses, and other sources. Father's finances are complex, and considering his use of cash and hand-written logs, it is not clear how the sum of these "loans" was calculated; the trial court's order does not clearly state how it arrived at the final values in Findings 34 and 35 of the 2019 Order.[10]

¶ 45 The trial court found that income categorized as "loans to shareholder" included generally all funds available to Father that he could withdraw from his businesses to pay personal expenses, and that Father "has never reimbursed the business for his loans nor has he paid any interest on" the "loans to shareholder." Father notes Finding 8(c) in the

10. However, Mr. Logeman also testified as to these practices, and the court found "[t]his behavior is not unusual in this industry but makes tracking 'income' difficult."

2019 Order clearly shows the relationship between profits and shareholder loans:

> c. . . . Profit is the amount of money on IRS Form K-1 of the tax returns. "Profit" for an S Corporation is taxed on the periodic return. Once taxed it goes into a "retained earnings account." The shareholder, [Father] in this case, *can take money out of that account by taking a distribution check or paying personal expenses and not get taxed again on the funds.*

(Emphasis added.) Father asserts this finding shows that the trial court "was close" but "what the trial court does not accurately understand is that money is not additional income." The trial court's ultimate findings of fact included separate categories for both "Profit" and " 'Loan to shareholder' income." The trial court appears to have characterized the payment of Father's personal expenses through business income as shareholder loans, and also found that Father can claim the entirety of his businesses' profits as income.

¶ 46 Additionally, the court appears to have found two different values for these loans for both 2014 and 2016. In the 2019 Order the trial court's ultimate findings of fact found Father's total income to include $98,196 from business profit and $44,870 in "loan to shareholder" income for 2014; in 2016 Father's total income included $110,244 from business profit and $54,298 from "loan to shareholder" income. But the trial court also found:

> 18. The total of confirmed and documented loans to [Father] shareholder in 2014 was $51,231.00 from KA/Theos. The figure represents money paid by KA for [Father] based on information given to Mr. Logeman. The total of confirmed and documented loans to [Father] shareholder in 2016 was $69,681.00 based on the check ledgers and information given to Mr. Logeman. . . .

The trial court does not make clear how it calculated any of the totals cited above. It generally lists some expenses as loans, but then provides two different aggregate totals for the loans for each year. None of the trial court's other findings clarify this discrepancy.

¶ 47 We are unable to tell how the evidence presented in the 2018 hearings supports the court's findings. *See Atwell*, 74 N.C. App. at 234, 328 S.E.2d at 49. Because of the inconsistency in the trial court's findings and

the difficulty in following the trial court's calculations, we vacate and remand for additional findings on how precisely the trial court calculated "profit" and "loan to shareholder income" and the exact interplay between these two categories of Father's income.

c. Mother's Income

¶ 48 Father argues the trial court also erred in determining Mother's income for 2014. Aside from Father's argument that the trial court also used the wrong years for Mother's income, he argues that Mother's income was erroneously inflated by approximately $3,900 per month between the 2019 and 2021 Orders. It is unclear why Father finds issue with this determination because, as Mother argues, "if it was error it only raised [Mother's] income." (Emphasis removed.)

¶ 49 In the 2019 Order, the trial court found Mother's monthly income to be $3,833.34, comprised of $3,466.67 in monthly wages and an average monthly bonus of $416.67. In the 2021 Orders, Mother's recurring monthly income in 2014 from employment remained $3,833.34, but the court elected to add "approximately $3,900 per month" in recurring payments from her current husband. The court does not explain or identify where this sum originates. Upon a review of the record, it appears the figure may have been argued by Mother's counsel at the December 2019 hearing. Mother's counsel argued that Mother's current husband actually pays Mother's and the minor children's expenses, and Mother's recurring income of $3,833.34 should be regularly added to "Mother's" household expenses for Mother and the children in order to calculate the total amount of money Mother has access to month-to-month both earned by herself and given to her by her husband—Mother's total income.

¶ 50 The trial court's findings do not make clear, however, how or why it added $3,900 in recurring payments to Mother's monthly income or why these payments were only added to Mother's income in the 2021 Orders. Because we can only speculate as to the source of these payments, the trial court's findings as to Mother's income are unsupported by competent evidence. *See Atwell*, 74 N.C. App. at 234, 328 S.E.2d at 49. On remand, the trial court should make additional findings clarifying Mother's income.

C. Substantial Change of Circumstances

¶ 51 **[3]** Father next asserts "the trial court erred when determining that there existed a substantial change in circumstances that warranted modification." (Capitalization altered.) Father argues the trial court misapplied the standard for determining a substantial change in circumstances

because the trial court called this case a "non-Guideline child support case" yet applied a Guidelines-based presumption of a substantial change of circumstances. Father also argues the trial court erred by failing to set a monetary baseline as to the children's expenses and standard of living in 2011 against which to compare their expenses and standard of living in 2014 and 2016 when the motions to modify were filed. Mother argues the Guidelines presumption can be analogized to a non-Guidelines case, and a substantial change of circumstances can be found because "[t]he landscape was simply not the same as it had been in 2011" when the Temporary Order was entered. For the reasons below, we hold there was sufficient evidence of a substantial change of circumstances warranting modification in both 2014 and 2016. However, we will limit our discussion of the details of the modification since we have already determined we must vacate the orders and remand for additional findings of fact regarding all the relevant facts and circumstances, without limitation to evidence of circumstances in 2014 and 2016. But we will address some of the arguments to the extent this may be useful on remand.

¶ 52 In the Amended Order, the court made the following findings of fact:

> 16. At the time [Mother] filed her 2014 Motion, almost four years had passed since the entry of the Temporary Order. [Father]'s child support obligation accordingly changed by more than 15% in that he no longer paid the mortgage at the former marital residence ($1370.70/m) for the benefit of [Mother] and the minor children, as part of his support. Further, the minor children had moved from primarily living in the former marital residence with their [Mother] to the residence of [Mother] and [Mother]'s husband . . . .
>
> 17. [Father]'s income was significantly higher than the base salary figures represented by him at the temporary hearing. . . . . [11]

¶ 53 Since we must remand for the trial court to make additional findings regarding the parties' incomes, expenses, and the children's needs, we will not address the parties' arguments regarding the changes in circumstances in detail. That sort of detail would require actual findings

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11. Considering that the limited information on Worksheet A attached to the 2011 Temporary Order was not specifically incorporated as a finding of fact, and we have no transcript of the 2011 hearing, we cannot definitively state what Father's income was represented as in 2011.

regarding the parties' incomes and expenses and the children's needs over the relevant time periods; without knowing the parties' incomes, we cannot say whether the case falls within the Guidelines or not.

¶ 54 At the time of each party's motion, the North Carolina Child Support Guidelines created a presumption of a substantial change in circumstances when more than three years has elapsed between entry of an order establishing support and a motion to modify, and there is greater than a 15% disparity between the standing support obligation and the recalculated obligation under the Guidelines.[12] But in the 26 March 2021 Amended Child Support Order the trial court concluded the parties' combined gross incomes for both 2014 and 2016 exceeded the limit set by the Guidelines and therefore "[t]he North Carolina Child Support Guidelines are not applicable in this action . . . ." Regardless, the trial court also found:

> 150. There has been a substantial change in circumstances as of the filing of the [Mother's] Motion to Modify on December 16, 2014 as it had been more than three years since the entry of the last Order and that Order is more than three years old and there is a 15% disparity between the support Ordered and the current support obligation.
>
> 151. There has been a substantial change in circumstances as of the filing of [Father's] Motion to Modify on October 21, 2016 as the minor child, [G.K.], had turned 18 on October 21, 2016 and graduated for high school.

¶ 55 We first note that both parties filed motions alleging substantial changes in circumstances requiring modification of the child support obligation established in the 2011 Temporary Order. Father's motion to modify, filed in 2016, alleged "there [had] been substantial and material changes in circumstances in that" his eldest daughter had "graduated

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12. The North Carolina Child Support Guidelines are established pursuant to North Carolina General Statute § 50-13.4 by the Conference of Chief District Judges. The Guidelines are promulgated by the North Carolina Administrative Office of the Courts, and the 2011 Guidelines in effect at the time Mother filed her motion may be found at: https://www.nccourts.gov/assets/documents/publications/guidelines_2011.pdf?VersionId=vTqhbVaIbGVBsfdM8YXPpyiWx3t3qsS7. The 2015 Guidelines in effect at the time Father filed his motion may be found at: https://www.nccourts.gov/assets/documents/publications/guidelines_2015.pdf?VersionId=Roo8e43y0k2RCzLZZsrUvVBUL6D7Bt74. The presumption was the same at the time both parties filed their motions.

from high school and turned 18 years of age." Thus, Father is apparently not arguing there has been no change in circumstances justifying modification of child support since 2011; he just argues the trial court should not have used the language of the Child Support Guidelines to find a substantial change in circumstances. As a practical matter, this is a distinction without a difference. There is simply no question that many substantial changes in circumstances relevant to child support occurred in the period of time from 2011 to the close of evidence in December 2019, to name a few obvious ones: the parties resolved their property distribution in 2014; Mother and the children moved out of the marital home in 2014 and Father bought Mother's interest in the residence, thus eliminating Father's obligation under the 2011 Order to pay the mortgage and maintenance expenses for the benefit of Mother and the children; and the older child attained the age of 18 in 2016. The question is not whether the trial court erred in using language based on the Guidelines definition of a presumption of a substantial change in circumstances in a non-Guideline case. The question is whether the trial court should establish child support based upon the Guidelines or if the parties' incomes place them outside the Guidelines, so the trial court must "determine the child support obligation . . . [by] considering the needs of the child[ren] and the relative ability of each parent to provide support." Since we must remand for the trial court to find all these numbers, we will not address this argument further.

¶ 56 As to Father's motion to modify, there is no doubt that there was a substantial change of circumstances in 2016 when the parties' older child turned 18 years old and had graduated from high school. Father filed the 2016 motion seeking modification due to a substantial change in circumstances, namely that his eldest daughter "graduated from high school and turned 18 years of age on" the day the motion was filed. He cannot complain that the court found a substantial change of circumstances resulting from his oldest daughter reaching age 18 when he was the party who sought modification on that basis. *See, e.g.*, *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) (citations omitted) ("A party may not complain of action which he induced.").

¶ 57 As discussed above, we have vacated the 2019 Order and remanded for entry of a new order as to the 2014 and 2016 incomes, and we have already discussed the need for findings as to the income, expenses, and needs of the children (assuming the child support calculation is not based upon the Child Support Guidelines) as of the time of calculation of any child support obligation prior to entry of the order and upon entry of the child support order. We need not address Father's remaining

arguments regarding the trial court's findings and conclusions of law since we must vacate and remand for entry of new orders.

D. Delay in Hearings and Entry of Orders

¶ 58 Father's final argument in his brief is the delay between the final Amended Child Support Order on 26 March 2021 and the evidentiary hearings in 2018 and 2019 resulted in prejudice to Father and confused the trial court. Mother argues Father "cannot show prejudice from the delay in entering the final order" because he merely alleges a delay, and that Father actually benefited from the delay because "he was allowed to pay only $1,300 in child support for years while the parties' motions to modify worked their way through" the trial court. Since we have already determined we must vacate the Child Support Order, Amended Order, and 2019 Order, we will not address the issue as to delay between the hearing and entry of the order. We also note that much of Father's argument focuses on the effects of the COVID-19 restrictions on operations on his restaurants, but we cannot address that issue as Father's motion to modify on that basis has not yet been decided by the trial court. Even though the final child support orders were entered in 2021, after the pandemic, the last evidentiary hearing ended in December 2019, before the start of the pandemic in March 2020, and we can address only the issues presented and decided based on the evidence addressed by the 2021 Amended Order on appeal.

IV. Conclusion

¶ 59 We vacate the 2019 Order, the Child Support Order, and the Amended Child Support Order and remand for entry of new orders. On remand, the trial court may rely on the evidence presented in prior evidentiary hearings for the time periods addressed at those hearings to make new findings of fact as discussed above but must also hold a hearing to receive additional evidence needed to establish child support. The trial court shall enter a new order setting the child support obligation for the entire time period from 2014 until the children both attained age 18 and graduated from high school, addressing all of the necessary factors including each party's income and expenses, the children's needs, and Father's ability to pay, and setting out the manner of payment of the child support. Since the children have now both attained the age of 18, Father will have no current ongoing child support obligation and the trial court's order will establish only past child support, the total amounts owed, how Father is to pay the child support, and any other related issues properly presented by the parties. Considering the complexity of the financial evidence already presented in this case and the need for

additional evidence to address the issues of child support over many years, we suggest, but do not mandate, that the trial court may in its discretion consider whether an order of reference under North Carolina General Statute § 1A-1, Rule 53(a)(2) may be appropriate on remand. "The ordering of a reference is within the sound discretion of the court." *Livermon v. Bridgett*, 77 N.C. App. 533, 536, 335 S.E.2d 753, 755 (1985) (citing *Long v. Honeycutt*, 268 N.C. 33, 149 S.E.2d 579 (1966)).

VACATED AND REMANDED.

Judges GORE and JACKSON concur.

CHARLOTTE HAIDAR, Plaintiff
v.
DARWIN MOORE, Defendant

No. COA22-543

Filed 15 November 2022

Civil Procedure—civil no-contact order—complaint dismissed—no findings of fact

Where the trial court failed to make any findings of fact when it entered an order dismissing plaintiff's complaint seeking a civil no-contact order against another student at her school (pursuant to N.C.G.S. § 50C), the appellate court was unable to conduct meaningful review. The trial court's order was vacated and the matter remanded to the trial court to make findings of fact as required by Civil Procedure Rule 52(a).

Appeal by Plaintiff from order entered 19 April 2022 by Judge Pat Evans in Durham County District Court. Heard in the Court of Appeals 2 November 2022.

Kerstin Walker Sutton PLLC, by Kerstin Walker Sutton, for Plaintiff-Appellant.

Thomas, Ferguson & Beskind, LLP, by Kellie Mannette, for Defendant-Appellee.

GRIFFIN, Judge.

¶ 1 Plaintiff Charlotte Haidar appeals from the trial court's order dismissing her complaint for a N.C. Gen. Stat. § 50C no-contact order. Plaintiff primarily argues that the trial court erred because it made no written findings of fact in the order dismissing her complaint. Plaintiff also asserts, if the order is sufficient for our review, that the trial court abused its discretion because its decision was not based upon competent evidence. Because the trial court's order contains no written findings of fact, we are unable to conduct meaningful appellate review. Therefore, we vacate and remand the trial court's order for written findings of fact.

I. Factual and Procedural Background

¶ 2 Plaintiff and Defendant first met on the evening of 2 October 2021, as both were part of a group of students staying on Duke University's campus during fall break. During the following days, Plaintiff and Defendant engaged in sexual conduct in Defendant's dorm room that Plaintiff asserts was, at least in part, nonconsensual. After these encounters, Plaintiff became very emotional, felt that she had been harmed, and suffered mental anguish and anxiety whenever she saw Defendant at events on campus. On 14 February 2022, Duke University administration issued a mutual no-contact order upon Plaintiff's request.

¶ 3 On 1 April 2022, Plaintiff filed a complaint requesting a no-contact order for stalking or nonconsensual sexual conduct against Defendant. On 19 April 2022, Defendant filed a motion to dismiss Plaintiff's complaint for failure to state a claim, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Following a hearing on the matter, the trial court issued an oral statement in open court explaining that, after weighing the evidence in a "very difficult" case where a "young lady [was] obviously in distress," the court "ha[d] to find that [P]laintiff has failed to prove grounds for issuance of a no-contact order."

¶ 4 The trial court then issued a written order denying and dismissing Plaintiff's complaint. The written order contained no findings of fact supporting its conclusion, stating only that "[t]he plaintiff has failed to prove grounds for issuance of a no-contact order."

¶ 5 Plaintiff timely appeals.[1]

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1. During the pendency of this appeal, Defendant filed a motion to seal all filings and a motion to refer to Defendant by a pseudonym for the remainder of the proceedings. Each of these motions has been denied.

Plaintiff has filed a motion for sanctions under Rule 34(a) of the North Carolina Rules of Appellate Procedure, arguing that Defendant's motions were frivolous, not grounded in existing law, and not made in good faith. *See* N.C. R. App. P. 34(a)(3) (stating this Court

II. Analysis

¶ 6 Plaintiff argues the trial court's order dismissing her complaint is facially defective because the trial court failed to make written findings of fact supported by competent evidence supporting its conclusions of law. We agree, and therefore remand the trial court's order for written findings of fact.

¶ 7 "The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (citation omitted). Rule 52(a)(1) of the North Carolina Rules of Civil Procedure states:

> In 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. R. Civ. P. 52(a)(1). When the trial judge acts as the trier of fact, the trial court must: "(1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly." *Gilbert Eng'g Co. v. City of Asheville*, 74 N.C. App. 350, 364, 328 S.E.2d 849, 857 (1985).

¶ 8 In *D.C. v. D.C.*, this Court recently held that, when the trial court does not make findings of fact as required under Rule 52, this Court is unable to conduct meaningful review of the resulting order:

> [T]he trial court failed to make any findings of fact, much less specific findings, in the Orders. It was required to enter findings of fact supporting its conclusions of law that each [p]laintiff "failed to prove grounds for issuance of a [DVPO]." Such failure to make findings of fact prevents us from conducting meaningful appellate review, and we must vacate the Orders and remand to the trial court for the entry of orders that comply with the North Carolina Rules of Civil Procedure and our caselaw.

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may sanction a party if it files a motion "grossly lacking in the requirements of propriety, grossly violat[ing] appellate court rules, or grossly disregard[ing] the requirements of a fair presentation of the issues to the appellate court"). Though his motions did not have merit found in any existing case law, we do not believe Defendant's motions were made in bad faith or were otherwise so grossly improper to warrant sanctions. We therefore deny Plaintiff's motion for sanctions.

D.C. v. D.C., 279 N.C. App. 371, 2021-NCCOA-493, ¶ 12. When the trial court properly makes findings of fact to support its conclusions of law, it allows this Court to review whether its determinations are appropriately based upon the record. Absent the required findings of fact, this Court is unable to conduct a proper review on appeal. In that instance, as the Court in *D.C.* held, our Court "must vacate the orders and remand to the trial court for the entry of orders that comply with the North Carolina Rules of Civil Procedure and our caselaw." *Id.*

¶ 9 In the case before us, the trial court made no written findings of fact in its order denying and dismissing Plaintiff's complaint. Because the trial court failed to make any findings of fact supporting its conclusions of law, we are unable to conduct meaningful appellate review of the order. We therefore must vacate and remand the trial court's order.

¶ 10 We note that, in *D.C.*, the trial court failed to make the required findings of fact on an order denying a domestic violence protective order under N.C. Gen. Stat. § 50B. Here, the trial court failed to make the required findings of fact on an order denying an N.C. Gen. Stat. § 50C no-contact order for stalking or nonconsensual sexual conduct. Although the statutory requirements needed to grant each type of order differ, the trial court is still required by Rule 52(a) to make findings of fact in its order that support its conclusions of law. Regardless of the type of order, "[e]vidence must support findings; findings must support conclusions; conclusions must support the judgment" and "each link in the chain of reasoning must appear in the order itself." *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980). "Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its functions to find the facts and apply the law thereto." *Id.* Therefore, following our precedent in *D.C.* and *Coble*, we vacate and remand back to the trial court to make the required findings of fact.

¶ 11 Because we vacate and remand on this issue, we decline to address Plaintiff's remaining arguments at this time.

III. Conclusion

¶ 12 For the foregoing reasons, we hold that the trial court erred by not making required findings of fact in its order. We vacate the order and remand to the trial court.

VACATED AND REMANDED.

Judges ZACHARY and ARROWOOD concur.

IN RE B.S.

[286 N.C. App. 419, 2022-NCCOA-743]

IN THE MATTER OF B.S.

No. COA22-441

Filed 15 November 2022

Mental Illness—involuntary commitment proceeding—waiver of counsel

The trial court's involuntary commitment order was vacated and the matter remanded for further proceedings where the court's perfunctory inquiry into respondent's desire to proceed pro se was insufficient to satisfy the statutory mandates of N.C.G.S. § 15A-1242, N.C.G.S. § 122C-168(d), and IDS Rule 1.6. The trial court merely asked respondent if he wanted to represent himself without the assistance of an attorney and did not inquire about respondent's age, mental condition, education, or whether respondent understood the complexity of the proceedings or the consequences of representing himself. Further, although respondent signed a waiver of counsel form intended for criminal matters, the written waiver was insufficient on its own to meet statutory waiver requirements.

Appeal by Respondent from order entered 5 November 2021 by Judge Andrea C. Plyler in Burke County District Court. Heard in the Court of Appeals 5 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Hilary R. Ventura, for the State of North Carolina.

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

JACKSON, Judge.

¶ 1 Respondent B.S.[1] ("Respondent") appeals from the trial court's order re-committing him to a 120-day term of involuntary inpatient commitment. After careful review, we vacate and remand back to the trial court.

I. Background

¶ 2 On 23 November 2020, Respondent was indicted on one count of first-degree arson and one count of attempted first-degree arson.

1. We use initials to protect Respondent's privacy. *See* N.C. R. App. P. 42(b).

On 3 March 2021, the Honorable Louis Trosch entered an Involuntary Commitment Custody Order finding that Respondent was incapable of proceeding with the criminal action and ordering that he be taken temporarily into the custody of a 24-hour treatment facility for examination and treatment pending a district court hearing.

¶ 3 At an initial commitment hearing on 18 June 2021, the trial court found that Respondent had a mental illness and was a danger to himself and ordered a commitment period of 60 days. Respondent was re-committed for a period of 90 days by order on 13 August 2021.

¶ 4 On 5 November 2021, Respondent's case was heard again in Burke County District Court after a recommendation by Respondent's physician at the inpatient facility that he be committed for a further 180 days. The trial court heard testimony from a psychiatrist at the inpatient facility. During the psychiatrist's testimony, Respondent, then represented by counsel, interrupted several times. After the first interruption the trial court directed Respondent to talk to his attorney, who in turn asked Respondent if he wanted to proceed *pro se*. Respondent said no.

¶ 5 A few moments later while the psychiatrist was still testifying, Respondent's attorney told the trial court that Respondent wished to represent himself. The trial court had Respondent sign a waiver of counsel form and he then proceeded *pro se*.

¶ 6 After the close of testimony and arguments, the trial court orally found that Respondent was mentally ill and a danger to himself or others. The same day, the trial court issued a written order committing Respondent to 120 days at the inpatient facility. The trial court checked the boxes on the commitment order form that Respondent was mentally ill and a danger to himself or others. The trial court also wrote as further facts supporting commitment: "poor insight into mental illness and poor judgment. Patient is refusing to take medication."

¶ 7 Respondent entered written notice of appeal of the 5 November 2021 order on 18 November 2021.

II. Analysis

¶ 8 Respondent raises three arguments on appeal: (1) the trial court erred by allowing Respondent to represent himself at the involuntary commitment hearing; (2) the trial court's findings of fact did not establish that Respondent was mentally ill or dangerous to himself or others; and (3) the proper remedy is to reverse the commitment order without remand to the trial court for a new hearing.

¶ 9 As an initial matter, though not challenged by the State, we note that while a term for involuntary commitment may necessarily be over by the time it reaches our Court, it is well established that "a prior discharge will not render questions challenging the involuntary commitment proceeding moot." *In re Booker*, 193 N.C. App. 433, 436, 667 S.E.2d 302, 304 (2008) (internal quotations omitted). This is because "the challenged order may form the basis for future commitment or may cause other collateral legal consequences for the respondent." *In re Webber*, 201 N.C. App. 212, 217, 689 S.E.2d 468, 472-73 (2009).

¶ 10 "We review the trial court's commitment order to determine whether the ultimate finding concerning the respondent's danger to self or others is supported by the court's underlying findings, and whether those underlying findings, in turn, are supported by competent evidence." *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016).

A. Waiver of Counsel

¶ 11 Respondent first contends that the trial court erred in allowing Respondent to represent himself at the commitment hearing. We agree.

¶ 12 North Carolina General Statute § 122C-268 governs the district court hearing procedures for inpatient commitment. Under this statutory scheme, a respondent "shall be represented by counsel of his choice; or if he is indigent within the meaning of G.S. 7A-450 or refuses to retain counsel if financially able to do so, he shall be represented by counsel appointed in accordance with the rules adopted by the Office of Indigent Defense Services." N.C. Gen. Stat. § 122C-268(d) (2021).

¶ 13 Rule 1.6 of the Office of Indigent Services ("IDS") provides:

> An indigent person who has been informed of his or her right to be represented by counsel at any in-court-proceeding may, in writing, waive the right to in-court representation by counsel. Any such waiver of counsel shall be effective *only if* the court finds of record that at the time of waiver the indigent person acted with full awareness of his or her rights and of the consequences of the waiver. In making such a finding, the court *shall* follow the requirements of G.S. 15A–1242 and *shall* consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the matter.

IDS Rule 1.6(a) (2015) (emphasis added).

¶ 14 North Carolina General Statute § 15A-1242 requires that a judge make a thorough inquiry and be satisfied that the defendant:

> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

¶ 15 Together, N.C. Gen. Stat. § 122C-268(d), IDS Rule 1.6, and N.C. Gen. Stat. § 15A-1242 form the mandatory framework under which a trial court must act when a respondent at an involuntary commitment proceeding chooses to represent himself, and the failure to follow this framework is prejudicial error. *In re Watson*, 209 N.C. App. 507, 518, 706 S.E.2d 296, 303 (2011).

¶ 16 In *Watson*, we vacated the trial court's commitment order where the trial court allowed the respondent to represent himself without inquiring about or considering the respondent's "age, education, mental condition, or the complexity of the proceeding." *Id.* We held that perfunctory questioning by the trial court is insufficient. *Id.*

¶ 17 Here, the following initial exchange took place at the commitment hearing:

> **Q**: Okay. How long ago did the refusals start?
>
> **[Witness]**: Well, I think he refused yesterday both doses. I think, I'm not sure about this morning, but I know yesterday he refused. And, you know, he says that it makes him nauseous—
>
> **B.S.**: Your Honor, I'd like to accuse the witness of perjury at this moment.
>
> **The Court**: Okay, talk to your attorney.
>
> **B.S.**: The witness—I took my medication yesterday. I refused two times the day before, and she said I refused several times. I would like to accuse her of perjury.
>
> **The Court**: All right. I'm going to let you talk to your attorney. I'm going to let the witness continue to testify. You'll have your opportunity to speak.

[B.S.'s attorney]: Do you want to be *pro se*?

B.S.: Okay.

[B.S.'s attorney]: Do you want to be *pro se*?

B.S.: No, I wouldn't like to be *pro se*.

¶ 18 A short time later, the following further exchange occurred:

[B.S.'s attorney]: Excuse me, Your Honor. My client has just informed me he would like to be *pro se* in this matter.

The Court: Sir, you wish to represent yourself here today—

B.S.: Yes, thank you.

The Court: —and you don't wish to have any help from an attorney?

B.S.: Um, no, thank you.

The Court: All right. At this time, raise your right hand, and listen to Madam Clerk that you wish to represent yourself.

The Clerk: [Indiscernible].

The Court: Okay. We're going to be at ease for just a moment. Just sit still for me.

B.S.: Thank you very much, madam.

The Court: You're welcome.

. . .

The Court: All right, sir. Raise your right hand and listen to Madam Clerk.

[B.S. affirms that he waives his right to an attorney at 9:46 a.m.]

The Court: Okay. We're going to have you sign this waiver.

B.S.: May I approach to sign, or what, is the bailiff gonna—

The Court: Nope. They'll bring it to you.

B.S.: Appreciate it, señor.

The Court: All right. You may proceed.

¶ 19 The trial court did not conduct any specific inquiry into Respondent's age, mental condition, or education, nor about whether he understood the complexity of the case or the full ramifications of choosing to represent himself.

¶ 20 Further, the waiver form signed by Respondent is a form designed for criminal cases, as evidenced by the certification section signed by the trial court that "the above named defendant has been fully informed of the charges against him/her, the nature of the statutory punishment for each charge, and the nature of the proceeding against the defendant[.]" The acknowledgement portion signed by Respondent contained no colloquy language and stated:

> As the undersigned party in this action, I freely and voluntarily declare that I have been fully informed of the charges against me, the nature of the statutory punishment for each such charge, and the nature of the proceeding against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.

¶ 21 The State argues that because Respondent signed the waiver and proceeded to represent himself, engaging in cross-examination of witnesses, testimony on his own behalf, and argument to the court, he demonstrated informed waiver of counsel. We are unpersuaded.

¶ 22 The written waiver Respondent signed cannot serve on its own to satisfy the requirements of N.C. Gen. Stat. § 15A-1242. It contains no substantive inquiry into Respondent's ability to represent himself. Even more importantly, it is clearly not intended to advise respondents in involuntary commitment hearings of their right to counsel and includes potentially misleading language about charges and prospective punishment faced by those who sign the form.

¶ 23 While it is true that the rationales of waiver of counsel from criminal cases also apply to cases of involuntary commitment, *Watson*, 209 N.C. App. at 516, 706 S.E.2d at 302, the signing of a criminal waiver of

counsel form does not absolve the trial court of its statutory obligations to perform an independent inquiry about a respondent's ability to represent themselves at a commitment hearing, and neither does the subsequent conduct of Respondent in his self-representation. *See* IDS Rule 1.6 (waiver of counsel is only effective if the court makes findings that "shall follow the requirements of G.S. 15A–1242 and shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the matter"); *Watson*, 209 N.C. App. at 513, 706 S.E.2d at 300 (the use of the word "shall" is mandatory language for our trial court).[2]

¶ 24 Despite having Respondent sign a waiver of counsel and proceed *pro se*, the trial court found in its 5 November 2021 order that Respondent was represented by counsel. This finding is not supported by the evidence.

¶ 25 Because the trial court allowed Respondent to represent himself without conducting the statutorily mandated inquiry, the commitment order must be vacated. *See Watson*, 209 N.C. App. at 522, 706 S.E.2d at 305.

B. The Trial Court's Commitment Order

¶ 26 Respondent next contends that the trial court's findings of fact do not support its conclusion of law that Respondent was mentally ill or a danger to himself or others. Because we have already determined that the commitment order should be vacated, we do not address this argument.

C. Appropriate Remedy

¶ 27 Respondent finally contends that the appropriate remedy in this case is to reverse the commitment order without remand to the trial court. Respondent asserts that there is a divergence in how this Court has disposed of cases where we have found that the trial court failed to record sufficient findings of fact. An earlier line of cases simply reversed with no remand back to the trial court, while a separate, later line reversed and remanded. Because our opinion this case is not analogous to

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2. We also note that even in those criminal cases where the criminal waiver of counsel form is appropriate to use, we have held that "a written waiver of counsel is no substitute for actual compliance by the trial court with G.S. § 15A-1242." *State v. Wells*, 78 N.C. App. 769, 773, 338 S.E.2d 573, 575 (1986). Our Supreme Court considers the written waiver to be a supplement to the required inquiry in N.C. Gen. Stat. § 15A-1242, not an alternative to it. *See State v. Thomas*, 331 N.C. 671, 674-75, 417 S.E.2d 473, 476 (1992) ("As a *further* safeguard, the trial court must obtain a written waiver of the right to counsel." (emphasis added)).

those cited by Respondent, we do not address this apparent conflict in our precedent.

¶ 28 Respondent is correct that there appears to be a split in our judicial history in how we have disposed of cases where we have found that the trial court made insufficient findings of fact in involuntary commitment cases. *See*, *e.g.*, *In re Crouch*, 28 N.C. App. 354, 355, 221 S.E.2d 74, 75 (1976) (reversed with no remand); *In re Neatherly*, 28 N.C. App. 659, 661, 222 S.E.2d 486, 487 (1976) (reversed with no remand); *In re Hogan*, 32 N.C. App. 429, 434, 232 S.E.2d 492, 495 (1977) (reversed with no remand); *In re Koyi*, 34 N.C. App. 320, 321, 238 S.E.2d 153, 154 (1977) (reversed with no remand); *In re Jacobs*, 38 N.C. App. 573, 576, 248 S.E.2d 448, 450 (1978) (reversed with no remand); *In re Bartley*, 40 N.C. App. 218, 220, 252 S.E.2d 553, 554 (1979) (reversed with no remand); *In re Caver*, 40 N.C. App. 264, 266, 252 S.E.2d 284, 286 (1979) (vacated and remanded); *In re Allison*, 216 N.C. App. 297, 300, 715 S.E.2d 912, 915 (2011) (reversed and remanded); *In re Whatley*, 224 N.C. App. 267, 274, 736 S.E.2d 527, 532 (2012) (reversed and remanded); *In re J.C.D.*, 265 N.C. App. 441, 453, 828 S.E.2d 186, 194 (2019) (vacated and remanded). However, none of the cases identified by Respondent or by us as simply reversing with no remand also addressed the question of adequate waiver of counsel. As discussed *supra*, waiver of counsel is the only issue we reach in this opinion.

¶ 29 Where we have held that the trial court failed to follow the statutory mandates for waiver of counsel, we have vacated the order and remanded for a new hearing. *See*, *e.g.*, *Watson*, 209 N.C. App. at 522, 706 S.E.2d at 305; *In re B.J.G.*, 237 N.C. App. 398, 767 S.E.2d 152, 2014 WL 6434492 (2014) (unpublished); *In re V.O.*, 264 N.C. App. 249, 823 S.E.2d 694, 2019 WL 1040369 (2019) (unpublished); *In re T.R.K.*, 255 N.C. App. 857, 805 S.E.2d 541, 2017 WL 4365151 (2017) (unpublished). We are bound by our precedent on this matter. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

III. Conclusion

¶ 30 For the foregoing reasons, we hold that the trial court failed to conduct the required statutory inquiry before allowing Respondent to represent himself at the 5 November 2021 involuntary commitment hearing. We therefore vacate the involuntary commitment order and remand for further proceedings.

VACATED AND REMANDED.

Judges WOOD and GRIFFIN concur.

STATE v. HAWKINS

[286 N.C. App. 427, 2022-NCCOA-744]

STATE OF NORTH CAROLINA
v.
KWAIN HAWKINS

No. COA22-97

Filed 15 November 2022

Appeal and Error—jurisdictional defect—failure to designate judgment appealed from—petition for certiorari—no showing of merit or error below

A criminal defendant's appeal from his convictions for statutory rape and indecent liberties with a child was dismissed where, although defendant preserved his arguments for appellate review pursuant to Appellate Rule 10, and the State had waived any objection to defendant's failure to attach a certificate of service to his notice of appeal (by participating in the appeal without raising the service issue), defendant's notice of appeal contained a jurisdictional defect in that it did not designate the judgment defendant was appealing from as required under Appellate Rule 4(b). Further, defendant's petition for a writ of certiorari was denied because it lacked merit and failed to show that the trial court probably erred in determining that defendant's expert witness was not qualified to testify as to whether a sexual assault had occurred in the case.

Appeal by defendant from judgment entered 25 June 2021 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 19 October 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State.

Mark Montgomery, for the defendant-appellant.

TYSON, Judge.

¶ 1 Kwain Hawkins ("Defendant") appeals from the judgment entered upon a jury's verdict for one count of statutory rape of a child fifteen years or younger and two counts of taking indecent liberties with a child. Defendant's appeal is dismissed.

I. Background

¶ 2 Fifteen-year-old "Anna" walked from the bus stop to her house on 17 October 2019. (Pseudonym used to protect identity of minor, per N.C. R. App. P. 41(b)). She rode to and from school every day on the bus, which dropped her off about five minutes from her home. Anna had been diagnosed with autism and experienced social anxiety, but is a well-behaved child, who always arrived home promptly between 4:00 and 4:30 p.m.

¶ 3 On 17 October 2019, Anna noticed an older man standing across the street from the bus stop. The man, who was later identified as Defendant, made eye contact with her. Anna attempted to ignore him when crossing the street, and she continued to listen to music through her headphones while walking home.

¶ 4 Defendant approached Anna and walked alongside her. He asked her: how old she was; if she had a boyfriend; if she found him attractive; if she had ever had sex before; and if she smoked. Anna attempted to ignore Defendant and contemplated whether to answer his questions truthfully.

¶ 5 Defendant asked Anna to walk with him to the park. Anna misheard Defendant because of the music playing on her headphones. She thought Defendant had said "parking lot," which was near her home. Anna agreed, hoping Defendant would leave her alone and rationalizing that she could quickly walk home from the parking lot. Defendant then asked to hold her hand. Anna said "no" three times before finally giving in. Anna's mother would later explain to an investigating officer that Anna's social anxiety causes her to avoid "push[ing] back at people because she hates to be mean and prefers to be a people pleaser."

¶ 6 Defendant led Anna to an open area, situated between two apartment buildings, that did not look like a park. Anna and Defendant sat together on a bench for a few minutes before she told Defendant she was going home. Defendant repeatedly asked Anna for a hug before she left, and he refused to accept "no" as an answer.

¶ 7 While hugging her, Defendant instructed Anna to remove her backpack and give him a "proper" hug. Anna complied out of fear. Defendant started kissing Anna on the lips and demanded for her to return the kiss. Defendant moved his hands towards Anna's pants and "grabbed [her] bottom." He put his hands inside of Anna's pants and "put his fingers inside [her] vagina."

¶ 8 Defendant directed Anna to follow him to a "more private" wooded area behind the apartment buildings. Once they reached the wooded area,

Defendant told Anna "to turn around and pull down [her] pants." When Anna asked "why," he repeatedly told her to "bend" over. Anna asked whether Defendant would hurt her if she refused to comply. Eventually, Anna complied with Defendant's demands. Defendant stood behind Anna and penetrated her vagina with his penis. This rape continued until Defendant was startled by a white van that pulled in behind the apartment complex and parked.

¶ 9 Defendant told Anna to follow him, so Anna pulled up her pants and grabbed her backpack. Anna walked behind Defendant because she "felt safer." Defendant asked Anna for her name and where she lived. Anna gave Defendant a false name because she did not "want him to ever come back." She also pointed in the opposite location of where her house was located because she "wanted to keep [her] family safe."

¶ 10 Anna's grandmother testified Anna had arrived home late and started crying uncontrollably after admitting she had been raped. Anna's grandmother took Anna to Wake Med North Hospital, while Anna's mother contacted law enforcement. Wake Med North transferred Anna to Wake Med's main hospital campus to collect a rape kit.

¶ 11 A scientist in the forensic biology section of the North Carolina Crime Lab later analyzed the rape kit. She determined the male DNA identified on Anna's vaginal swabs matched Defendant's DNA.

¶ 12 While examining Anna's clothing and undergarments, a City-County Bureau of Identification agent observed white residue in the groin area of Anna's underwear. He noticed "brownish colored stains on the inside of the legs of [Anna's] leggings."

¶ 13 Video surveillance from a nearby middle school showed two individuals, matching Anna and Anna's description of her assailant, walking from the bus stop towards Anna's home around 4:00 p.m. on 17 October 2019. One of the investigating officers used this surveillance footage to capture a photograph of Defendant. The officer posted the photograph on an internal Raleigh Police Department website, which is accessible to all officers and detectives, and instructed officers to "Be On The Lookout" ("BOLO") for the individual shown in the photo.

¶ 14 Two officers, unrelated to the investigation, recognized Defendant from the BOLO post and contacted the officer who had posted the image. Those officers explained they were "about 85 percent [sure] that the suspect [pictured] is Kwain Hawkins" and included Defendant's date of birth.

¶ 15 A Wake County grand jury indicted Defendant with one count of statutory rape of a child fifteen years old or younger and two counts of taking indecent liberties with a child on 9 March 2020. Anna's mother and grandmother corroborated Anna's testimony. The State entered all of the physical and testimonial evidence outlined above at trial.

¶ 16 Defendant attempted to elicit expert testimony from a nurse, Caron Jones ("Jones"), during his case-in-chief. Jones, a registered nurse, was previously specialized as a "family nurse practitioner and a certified nurse midwife," although her certification to practice as a registered nurse and midwife had expired. Jones was not certified as a Sexual Assault Nurse Examiner ("SANE"), and she had not conducted an examination on a rape trauma victim in over twenty years. Before trial, Defendant had sent emails to the State indicating Jones was prepared to testify "with 100 percent certainty [ ] the victim in this case had not been penetrated based on the amount of DNA that was found on her vaginal swabs."

¶ 17 The State filed a motion in *limine* to exclude this testimony because Jones intended to draw a legal conclusion about whether a sexual "penetration" occurred. N.C. Gen. Stat. § 8C-1, Rule 704 (2021). The State conceded at a pre-trial hearing Jones "could testify that there was nothing in the medical examination consistent with sexual abuse," if tendered as an expert witness.

¶ 18 After the *voir dire* of Jones, the trial court found and concluded Jones was only "qualified to describe female anatomy." The trial court would have allowed Jones to testify there were "no findings of physical trauma in the medical records from the examination of [Anna]," but would not allow Jones to link her opinion "to any conjecture as to whether a sexual assault occurred because she d[id] not have a scientific basis for that linkage." Defendant chose not to call Jones to testify purportedly because of the limitations regarding her testimony.

¶ 19 The jury's verdict found Defendant to be guilty on all three charges. Defendant was sentenced as a prior record level IV offender. He received an aggravated sentence of 456 to 607 months. Defendant filed a timely notice of appeal.

II. Jurisdiction

¶ 20 Defendant filed a petition for writ of certiorari. He realized after filing his brief that a certificate of service evidencing service of his notice of appeal was missing from the record on appeal. Defendant also realized his notice of appeal omitted the trial court's rulings, both the

pretrial ruling on the State's motion in *limine* and the ruling following the *voir dire* of Jones during trial, regarding the limitations of Jones' expert witness testimony.

¶ 21 Defendant's notice of appeal only discussed the court's ruling on the motion in *limine* regarding the use of the word "rape," along with five other issues, none of which were discussed in neither Defendant's nor the State's briefs. In his list of proposed issues on appeal, Defendant included the "exclusion of testimony from the defendant's expert witness."

¶ 22 Whether a party adheres to the rules governing appellate procedure is a jurisdictional issue. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 364-65 (2008) ("The appellant's compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a particular case.").

¶ 23 "The North Carolina Rules of Appellate Procedure are mandatory and failure to follow these rules will subject an appeal to dismissal." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (citation and quotation marks omitted).

¶ 24 A criminal defendant may appeal "from a judgment or order of a superior or district court" by:

> (1) giving oral notice of appeal at trial, *or*
>
> (2) filing notice of appeal with the clerk of superior court *and serving copies thereof upon all adverse parties* within fourteen days after entry of the judgment or order or within fourteen days after a ruling on a motion for appropriate relief made during the fourteen-day period following entry of the judgment or order.

N.C. R. App. P. 4(a) (emphasis supplied).

¶ 25 When a Defendant provides a written notice of appeal, the notice must also "designate the judgment or order from which appeal is taken and the court to which appeal is taken." N.C. R. App. P. 4(b).

¶ 26 To preserve an issue for appeal, "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).

¶ 27 The party invoking appellate jurisdiction must also prepare a list of "[p]roposed issues that the appellant intends to present on appeal . . . without argument at the conclusion of the printed record in a numbered list." N.C. R. App. P. 10(b). This list of proposed issues on appeal "*shall not limit the scope of the issues presented on appeal* in an appellant's brief." *Id.* (emphasis supplied).

¶ 28 Rule 21 of the North Carolina Rules of Appellate Procedure provides an alternative, although a discretionary and extraordinary basis for parties to obtain appellate jurisdiction. *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citations omitted) (explaining a petition for writ of certiorari "must show merit or that error was probably committed below" and "is a discretionary writ, to be issued only for good and sufficient cause shown"). If a party petitions this court for a writ of certiorari, this Court, wholly within its discretion, may "suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party." N.C. R. App. P. 2.

A. Certificate of Service Requirement per Rule 4(a) of North Carolina Rules of Appellate Procedure

¶ 29 This Court may issue a writ of certiorari "in appropriate circumstances . . . when the right to prosecute an appeal has been lost by *failure to take timely action*." N.C. R. App. P. 21(a)(1) (emphasis supplied). "Rule 21(a)(1) gives an appellate court the [jurisdictional] authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner." *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997).

¶ 30 In *Hale v. Afro-Am. Arts Int'l., Inc.*, this Court "dismissed defendants' appeal after the record on appeal had been served on the appellee and docketed *without objection* in the Court of Appeals and *after all briefs had been duly filed*." 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993) (*per curiam*) (emphasis supplied). Our state Supreme Court disagreed with this Court's decision.

¶ 31 "[A] party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal, as did the plaintiff here." *Id.* (reversing and remanding the case back to this Court "for consideration on the merits").

¶ 32 Here, the facts are similar to those in *Hale.* While Defendant failed to include a copy of the certificate of service in the record on appeal, the State nevertheless responded to Defendant's brief and filed responsive

arguments without objection. *Hale*, 335 N.C. at 232, 436 S.E.2d at 589. The State only noticed the defect in the record *after* Defendant had raised the issue in his petition for writ of certiorari, which was filed over a month after the State submitted its reply brief.

¶ 33 The State has waived their opportunity to raise the failure of service objection "by not raising the issue by motion or otherwise and by participating without objection in the appeal." *Id.* If Defendant's failure to include the certificate of service in the record on appeal was the only jurisdictional defect in his appeal, this Court could review Defendant's appeal per *Hale*. 335 N.C. at 232, 436 S.E.2d at 589.

B. The "Designate the Judgment or Order" Requirement under Rule 4(b) of North Carolina Rules of Appellate Procedure

¶ 34 Our Supreme Court recently re-affirmed: "A writ of certiorari is not intended as a substitute for a notice of appeal because such a practice would render meaningless the rules governing the time and manner of noticing appeals." *State v. Ricks*, 2021-NCSC-116, ¶ 6, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021) (citation and quotation marks omitted).

¶ 35 The Court in *State v. Ricks* reviewed a claim with jurisdictional defects due to a defendant's failure to comply with the North Carolina Rules of Appellate Procedure. *Id.*, ¶ 3-4, 378 N.C. at 739, 862 S.E.2d at 837-38 (citing the reasoning adopted by the dissent in *State v. Ricks*, 271 N.C. App. 348, 843 S.E.2d 652 (2020) (Tyson, J., concurring in the result in part and dissenting in part)).

¶ 36 The defendant in *Ricks* "gave oral notice of appeal from his criminal convictions," but "he made no objection to the imposition of SBM [at trial] and never filed a written notice of appeal of the SBM orders." *Id.*, ¶ 3, 378 N.C. at 739, 862 S.E.2d at 837. The defendant filed "a petition for writ of certiorari seeking review of the SBM orders" after filing the record of appeal. *Id.*

¶ 37 Our Supreme Court held this Court abused its discretion in *Ricks* by invoking Rule 2 to review a constitutional argument the defendant had failed to preserve at trial, which is required by Rule 10. *Id.*, ¶ 5-6, 378 N.C. at 740-41, 862 S.E.2d at 838-39 (noting the defendant also had failed to comply with Rule 3, which is the civil equivalent of Rule 4, by failing to file a written notice of appeal of the SBM issue); N.C. R. App. P. 2, 3, 4, and 10.

¶ 38 "Though the Court of Appeals may issue a writ of certiorari to review a trial court's order 'when the right to prosecute an appeal has been lost by failure to take timely action,' N.C. R. App. P. 21(a)(1), the petition

must show 'merit or that error was probably committed below.' " *Id.*, ¶ 6, 378 N.C. at 741, 862 S.E.2d at 839 (citing *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9).

¶ 39 Here, Defendant's procedural defects differ from the defects present in *Ricks* because Defendant complied with Rule 10. *Id.*, ¶ 5-6, 378 N.C. at 740-41, 862 S.E.2d at 838-39. The issue Defendant asks this Court to review on appeal was preserved at trial in accordance with Rule 10(a)(1). N.C. R. App. P. 10(a)(1) (noting, to preserve an issue on appeal, "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" and the party must have "obtain[ed] a ruling").

¶ 40 The trial court ruled on the State's motion in *limine* and its Rule 702 objection at trial. Defendant also included the exclusion of Jones' expert witness testimony in his list of proposed issues on appeal, which is also required by Rule 10(b). N.C. R. App. P. 10(b).

¶ 41 Although Defendant complied with Rule 10, Defendant's appeal still possesses jurisdictional defects because of his failure to comply with Rule 4. *Ricks*, ¶ 6, 378 N.C. at 741, 862 S.E.2d at 839 (citing *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9); N.C. R. App. P. 4 and 10. Defendant's petition for writ of certiorari must assert a showing of "merit or that error was probably committed below." *Id.*

III. Restricting Expert Testimony

¶ 42 Defendant purports to raise one issue on appeal: whether the trial court erred by restricting Jones' expert testimony. Defendant argues an expert witness is not required to cite specific scientific studies to support their opinions when testifying to the characteristics of alleged rape victims.

A. Standard of Review

¶ 43 "In reviewing trial court decisions relating to the admissibility of expert testimony evidence, this Court has long applied the deferential standard of abuse of discretion. Trial courts enjoy wide latitude and discretion when making a determination about the admissibility of [expert] testimony." *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 539-40 (2012) (citation omitted).

B. Analysis

¶ 44 Rule 702 of the North Carolina Rules of Evidence governs the admissibility of expert testimony, which provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702 (2021).

¶ 45 The trial court reviews and determines preliminary questions regarding the qualifications of a witness to testify as an expert witness and the admissibility of evidence. N.C. Gen. Stat. § 8C-1, Rule 104(a) (2021); *State v. Goode*, 341 N.C. 513, 527, 461 S.E.2d 631, 639 (1995) (explaining Rule 702 and Rule 104(a) read conjunctively mean that when "a trial court is faced with a proffer of expert testimony, it must determine whether the expert is proposing to testify to scientific, technical, or other specialized knowledge that will assist the trier of fact to determine a fact in issue").

¶ 46 The first prong of Rule 702 focuses on the principles and methodologies an expert utilized or relied upon when reaching their conclusions.

> The subject of an expert's testimony must be "scientific . . . knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation.
>
> . . .
>
> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589-90, 125 L.Ed.2d 469, 480-81 (1993); *see also Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 376, 770 S.E.2d 702, 711 (2015) (citations and quotation marks omitted) ("The requirement that expert testimony must be based on scientific knowledge, means that the principles and methods used to form that testimony must be grounded in the scientific method. In other words, the principles and methods must be capable of generating testable hypotheses that are then subjected to the real world crucible of experimentation, falsification/validation, and replication.").

¶ 47 Here, Defendant has failed to show the trial court did not act and rule within the allowable scope of its discretion. The trial court first applied the factors outlined in *Daubert* when determining whether Jones was qualified as an expert, focusing on the absence of reliable principles and methods.

> THE COURT: Okay. I think we're here just simply – I have not really – my question was what studies did she rely on because one of the – you know, three criteria under *Daubert* is the underlying scientific theory must be valid, the technique applying the theory must be valid, and the technique must have been properly applied upon the occasion in question. . . . I was trying to understand what scientific theories was she relying upon in making these conclusions about the lack of physical trauma is inconsistent with a report of a 15-year-old being statutorily raped. And that's – that is the – I was simply asking what scientific data she was relying on.

¶ 48 The trial court also contemplated how to balance Jones' lack of credentials and training with Defendant's right to present a defense.

> THE COURT: All right. This would put the Court in somewhat of a dilemma because, clearly, I have a gatekeeping function under Rule 702 of the Rules of Evidence to exclude unqualified expert testimony, and I'll candidly say much of what I heard falls into that category. What I am balancing that against – and normally that's a discretionary call on my part[,] and I would simply exercise my discretion and make that ruling.
>
> What I'm balancing here is there is a constitutional right of the defendant to present a defense, and that's

> the challenge that I have here is that, in spite of my – in spite of what I've heard regarding the scientific basis or application of that scientific theory to this case, there is a higher burden on making a decision here. What I am – and there's no doubt that Ms. Jones has extensive experience as a nurse-practitioner, a registered nurse, as an administrator in the health field. And certainly not diminishing that, but this case relates to sexual assault examinations in 2019, and that is where the expertise needs to be.
>
> I would permit two opinions. Well, one, yes, I agree with the State that she is qualified to describe female anatomy. The second thing that I would allow her to testify to – and this is a very narrow opinion that she may render. She may tell the jury, if she so believes, that there are – there is – are no findings of physical trauma in the medical records from the examination of the alleged victim in this case.
>
> However, she cannot link that opinion to any conjecture as to whether a sexual assault occurred because she does not have a scientific basis for that linkage.

¶ 49 Defendant has failed to demonstrate anywhere in the record that the trial court was not correctly analyzing and exercising its discretion to answer the preliminary question of whether Jones was qualified to testify as an expert witness, and to determine the allowable range and scope of her testimony. *Goode*, 341 N.C. at 527, 461 S.E.2d at 639. Defendant's argument is without merit.

IV. Conclusion

¶ 50 Defendant has failed to show merit or prejudice in his petition for writ of certiorari. Defendant's explanations of his jurisdictional and procedural defects, in the exercise of our discretion, do not warrant this Court's issuance of the writ without a showing of merit or that prejudicial error was probably committed by the trial court. *Ricks*, ¶ 6, 378 N.C. at 741, 862 S.E.2d at 839 (citing *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9).

¶ 51 Defendant has failed to demonstrate anything tending to show the trial court abused its discretion by limiting the expert opinion testimony of Jones. Although Defendant was allowed to call Jones to testify, he failed to call and preserve her testimony or to make a *voir dire* proffer of

what scientific evidence her testimony would have relied on. Defendant has failed to show he did not receive a fair trial, free from prejudicial errors he preserved and argued on appeal.

¶ 52 Defendant's petition is denied, and the appeal is dismissed. *It is so ordered.*

DISMISSED.

Judges ZACHARY and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY GERARD WALKER, DEFENDANT

No. COA22-260

Filed 15 November 2022

1. Homicide—first-degree murder—premeditation and deliberation—sufficiency of evidence—verbal altercation—totality of circumstances

The State presented sufficient evidence of premeditation and deliberation to convict defendant of first-degree murder where the victim threatened to kill defendant at some unknown time in the future and defendant responded by shooting the victim at least six times, including twice in the head after several shots to the body; where defendant left the scene without rendering aid, evaded police for more than two weeks, and told his girlfriend that he intended to deny being present at the crime rather than assert self-defense; and where defendant had purchased the gun in anticipation of a violent confrontation with the victim.

2. Homicide—first-degree murder—jury instructions—premeditation and deliberation—plain error review

In defendant's trial for first-degree murder, the trial court did not commit plain error in giving the pattern jury instruction on premeditation and deliberation where the instruction accurately reflected the law and evidence. Further, the instruction even encompassed the law and meaning provided by defendant's proposed instruction by stating that premeditation is an intent to kill

formed with a fixed purpose "not under the influence of some suddenly aroused violent passion."

3. Homicide—first-degree murder—jury instructions—"stand your ground"—proportionality

In defendant's trial for first-degree murder, the trial court did not err by refusing to deliver defendant's requested "stand your ground" jury instruction where the trial court instructed the jury that defendant was not guilty of murder if he acted proportionally to the threat posed by the victim—in other words, the jury charge effectively conveyed the concept that defendant incorrectly claimed was prejudicially omitted. Proportionality is a prerequisite to self-defense even when a defendant had no duty to retreat. Finally, even if the trial court did err, defendant could not show prejudice because the evidence overwhelmingly demonstrated that defendant's force was excessive.

Appeal by Defendant from judgments entered 27 August 2021 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 20 September 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael Bulleri, for the State.

William D. Spence for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant Timothy Gerard Walker ("Defendant") appeals from two judgments entered following jury verdicts convicting him of first-degree murder and possession of a firearm by a felon. After careful review, we hold Defendant received a fair trial, free from error.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 On 9 April 2017, Defendant and two other men, Michael Watts and James Christopher Brooks, were relaxing at Mr. Brooks' house in High Point, North Carolina. Defendant and Mr. Brooks were sitting on a couch watching television and drinking alcohol when Marcus Boyce entered Mr. Brooks' house and began arguing with Defendant. Mr. Brooks told the men he did not want any trouble in his house, and Mr. Boyce said he would respect Mr. Brooks' request. He then asked Defendant to go outside so that they could have a "fair fight." Defendant remained seated

and the verbal altercation continued, with Mr. Boyce telling Defendant "when I see you again I'm going to lay you where you stand" and "[w]herever I see you at, I'm gonna kill you. I don't care if it's with your son, at your grandma's house, at the store[.]" Mr. Boyce also put his finger in Defendant's face and spit on him as he yelled. Mr. Boyce never put a hand on Defendant and, although he threatened to kill Defendant at a later time, he expressly stated he would not do so in Mr. Brooks' home.

¶ 3 After Mr. Boyce—who was unarmed—made these statements, Defendant removed a pistol from his waistband and shot Mr. Boyce at least six times. After the first few bullets struck Mr. Boyce in the back, pelvis, arm, leg, and chest, Mr. Boyce bent over and two bullets struck him in the head. Defendant had purchased the gun after a prior argument with Mr. Boyce and in anticipation of a future confrontation.

¶ 4 Defendant left Mr. Brooks' house with the firearm. Mr. Brooks called 9-1-1 and emergency officials arrived at the scene to confirm the death of Mr. Boyce. Law enforcement issued a warrant for Defendant's arrest, and Defendant turned himself in to the police 18 days later. Defendant spoke to his girlfriend while out of police custody, telling her that he intended to deny being at the scene rather than claim self-defense.

¶ 5 Defendant was indicted for first-degree murder and possession of a firearm by a felon on 10 October 2017. Defendant provided notice of his intent to plead self-defense on 26 March 2019. Defendant's case went to trial on 23 August 2021 in Guilford County. Defendant twice moved to dismiss the charges against him—once at the close of the State's evidence and once at the close of all the evidence—and both motions were denied. Defendant then requested a "stand your ground" instruction during the charge conference, which the trial court also denied.

¶ 6 On 27 August 2021, the jury found Defendant guilty on both charges. Defendant was sentenced to life imprisonment without parole on the conviction of first-degree murder and a concurrent sentence of 17-30 months on the conviction of possession of a firearm by a felon. Defendant gave oral notice of appeal.

II. ANALYSIS

¶ 7 Defendant asserts the trial court erred in: (1) denying his motions to dismiss the first-degree murder charge for lack of premeditation and deliberation; (2) giving the pattern jury instruction on deliberation in light of the particular facts of the case; and (3) refusing to give a "stand your ground" instruction as requested by Defendant. We hold that Defendant has failed to demonstrate error or prejudice under any theory.

1. Standards of Review

¶ 8 This Court reviews the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). After a defendant's motion to dismiss, the court must decide "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) (citation and quotation marks omitted). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 255 (1987) (citations omitted). We must consider the evidence in the light most favorable to the State and with the benefit of all reasonable inferences. *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455.

¶ 9 Alleged errors in the trial court's jury instruction are reviewed under different standards, depending on whether such errors were preserved. If a defendant failed to preserve his challenge to the trial court's instruction, we review the issue for plain error when explicitly asserted in the defendant's brief. *State v. Foye*, 220 N.C. App. 37, 44, 725 S.E.2d 73, 79 (2012); *see also* N.C. R. App. P. 10(a)(4) (2022). "Under the plain error rule, defendant must convince this Court 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).

¶ 10 Preserved challenges to jury instructions are reviewed *de novo*. *State v. Richardson*, 270 N.C. App. 149, 152, 838 S.E.2d 470, 473 (2020). In determining whether the requested instruction is warranted, we view the evidence in the light most favorable to the defendant. *State v. Debiase*, 211 N.C. App. 497, 504, 711 S.E.2d 436, 441 (2011). To prevail on appeal, the defendant must show that there is a "reasonable possibility" that the jury would have reached a different result had the requested instruction been given. *See State v. Brewington*, 343 N.C. 448, 454, 471 S.E.2d 398, 402 (1996).

2. Motions to Dismiss

¶ 11 **[1]** Defendant first contends that the trial court erred in denying his motions to dismiss the charge of first-degree murder, asserting that the shooting was in the heat of passion and without premeditation and deliberation. The State disagrees, highlighting the evidence showing: (1) the number of times the deceased was shot; (2) Defendant shot Mr. Boyce twice in the head after shooting him in the body several times; (3) Defendant's departure from the scene without rendering aid, evading

police for 18 days, and telling his girlfriend he intended to deny being at the scene rather than proclaim self-defense; and (4) Defendant's testimony that he had bought the gun in anticipation of a violent confrontation with Mr. Boyce. We agree with the State that there was sufficient evidence of premeditation and deliberation to send the first-degree murder charge to the jury.

¶ 12 First-degree murder is defined in part as a "willful, deliberate, and premeditated killing[.]" N.C. Gen. Stat. § 14-17(a) (2021). Courts consider different factors to determine if a killing occurred with premeditation and deliberation. *State v. Pittman*, 332 N.C. 244, 255, 420 S.E.2d 437, 443 (1992). These factors include:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the occurrence giving rise to the victim's death; (4) ill-will or previous difficulty between the parties; (5) evidence that the killing was done in a brutal manner; and (6) the nature and number of the victim's wounds.

Id.

¶ 13 The number of gunshot wounds inflicted is probative on the issue, as there is "some amount of time, however brief, for thought and deliberation . . . between each pull of the trigger." *State v. Austin*, 320 N.C. 276, 296, 357 S.E.2d 641, 653 (1987). Also relevant is whether the defendant "left the deceased to die without attempting to obtain assistance for the deceased." *State v. Hunt*, 330 N.C. 425, 428, 410 S.E.2d 478, 481 (1991). In analyzing premeditation and deliberation, courts look to the "totality of the circumstances" rather than a single factor. *State v. Hager*, 320 N.C. 77, 82, 357 S.E.2d 615, 618 (1987) (citing *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981)).

¶ 14 Defendant rightly notes that there are circumstances in which a verbal altercation is so provocative as to foreclose a finding of premeditation. Under that precedent, "words or conduct not amounting to an assault or threatened assault, may be enough to arouse a sudden and sufficient passion in the perpetrator to negate deliberation and reduce a homicide to murder in the second degree." *State v. Watson*, 338 N.C. 168, 177, 449 S.E.2d 694, 700 (1994). However, "Defendant's mere anger at the victim is not alone sufficient to negate deliberation. . . . What is required to negate deliberation . . . is a sudden arousal of passion, brought

on by sufficient provocation during which the killing immediately takes place." *Id.* at 178, 499 S.E.2d at 700. Evidence of a heated argument does not, however, foreclose a finding of premeditation and deliberation, as "[a perpetrator] may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time." *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991). It is only when *all* the evidence shows a lack of premeditation and deliberation that this element is negated, *Watson*, 338 N.C. at 177, 499 S.E.2d at 700, and "evidence of [a] quarrel . . . is not enough to negate deliberation as a matter of law." *Id.* at 178, 499 S.E.2d at 700; *see also State v. Misenheimer*, 304 N.C. 108, 114, 282 S.E.2d 791, 796 (1981) (holding the State submitted sufficient evidence of premeditation and deliberation notwithstanding the fact that "all the evidence showed that the killing occurred after defendant and his father had engaged in a struggle and his father had twice 'grabbed' defendant").

¶ 15 These precedents establish that evidence of a verbal altercation does not serve to negate a charge of first-degree murder when "there was other evidence sufficient to support the jury's finding of both deliberation and premeditation." *Watson*, 338 N.C. at 178, 499 S.E.2d at 700-01. Other such evidence exists here. Indeed, the Court in *Watson* rejected a defendant's claim that premeditation was negated in part because—as in this case—there was existing ill will between the defendant and victim, the defendant had bought a gun in anticipation of an altercation with the victim, and such evidence "tend[ed] to show preparedness on the part of defendant to kill the victim before the argument between them ensued." *Id.* at 177, 499 S.E.2d at 700. The Supreme Court also pointed out that the victim was shot multiple times—again, as occurred here—and that the number of shots supported a finding of premeditation and deliberation. *Id.* at 179, 499 S.E.2d at 701.

¶ 16 Defendant attempts to analogize this case to *State v. Corn* and *State v. Williams*, both of which vacated first-degree murder convictions on the basis that there was insufficient evidence of premeditation and deliberation when a defendant shot the victim following a verbal altercation. *Corn*, 303 N.C. at 298, 278 S.E.2d at 224; *State v. Williams*, 144 N.C. App. 526, 530-31, 548 S.E.2d 802, 805-06 (2001). However, the facts of those cases are materially different; the defendant in *Corn* fired his gun at two men who were "bigger than him . . . and with a history of violence—who were charging at him while he was on the couch in his home," *State v. Dennison*, 171 N.C. App. 504, 509, 615 S.E.2d 404, 408 (2005) (describing *Corn*), while the defendant in *Williams* fired his weapon after being struck in the jaw by the victim. *Williams*, 144 N.C.

App. at 527, 548 S.E.2d at 804. Neither defendant bought their firearms in anticipation of a violent confrontation with their victims, and both cooperated with the respective investigations within 24 hours of each shooting. *Corn*, 303 N.C. at 295, 278 S.E.2d at 222; *Williams*, 144 N.C. App. at 530-31, 548 S.E.2d at 805-06. Nor was there any evidence of prior arguments or ill will between the victims and the defendants in those cases. *Corn*, 303 N.C. at 298, 278 S.E.2d at 224; *Williams*, 144 N.C. App. at 530-31, 548 S.E.2d at 805. And, in *Williams*, the defendant fired only a single shot. 144 N.C. App. at 531, 548 S.E.2d at 805.

¶ 17 None of the dispositive facts in *Corn* or *Williams* is present here. The unequivocal evidence shows Defendant had previously quarreled with the victim and shot the victim at least six times in the back, pelvis, and head. After several shots struck the victim's torso, Defendant shot the victim in the head. Defendant himself testified that he left the victim at the scene of the crime without trying to render aid. He also took the murder weapon, which he had purchased in anticipation of a violent confrontation with the victim, when he fled. Defendant then remained on the lam for 18 days with knowledge that there was a warrant out for his arrest. He informed his girlfriend he intended to deny shooting the victim rather than admit doing so in self-defense. Based on the evidence presented, the jury could rationally infer that Defendant killed Mr. Boyce with premeditation and deliberation notwithstanding the verbal argument between the two men. The trial court did not err in denying Defendant's motions to dismiss the first-degree murder charge.

3. Pattern Instruction on Deliberation

¶ 18 **[2]** Defendant next argues that the trial court erred in giving the pattern jury instruction on premeditation and deliberation, conceding that trial counsel did not object to the instruction during the charge conference. Defendant specifically and distinctly contends the trial court's instruction amounted to plain error,[1] and we therefore review this unpreserved issue under that standard.

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1. Defendant argues in the alternative that this error was preserved as a matter of law, as a trial judge is obligated to instruct the jury on all essential features of the case arising from the evidence. *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982). Defendant's automatic preservation argument fails because our Supreme Court has elsewhere made clear that failure to object to a jury instruction waives harmless error review and subjects the issue to plain error review only. *See, e.g.*, *State v. Lawrence*, 365 N.C. 506, 514, 723 S.E.2d 326, 332 (2012) (holding plain error review was the proper standard applicable to a defendant's claim that the trial court erred in omitting an instruction on a necessary element of the crime when defendant did not lodge any objection to the jury charge).

¶ 19 Defendant does not dispute that the court followed Pattern Jury Instruction 206.1 for first-degree murder, which includes a definition and explanation of deliberation as an element of the crime. Rather, Defendant believes the facts in this case required the following additional instruction on deliberation: "If you find that defendant shot Mr. Boyce during a passion suddenly aroused by Mr. Boyce's assault or threatened assault upon defendant, or by his aggressive conduct toward defendant, then defendant would not be guilty of first degree murder."

¶ 20 Defendant's argument relies entirely on a dissenting opinion in *State v. Patterson*, 288 N.C. 553, 574, 220 S.E.2d 600, 615 (1975) (Exum, J., dissenting), which has no force of law. *See Georgia v. Public.Resource.Org, Inc.*, ___ U.S. ___, ___, 206 L. Ed. 2d 732, 748 (2020) ("As every judge learns the hard way, comments in a dissenting opinion about legal principles and precedents are just that: comments in a dissenting opinion." (cleaned up) (quotation marks and citation omitted)). Further, the dissent in *Patterson* was based on a "bare bones definition of deliberation" given in that case, 288 N.C. at 575, 220 S.E.2d at 616, and the pattern jury instruction used here was substantially more detailed in its definition and examples. *See State v. Cagle*, 266 N.C. App. 193, 202, 830 S.E.2d 893, 900 (2019) (rejecting a similar argument that the pattern instruction was insufficient to describe premeditation and deliberation after noting that the pattern instruction, also used in this case, "defined and provided examples of deliberation").

¶ 21 The pattern instruction used here also encompassed the law and meaning provided by the Defendant's proposed instruction, as it stated premeditation is shown "[i]f the intent to kill was formed with a fixed purpose *not under the influence of some suddenly aroused violent passion*." (emphasis added). The trial court gave an instruction that accurately reflected the law and evidence, and it was "not required to frame . . . instructions with any greater particularity than is necessary to enable the jury to understand and apply the law to the evidence bearing upon the elements of the crime charged." *State v. Lewis*, 346 N.C. 141, 145, 484 S.E.2d 379, 381 (1997) (quotation marks and citation omitted). Defendant has thus failed to show plain error.

4. "Stand Your Ground" Instruction

¶ 22 **[3]** In his final argument, Defendant contends that the trial court prejudicially erred in refusing to give the following "stand your ground" instruction requested during the charge conference:

> If the defendant was not the aggressor and the defendant was at a place where the defendant had a lawful

> right to be, the defendant could stand the defendant's ground and repel force with force regardless of the character of the assault being made upon the defendant. However, the defendant would not be excused if the defendant used excessive force.

Defendant specifically argues that the failure to instruct the jury that he could "repel force with force regardless of the character of the assault being made upon the defendant" was prejudicial, as the jury was not informed that "defendant had the right to use deadly force even if it had not been wielded against him."

¶ 23 Instead of Defendant's requested instruction, the trial court charged the jury as follows:

> The defendant would be excused of . . . murder on the ground of self-defense if, first, the defendant believed it was necessary to kill the victim or to use deadly force against the victim in order to save the defendant from death or great bodily harm.
>
> And, second, the circumstances, as they appeared to the defendant at the time, were sufficient to create such a belief in the mind of a person of ordinary fitness.
>
> In determining the reasonableness of the defendant's belief you should consider the circumstances as you find them to have existed from the evidence including
>
> . . . .
>
> [t]he fierceness of the assault, if any, upon the defendant
>
> . . . .
>
> The defendant would not be guilty of murder or manslaughter if the defendant acted in self-defense and if the defendant did not use excessive force under the circumstances.

Notably, the trial court expressly told the jury Defendant was not guilty if he acted proportionally to the threat posed. Ultimately, Defendant's argument fails because proportionality is still a pre-requisite to asserting self-defense even when a defendant had no duty to retreat.

¶ 24 Defendant's argument is foreclosed by our Supreme Court's recent decision in *State v. Benner*, where a defendant shot and killed a victim in the defendant's home. 380 N.C. 621, 2022-NCSC-28, ¶ 13. That decision makes clear that the use of deadly force cannot be excessive and must still be proportional even when the defendant has no duty to retreat and is entitled to stand his ground:

> [T]he proportionality rule inherent in the requirement that the defendant not use excessive force continues to exist even in instances in which a defendant is entitled to stand his or her ground. For that reason, a trial court need not use the expression "regardless of the character of the assault" in the absence of a concern that the jury would believe that the nature of the assault that the victim had made upon the defendant had some bearing upon the extent to which a defendant attacked in his own home has a duty to retreat before exercising the right of self-defense. In view of the fact that the trial court made no distinction between a simple and a felonious assault in its instructions to the jury concerning the extent to which defendant was entitled to exercise the right of self-defense without making an effort to retreat and did not tell the jury that defendant was not entitled to use a firearm or any other form of deadly force in the course of defending himself from [the victim's] attack as long as he actually and reasonably believed that he needed to use deadly force to protect himself from death or great bodily injury, the trial court did not need to further clarify that defendant was entitled to exercise the right of self-defense "regardless of the character of the assault."

Id. ¶ 29 (quotation marks and citations omitted). Because the trial court in that case instructed the jury that the defendant had no duty to retreat and could use deadly force if proportional to the threat posed by the victim, the trial court did not err in declining to give a special "stand your ground" instruction. *Id.*

¶ 25 Defendant asserts *Benner* does not apply in this case because the right to stand one's ground in the home arises under common law, while Defendant's right to stand his ground outside the home arose under statute. *See id.* ¶ 21 (noting that N.C. Gen. Stat. §§ 14-51.2 and 14-51.3 (2021) extended the common law right to stand one's ground in self-defense

to places outside the home under certain circumstances). However, the language Defendant claims was prejudicially omitted—that he could respond to force with force regardless of the nature of the assault—was deemed in Benner to be "rooted in common, rather than statutory, law." *Id.* ¶ 25. The Supreme Court also held in Benner that a distinction between common and statutory law was immaterial when the trial court's instruction adequately conveyed the proportionality requirement to the jury. *Id.* ¶ 26. Here, the instruction given by the trial court effectively conveyed the proportionality concept to the jury, as it told the jury Defendant could respond with deadly force if it was not excessive. The instruction requested by Defendant does not state that he could respond to force with deadly force regardless of the character of the assault. Instead, it provides that Defendant could reply to "force with force regardless of the character of the assault being made upon the defendant. However, the defendant would not be excused if the defendant used excessive force." The trial court therefore did not err in its instruction, as its charge effectively conveyed the concept that Defendant incorrectly claims was prejudicially omitted. *Benner*, ¶ 29.

¶ 26 Even if *Benner* does not apply, the "stand your ground" statute on which Defendant relies imposes the same requirement that any use of deadly force be proportional to that threatened against Defendant. Subsection 14-51.3(a) provides that a person in a place he has a legal right to be may use deadly force without retreating if either of the following apply: "(1) He . . . reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or . . . another," or "(2) Under the circumstances permitted pursuant to [Section] 14-51.2." N.C. Gen. Stat. § 14-51.3(a) (2021). Section 14-51.2, the "castle doctrine" statute, simply provides that a lawful occupant of a home, workplace, or motor vehicle is entitled to a rebuttable presumption that deadly force is reasonable when used against someone who had or was unlawfully breaking into that location or kidnapping someone from that location. N.C. Gen. Stat. § 14-51.2; *see also State v. Austin*, 279 N.C. App. 377, 2021-NCCOA-494, ¶¶ 24-25 (describing the presumption created by the castle doctrine statute and the circumstances in which it applies). In other words, the castle doctrine statute does not obviate the proportionality requirement inherent to lethal self-defense; instead, it simply presumes that the proportionality requirement is satisfied under specific circumstances.

¶ 27 Here, Defendant was not the owner of the home where the victim was shot, and the homeowner, Mr. Brooks, testified that the victim was "more than welcome" in the house and was never told to leave.

Because the castle doctrine statute does not apply to this circumstance, Defendant could use deadly force against the victim under Subsection 14-51.3(a) *only* if it was necessary to prevent imminent death or great bodily harm, *i.e.*, if it was proportional. N.C. Gen. Stat. § 15-51.1(a)(1). The jury was given exactly this instruction and was told Defendant was not guilty "if the defendant acted in self-defense and if the defendant did not use excessive force under the circumstances."

¶ 28 Lastly, even if the trial court did err in declining to give the requested instruction, Defendant cannot show prejudice. As Defendant's own requested instruction recognized, he could not use lethal self-defense if doing so amounted to "excessive force," and the evidence overwhelmingly demonstrates that Defendant's force was excessive. Defendant was under no threat of imminent harm: while Mr. Boyce threatened to kill Defendant *at some unknown time in the future*, he was clear that he had no intention of killing Defendant in Mr. Brooks' home at the time of the altercation. The only actual physical "assault" in evidence was the victim spitting on Defendant as he shouted. Lethal force is not a proportional response to being spit on. Because the overwhelming evidence shows that the lethal force used was excessive and precluded any "stand your ground" defense, Defendant cannot show prejudicial error. *See Benner*, ¶ 30 (holding no prejudice in failure to give an identical requested instruction because "the record contains more than sufficient evidence from which a reasonably jury could have determined that defendant used excessive force when he killed [the victim]").

III. CONCLUSION

¶ 29 The trial court properly denied Defendant's motions to dismiss, did not plainly err in its deliberation jury instruction, and did not err in denying Defendant's request for a specific "stand your ground" instruction. For the foregoing reasons, we hold that Defendant received a fair trial, free from error.

NO ERROR.

Judges DIETZ and JACKSON concur.

STATE v. WOODLEY

[286 N.C. App. 450, 2022-NCCOA-746]

STATE OF NORTH CAROLINA
v.
RAYMOND WOODLEY

No. COA21-670

Filed 15 November 2022

1. Jurisdiction—superior court—murder trial—global pandemic—expiration of emergency directives—under authority of Chief Justice

The superior court properly exercised subject matter jurisdiction over defendant's first-degree murder trial, which had originally been set for rescheduling under two emergency directives issued by the Supreme Court's former Chief Justice during an ongoing coronavirus pandemic. Pursuant to his statutory authority, the new Chief Justice entered an order declaring that the emergency directives had expired, and the Administrative Office of the Courts—under the Chief Justice's authority—issued a commission to a superior court judge to preside over a regular criminal session that included defendant's trial.

2. Constitutional Law—effective assistance of counsel—trial held during pandemic—continuance denied—counsel's concerns about exposure

In a murder trial held during an ongoing coronavirus pandemic, the trial court neither abused its discretion nor violated defendant's constitutional rights by denying defendant's motion to continue, in which defense counsel expressed concerns about risking exposure to the coronavirus by physically appearing in court and posited that these concerns would affect her performance at trial. Defense counsel admitted that she was otherwise fully prepared to try defendant's case, and defendant failed to show that he received ineffective assistance of counsel. Further, the trial court did not err in allowing defense counsel to enter the courtroom where, although an emergency directive required any person "who has likely been exposed" to the virus to follow certain protocols before entering court facilities, defense counsel mentioned her potential coronavirus exposure for the first time in open court without having referenced the emergency directive in the motion to continue or having followed the directive's protocols before trial.

3. Appeal and Error—preservation of issues—constitutional argument—exclusion of defendant's father from courtroom—Rule 2

In a murder trial held during an ongoing coronavirus pandemic, defendant did not object when the trial court excluded his father from the courtroom during jury selection (to comply with pandemic-related social distancing guidelines), and therefore defendant failed to preserve for appellate review his argument that the trial court's action violated his state and federal constitutional rights to a public trial. Further, the appellate court declined to invoke Appellate Rule 2 to review defendant's argument because nothing in the record demonstrated "exceptional circumstances" sufficient to justify suspending the Appellate Rules in order to prevent "manifest injustice."

4. Jury—selection—passing a panel of less than twelve jurors to defendant—prejudice analysis—issue preservation

In a murder trial held during an ongoing coronavirus pandemic, there was no prejudicial error where the trial court allowed the State to pass prospective jurors to defendant in small groups until twelve jurors had been accepted rather than pass a full panel of twelve prospective jurors to defendant as required under N.C.G.S. § 15A-1214. Defendant failed to exhaust his peremptory challenges and was not forced to accept any undesirable juror as a result of the court's departure from statutory jury selection procedure. At any rate, defendant failed to preserve this issue for appellate review where he neither raised it at trial nor "specifically and distinctly" argued in his appellate brief that the court committed plain error.

5. Evidence—relevance—hearsay—social media messages—documentation of gun purchase—murder trial

In a murder trial arising from an altercation in which the victim was fatally shot, the trial court properly admitted into evidence certain social media messages sent before the murder, including one in which defendant's sister told the victim's sister that the victim sold a gun to defendant but failed to deliver the gun after taking defendant's money. These messages were relevant to issues of defendant's guilt and motive for murder, and even if his sister's statements were inadmissible as hearsay, defendant failed to show that he was prejudiced by their admission. The trial court also properly admitted evidence that defendant's sister had purchased a handgun before the murder where, because the handgun was the same caliber as the shell casings found at the crime scene and the gunshot wounds found on the

victim's body, the evidence was relevant to the issue of defendant's opportunity to acquire the murder weapon.

Appeal by defendant from judgment entered 15 January 2021 by Judge Jeffery B. Foster in Pasquotank County Superior Court. Heard in the Court of Appeals 21 September 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert C. Montgomery, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

TYSON, Judge.

¶ 1 Raymond Woodley ("Defendant") appeals from judgment entered after a jury's unanimous verdict convicted him of first-degree murder. We find no error.

I. Background

¶ 2 Trevon Blount, a nineteen-year-old black male, and his friend, Trevor Debowski, left a party at a friend's house around 9:30 p.m. on 3 May 2018. The pair walked onto Holly Street in Elizabeth City. The men approached a crowd of people on the street. Defendant, also a nineteen-year-old black male, was present in the crowd on the street, and began "fussing and arguing" with Blount. Defendant pulled a gun from the waistband of his pants and began shooting at Blount as he ran down the street.

¶ 3 An autopsy of Blount's body revealed he had suffered nine .40 caliber gunshot wounds, including three in his back, one in the back of his left shoulder, and one to his head. Two of the shots to Blount's back caused damage to the lungs, heart, and liver, and were fatal. Blount's body also displayed lacerations on his head and upper extremities.

¶ 4 Charlie Unangst, who lived nearby, heard the commotion, witnessed the shooting, and called 911 to report the shooting. Unangst reported the shooter was a black male and wearing a Nike jacket.

¶ 5 Miranda Darlene Lane was sitting inside a car on Holly Street with Keion Burnham and Angelina Silver smoking marijuana. Lane also observed the shooting and reported seeing Blount and the shooter running past her car, Blount falling down, and the shooter continuing to shoot. When the police interviewed Lane, she identified Defendant as a black

male with braided hair and the shooter with eighty to ninety percent certainty in a photographic lineup.

¶ 6 Burnham also observed the shooting. He clearly saw the shooter's silver and black handgun, got a good look at the shooter's face, and had "no doubt" it was Defendant. Silver was seated in the backseat and did not see the shooter's face, but testified she recognized Defendant as the shooter, based upon the appearance of his hair.

¶ 7 Police arrived at the scene of the shooting shortly before 9:30 p.m. and observed people running from the area where Blount's body lay. Police found no weapon at the scene but found and collected six Smith and Wesson .40 caliber shell casings. A K9 unit tracked a scent approximately three quarters of a mile to the back door of a residence where Jamariaron Taylor lived.

¶ 8 Defendant's cousin, Rashawn Cole, informed Police he was present with Defendant on the night of the shooting. Cole described the shooting and how he and Defendant ran to Taylor's house after the shooting. While Cole and Defendant were incarcerated, Defendant later threatened to "beat up" Cole because he had spoken to law enforcement.

¶ 9 Police later learned Kimberly Ashley, Defendant's sister, had contacted Britney Spence, Blount's sister, via Facebook Messenger almost eight months prior to the murder. In the Facebook message, Ashley asserted Blount had taken money from Defendant and had not provided him with a gun as was promised. Spence told Blount about the message, but he denied any involvement. Defendant's sister, Ashley, had acquired a Smith and Wesson .40 caliber handgun prior to the murder.

¶ 10 While incarcerated and awaiting trial, Defendant described Blount's murder to his cellmate. Defendant said he went looking for Blount over "disrespect" with about a dozen friends, found and argued with him, became frustrated, and began shooting. After emptying the "clip" in his weapon, Defendant caught up to Blount attempting to escape, kicked his legs out from under him, and beat and kicked Blount until Defendant was certain Blount was dead. Blount's body displayed lacerations on his head and upper extremities, in addition to the gunshot wounds, consistent with Defendant's post-shooting actions. Defendant went to Taylor's house, where he wrapped the gun in his windbreaker until he could retrieve it, and take it to Virginia. Defendant was indicted by the grand jury for first-degree murder.

¶ 11 The jury unanimously found Defendant guilty of first-degree murder and he was sentenced to life in prison without parole. Defendant appeals.

II. Jurisdiction

¶ 12 **[1]** At trial and in briefing before this Court Defendant conceded the trial court's jurisdiction. However, Defendant's appellate counsel at oral argument asserted: "In preparing for this argument and thinking about it, I'm not sure that this isn't a [subject matter jurisdiction issue.]" The test of subject matter jurisdiction is well settled.

¶ 13 "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it[.]" *State v. Petty*, 212 N.C. App. 368, 371, 711 S.E.2d 509, 512 (2011) (citation omitted). "[A] trial court must have subject matter jurisdiction over a case in order to act in that case[,] and [ ] a court's lack of subject matter jurisdiction is not waivable and can be raised at any time" including for the first time on appeal. *Id.* (internal quotation marks and citations omitted). "The State bears the burden in criminal matters of demonstrating beyond a reasonable doubt that a trial court has subject matter jurisdiction." *State v. Williams*, 230 N.C. App. 590, 595, 754 S.E.2d 826, 829 (2013) (citation omitted).

¶ 14 Subject matter jurisdiction "is conferred upon the courts by either the North Carolina Constitution or by statute." *Petty*, 212 N.C. App at 371, 711 S.E.2d at 512 (citation omitted). Article IV, section 1 of the North Carolina Constitution vests the judicial power of the State in a General Court of Justice. N.C. Const. art IV, § 1. The General Court of Justice consists "of an Appellate Division, a Superior Court Division, and a District Court Division." N.C. Const. art IV, § 2.

A. Article IV, § 12 of the North Carolina Constitution

¶ 15 Pursuant to Article IV, section 12 of the North Carolina Constitution, "the Superior Court shall have original general jurisdiction throughout the State." N.C. Const. art IV, § 12; *see* N.C. Gen. Stat. § 7A-271 (2021) ("The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division[.]").

¶ 16 Our General Statutes provide:

> Authority of Chief Justice. — When the Chief Justice of the North Carolina Supreme Court determines and declares that catastrophic conditions exist or have existed in one or more counties of the State, the Chief Justice may by order entered pursuant to this subsection:
>
> (1) Extend, to a date certain no fewer than 10 days after the effective date of the order, the time

> or period of limitation within which pleadings, motions, notices, and other documents and papers may be timely filed and other acts may be timely done in civil actions, criminal actions, estates, and special proceedings in each county named in the order. The Chief Justice may enter an order under this subsection during the catastrophic conditions or at any time after such conditions have ceased to exist. The order shall be in writing and shall become effective for each affected county upon the date set forth in the order, and if no date is set forth in the order, then upon the date the order is signed by the Chief Justice.
>
> (2) Issue any emergency directives that, notwithstanding any other provision of law, are necessary *to ensure the continuing operation of essential trial or appellate court functions, including the designation or assignment of judicial officials who may be authorized to act in the general or specific matters stated in the emergency order*, and the designation of the county or counties and specific locations within the State where such matters may be heard, conducted, or otherwise transacted. The Chief Justice may enter such emergency orders under this subsection in response to existing or impending catastrophic conditions or their consequences. An emergency order under this subsection shall expire the sooner of the date stated in the order, or 30 days from issuance of the order, but the order may be extended in whole or in part by the Chief Justice for additional 30-day periods if the Chief Justice determines that the directives remain necessary.

N.C. Gen. Stat. § 7A-39 (b) (2021) (emphasis supplied).

¶ 17 Pursuant to N.C. Gen. Stat. § 7A-39(b)(2) then Chief Justice Cheri Beasley on 14 December 2020 reinstated Emergency Directive 1 and modified and reinstated Emergency Directive 10. *See* Order of the Chief Justice of North Carolina, (14 Dec. 2020), https://www.nccourts.gov/assets/news-uploads/14%20December%202020%20-%207A39%28b%29%282%29%20Order%20Extending%20Emergency%20Directives%201-5%2C%208-15%2C%2018%2C%2020 22%20%28Final%29.pdf?fwcb9Jh3QU_twAJOVr6Vpa0PuktaRX2c=#:~:text=Emergency

%20Directive%201,All%20superior%20court&text=the%20senior%20resident%20superior%20court,and%20safety%20of%20all%20participants.

¶ 18 Emergency Directive 1 provides:

> All superior court and district court proceedings, including proceedings before the clerks of superior court, must be scheduled or rescheduled for a date no sooner than 14 January 2021, unless:
>
> a. the proceeding will be conducted remotely;
>
> b. the proceeding is necessary to preserve the right to due process of law (e.g., a first appearance or bond hearing, the appointment of counsel for an indigent defendant, a probation hearing, a probable cause hearing, etc.);
>
> c. the proceeding is for the purpose of obtaining emergency relief (e.g., a domestic violence protection order, temporary restraining order, juvenile custody order, judicial consent to juvenile medical treatment order, civil commitment order, etc.); or
>
> d. *the senior resident superior court judge*, chief business court judge, or chief district court judge *determines that the proceeding can be conducted under conditions that protect the health and safety of all participants*.
>
> The examples provided above are not exhaustive.

Id. (emphasis supplied).

¶ 19 Emergency Directive 10 provides: "No jury trials shall be conducted in the superior or district court of any county for the next thirty (30) days, unless a jury has already been empaneled." *Id.*

B. Specific Commission

¶ 20 On 1 January 2021, Senior Associate Justice Paul M. Newby took his oath as Chief Justice of North Carolina. Under the authority of the Chief Justice and order, the Administrative Office of the Courts ("AOC") issued a commission on 5 January 2021, to a superior court judge to preside over a Regular Session of Superior Court in Pasquotank County, Schedule B, for the trial of Criminal and Civil cases calendared to begin 11 January 2021. *See Hinkle v. Hartsell*, 131 N.C. App. 833, 836, 509 S.E.2d 455, 457 (1998) ("[J]udicial notice is appropriate to determine the

existence and jurisdiction of the various courts of the State; their terms or sessions, and judges; the counties comprising the various judicial districts; and, any earlier proceedings in the court involving the same case." (citing 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 26, at 102 (5th ed. 1998)).

¶ 21 On 11 January 2021, Chief Justice Newby issued a letter to Judicial Branch Stakeholders where a draft of an order of the Chief Justice of the Supreme Court of North Carolina to be issued on 13 January 2021 and become effective on 14 January 2021, including the expiration of the 14 December 2020 Emergency Directives, wherein Emergency Directives 1 and 10 were ordered to expire.

¶ 22 Emergency Directive 10 did not divest the superior court of either its Constitutional or Statutory jurisdiction. The superior court session was presided over by a superior court judge, who was lawfully commissioned under the authority of the Chief Justice for the superior court civil or criminal sessions beginning on 11 January 2021, which included this case by counsel's prior agreement and consent. Jury Selection began on 12 January 2021 and the jury was empaneled the following day on 13 January 2021. This panel need not examine the validity of orders issued beyond the term of the Chief Justice. The 5 January 2021 AOC commission for this session and the 13 January 2021 order from Chief Justice Newby effectively repudiated and superseded the 14 December 2020 order. Defendant's challenge to the trial court's subject matter jurisdiction is without merit and overruled.

¶ 23 Appellate jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(1) (2021).

III. Issues

¶ 24 Defendant argues the trial court erred by: (1) denying his motion to continue; (2) improperly excluding his father from the courtroom; (3) varying from the statutory jury selection procedure; and, (4) admitting inadmissible evidence.

IV. Defendant's Motion to Continue

A. Standard of Review

¶ 25 A motion to continue generally rests within the trial court's discretion and is reviewable on appeal only for an abuse of discretion. *State v. Thomas*, 294 N.C. 105, 111, 240 S.E.2d 426, 431 (1978) (citations omitted). When the motion to continue is based upon a constitutional right, "the question presented is one of law and not of discretion, and the order

of the court below is reviewable" on appeal. *State v. Harris*, 290 N.C. 681, 686, 228 S.E.2d 437, 440 (1976) (citations omitted).

B. COVID-19

¶ 26 **[2]** In arguing her motion to continue, Defendant's trial counsel asserted in the wake of the COVID-19 pandemic she did not feel it was the "correct time" to proceed to trial. She argued purported concerns for her own health would deprive Defendant of effective assistance of counsel, and she would have to put herself at risk by being in court and by going to visit the jail each evening to discuss the trial progress with Defendant. During the hearing on the motion to continue, the following colloquy occurred between Defendant's counsel and the trial court:

> DEFENDANT'S COUNSEL: And so, again, as I stated earlier, when I agreed the last time to get the case tried, I had no idea the numbers were going to go up. I don't have any control over that. And yes, I have grave concerns and I do not believe that I can be effective for [Defendant]. I have explained that to [Defendant]. I have explained that, you know, my mind is all over the place as it relates [to COVID-19].
>
> THE COURT: You mentioned that a couple of times. Is it your position to the Court that you are emotionally and mentally unable to proceed as counsel for this defendant?
>
> DEFENDANT'S COUNSEL: At this point, yes.
>
> THE COURT: Okay. And so you are calling into question your own competency to represent him?
>
> DEFENDANT'S COUNSEL: Yes, sir.

¶ 27 Following a recess, the trial court further inquired into Defendant's counsel's preparation for trial and basis for apprehension:

> THE COURT: [Defendant's counsel], I've got a couple of follow-up things I need to address with you before I rule. Number one, notwithstanding the COVID issue that you have raised, are you otherwise prepared to go forward with this case?
>
> DEFENDANT'S COUNSEL: Can you clarify the question?

> THE COURT: Yes. Are you legally ready, done your preparation, and are you ready to present your case and defend your client based on the work that needed to be done?
>
> DEFENDANT'S COUNSEL: Based on the work that needs to be done, yes.
>
> THE COURT: So you are prepared to go forward from a work standpoint?
>
> DEFENDANT'S COUNSEL: As far as all of the evidence in the case?
>
> THE COURT: Absent COVID, you would be fine to go ahead and try this case?
>
> DEFENDANT'S COUNSEL: I'm just trying to figure out how to clearly answer that question.
>
> THE COURT: Yes or no.
>
> DEFENDANT'S COUNSEL: I think my concerns with COVID, absent that, yes.
>
> THE COURT: So the only reason for your motion to continue here is COVID and not any lack of preparation on your part that would prejudice or bias your client?
>
> DEFENDANT'S COUNSEL: As it relates to preparation to advise my client, no. As it relates to my concerns with COVID and - -
>
> THE COURT: Notwithstanding your concerns about COVID, we're not talking about COVID now. Let's assume COVID is not in the picture and we're all here without masks on, you would be ready to go forward with the defense of your client?
>
> DEFENDANT'S COUNSEL: Yes.

¶ 28 Defendant's counsel initially expressed potential concerns about her health and about her ability to represent Defendant in a courtroom, specifically communicating without a mask to the jury and having to remain seated six feet apart from Defendant at the counsel table. She argued Defendant may be prejudiced, if the jury observed her sitting so far away from him at the table.

¶ 29 Defendant's trial counsel further argued she was worried about staying with her mother, who is a nurse. The trial court informed Defendant's counsel the State could authorize funds for her to stay in a hotel instead of staying with her mother. Defendant's counsel stated she was legally prepared to try the case. Defendant's counsel had earlier picked and agreed to the calendared date to try the case when jury trials resumed after the COVID-19 pandemic.

¶ 30 In arguing her motion to further continue, the calendared date of trial Defendant's counsel only stated she was concerned about the COVID-19 pandemic and its effects on her being in court. Criminal defendants are constitutionally guaranteed "a fair trial and a competent attorney." *Engle v. Isaac*, 456 U.S. 107, 134, 71 L.Ed.2d 783, 804 (1982). "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993) (citation omitted).

¶ 31 In order to show ineffective assistance of counsel, a defendant must satisfy the two-prong test announced by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 693 (1984). This test for ineffective assistance of counsel has also been explicitly adopted by the Supreme Court of North Carolina for state constitutional purposes. *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Pursuant to *Strickland*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 80 L.Ed.2d at 693; *accord Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248.

¶ 32 Defendant has failed to show he suffered prejudice or the trial court abused its discretion by denying Defendant's motion to continue. As

Defendant's counsel stated, she was legally prepared to try the case, but was solely worried about potential COVID-19 risks. Defendant's appellate counsel points to several instances where he asserts Defendant's trial counsel's personal interest in avoiding COVID-19 purportedly caused her to perform deficiently but makes no showing of any deficient representation throughout trial. Defendant did not and cannot meet either prong of *Strickland*. He cannot show the errors are "so serious as to deprive [him] of a fair trial" nor can or did he show any prejudice. *Id.* Defendant's argument is overruled.

C. Emergency Directive 2

¶ 33 Defendant further argues the trial court should have granted his motion for a continuance because Defendant's trial counsel should not have been allowed in the courtroom and trial should not have commenced pursuant to Emergency Directive 2. Chief Justice Beasley reinstated Emergency Directive 2 on 14 December 2020. *See* Order of the Chief Justice of North Carolina, (14 Dec. 2020), https://www.nccourts.gov/assets/news-uploads/14%20December%202020%20-%207A-39%28b%29%282%29%20Order%20Extending%20Emergency%20Directives%201-5%2C%208-15%2C%2018%2C%2020-22%20%28Final%29.pdf?fwcb9Jh3QU_twAJOVr6Vpa0PuktaRX2c=#:~:text=Emergency%20Directive%201,-All%20superior%20court&text=the%20senior%20resident%20superior%20court,and%20safety%20of%20all%20participants.

¶ 34 Emergency Directive 2 provides:

> The clerks of superior court shall post a notice at the entrance to every court facility in their county directing that any person *who has likely been exposed* to COVID-19 should not enter the courthouse. *A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction.* For purposes of this order, a person who has *likely been exposed* to COVID-19 is defined as any person who:
>
> > a. is experiencing fever, cough, shortness of breath, or loss of smell and/or taste;
> >
> > b. is under a direction to quarantine, isolate, or self-monitor;

> c. has been exposed to a person who tested positive for COVID-19 within the last fourteen (14) days;
>
> d. has been diagnosed with COVID-19 within the last fourteen (14) days; or
>
> e. resides with or has been in close contact with any person in the abovementioned categories.

Id. (emphasis supplied).

¶ 35 Defendant's counsel's motion to continue filed on the commencement of the 11 January 2021 session asserted no reference to Emergency Directive 2. Defendant's counsel made no prior contact with the clerk of superior court and only asserted her potential COVID-19 exposure and Emergency Directive 2 in open court while arguing her motion.

¶ 36 Defendant's counsel did not invoke any of the protocols established in Directive 2, specifically, "A person who has likely been exposed to COVID-19 and who has business before the courts shall contact the clerk of superior court's office by telephone or other remote means, inform court personnel of the nature of his or her business before the court, and receive further instruction." *Id.*

¶ 37 Defendant's counsel did not contact any official or officer of the court *via* any "remote means" for further instructions, but, only after coming to court and as asserted support in arguing her motion, did she inform the court of this potential issue. Defendant has shown no abuse of discretion or constitutional violation in the trial court's denial of his day of trial motion to continue. Defendant's argument is overruled.

V. Courtroom Closure

¶ 38 **[3]** Defendant asserts his federal and state constitutional rights to a public trial were violated when Defendant's father was excluded from the courtroom during jury selection.

A. Standard of Review

¶ 39 Defendant failed to object to the exclusion of his father from the courtroom during jury selection. Defendant has failed to preserve this issue for appellate review. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citation omitted).

B. Rule 2 of the North Carolina Rules of Appellate Procedure

¶ 40 Defendant seeks for this Court to invoke Rule 2 of the Appellate Rules of Procedure to review the merits of this argument. This Court may suspend the Appellate Rules under Rule 2, in order "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." N.C. R. App. P. 2.

¶ 41 Our Supreme Court has addressed the appropriateness of discretionarily invoking Rule 2 on many occasions. "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears to manifest to the Court *and only in such instances*." *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (citations and quotation marks omitted) (emphasis supplied).

¶ 42 "[T]he exercise of Rule 2 was intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions." *Id.* at 316, 644 S.E.2d at 205 (citations and internal quotation marks omitted).

¶ 43 Nothing in the record or in either party's brief demonstrates "exceptional circumstances" sufficient to justify suspending or varying the rules in order to prevent "manifest injustice" to Defendant." *Id.* at 315, 644 S.E.2d at 205. The trial court reported the Defendant's father was not allowed to enter because the courtroom had no occupancy to accommodate him due to the limited occupancy as a result of COVID-19 social distancing protocols with members of the jury pool who had already been brought into the courtroom. In the exercise of our discretionary authority, we decline to invoke Rule 2 to further review this assertion. Defendant's unpreserved argument is dismissed.

VI. Jury Selection

¶ 44 **[4]** Defendant argues the trial court erred by allowing the State to question and pass a panel of fewer than twelve prospective jurors to him. Defendant contends this violated the provisions of N.C. Gen. Stat. § 15A-1214 (2021) and entitles him to a new trial.

A. Standard of Review

¶ 45 "When a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000) (citation omitted). "In reviewing a trial court's deviation from the statutory procedure for the passing of jurors to the defendant where

[the] defendant failed to object to the procedure, we review for plain error." *State v. Gurkin*, 234 N.C. App. 207, 213, 758 S.E.2d 450, 455 (2014).

¶ 46 To show plain error "a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted). The plain error rule is to be applied cautiously and only in exceptional cases, and the error will be one so prejudicial and that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]" *Id.* (citations and quotation marks omitted).

B. Analysis

¶ 47 Our appellate rules provide:

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4). Defendant does not argue the passing of fewer than twelve prospective jurors during jury selection amounted to plain error. Defendant has failed to "specifically and distinctly contend [ ] . . . plain error" and is not entitled to plain error review on the issue. *Id.*; *see State v. Goncalves*, 285 N.C. App. 424, 876 S.E.2d 915, __, 2022-NCCOA-610, ¶ 21 (2022) (unpublished).

¶ 48 Presuming Defendant did not waive appellate review of this issue, he is not entitled to a new trial. The North Carolina jury selection statute provides, *inter alia*:

> **(d)** The prosecutor must conduct his examination of the first 12 jurors seated and make his challenges for cause and exercise his peremptory challenges. If the judge allows a challenge for cause, or if a peremptory challenge is exercised, the clerk must immediately call a replacement into the box. When the prosecutor is satisfied with the 12 in the box, they must then be tendered to the defendant. Until the prosecutor indicates his satisfaction, he may make a challenge for

> cause or exercise a peremptory challenge to strike any juror, whether an original or replacement juror.
>
> **(e)** Each defendant must then conduct his examination of the jurors tendered him, making his challenges for cause and his peremptory challenges. If a juror is excused, no replacement may be called until all defendants have indicated satisfaction with those remaining, at which time the clerk must call replacements for the jurors excused. The judge in his discretion must determine order of examination among multiple defendants.

N.C. Gen. Stat. § 15A-1214(d), (e) (2021).

¶ 49 In order to comply with COVID-19 guidance on social distancing, the trial court called five prospective jurors spaced out six feet apart into the jury box. When the State accepted five jurors, the trial court tendered those jurors to Defendant for examination.

¶ 50 Defendant exercised two pre-emptory challenges on two of these five prospective jurors. The trial court called two replacement prospective jurors for the State to question. The State passed these two prospective jurors to Defendant. Defendant challenged one of those prospective jurors. A single replacement was called, whom Defendant questioned and accepted to serve. Once Defendant had accepted five jurors, the trial court called five more prospective jurors socially distanced. When Defendant challenged two of those prospective jurors, the trial court called four new jurors into the box. The State and Defendant questioned and accepted these four jurors to complete the jury.

¶ 51 While the jury selection procedure the court utilized here may have varied the express requirement of N.C. Gen. Stat. § 15A-1214(d) requiring the State to pass a full panel of twelve prospective jurors, Defendant cannot show reversible prejudice to award a new trial. Defendant questioned and accepted juror White, without objection, who he now asserts he possibly would have excluded. Defendant failed to exhaust his pre-emptory challenges and did not move for the removal of juror White for cause. Defendant was not forced to accept any undesirable juror as a result of the passing of less than twelve prospective jurors during jury selection procedure under these circumstances. *Lawrence*, 352 N.C. at 13, 530 S.E.2d at 815 (citing N.C. Gen. Stat. § 15A-1443(c) (1999); *State v. Miller*, 339 N.C. 663, 681, 455 S.E.2d 137, 147, *cert. denied*, 516 U.S. 893, 133 L.Ed.2d 169 (1995); *State v. Fletcher*, 348 N.C. 292, 312, 500 S.E.2d

668, 680 (1998), *cert. denied*, 525 U.S. 1180, 143 L.Ed.2d 113 (1999)). To any extent Defendant's argument is not waived, no prejudice is shown. Defendant's argument is overruled.

VII. Admission of State's Exhibits 54, 55, and 57

¶ 52 **[5]** Defendant argues the trial court erred by admitting the State's Exhibits 54, 55, and 57 over his objections. The State's Exhibit 54 is a copy of Facebook social media messages between Defendant's and Blount's sisters, Spence and Ashley. In the 13 August 2017 message from Ashley to Spence, she was trying to reach Blount because he had allegedly sold her brother a gun for $260, did not deliver the firearm, and had allegedly made "off with the money." Ashley also messaged Spence asserting Blount had "better cough up $260," and if her brother saw Blount there would be a fight.

¶ 53 State's Exhibit 55 is a copy of Facebook messages between Spence and decedent Blount. In the message Spence informed her brother, Blount, that Ashley was looking for him. Spence told Blount that Ashley had asserted Blount was supposed to have sold a gun to her brother, but had taken the money and did not deliver the weapon.

¶ 54 State's Exhibit 57 is documentation of Ashley's handgun purchase of a .40 caliber Smith and Wesson handgun. Ashley applied for and was granted a handgun permit on 8 March 2018. She purchased a .40 caliber Smith and Wesson handgun on 30 March 2019.

C. Relevance

¶ 55 Defendant argues the admission of this evidence was irrelevant under North Carolina Rules of Evidence 401 and 402. N.C. Gen. Stat. § 8C-1, Rules 401, 402 (2021).

¶ 56 Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. Irrelevant evidence is evidence "having no tendency to prove a fact at issue in the case." *State v. Hart*, 105 N.C. App. 542, 548, 414 S.E.2d 364, 368, *disc. review denied*, 332 N.C. 348, 421 S.E.2d 157 (1992). Under Rule 402, relevant evidence is generally admissible at trial, while irrelevant evidence is inadmissible. *See* N.C. Gen. Stat. § 8C-1, Rule 402.

1. Standard of Review

¶ 57 "Although a trial court's rulings on relevancy are not discretionary and we do not review them for an abuse of discretion, we give them

great deference on appeal." *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006) (citation omitted), *disc. review denied*, 361 N.C. 223, 642 S.E.2d 712 (2007).

2. Analysis

¶ 58 Defendant asserts the statements made by Ashley in her Facebook messages were not relevant because it was not clear whether Ashley meant Defendant when she referenced her "brother." The evidence produced shows Ashley has three brothers: Defendant, Dataveus White, and Dustin Hartley. Defendant maintains the testimony was without proper foundation and irrelevant regarding Ashley's contact with Spence under Rules 401 and 402.

¶ 59 Defendant's argument is misplaced, Spence's testimony showed she was unaware of Ashley having any brothers other than Defendant. Spence testified she understood Ashley to mean Defendant in the messages. Defendant's objections to relevancy to Exhibits 54 and 55 were properly overruled.

¶ 60 Defendant further argues the trial court erred in allowing documents showing Ashley's purchase of a Smith and Wesson .40 caliber handgun on 30 March 2018 into evidence. Our Supreme Court has long held: "in criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible." *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965). The .40 caliber handgun Ashley purchased was the same caliber as the shell casings recovered at the scene and recovered from Blount's body. Defendant's objections to relevancy to admission of Exhibit 57 was properly overruled.

¶ 61 The challenged testimony and exhibits were clearly relevant under Rules 401 and 402. They were probative to issues of Defendant's guilt, Defendant's opportunity to acquire a weapon, and Defendant's possible motive for the killing. Defendant has failed to show Spence's testimony and the exhibits at issue are irrelevant and inadmissible under Rules 401 and 402. N.C. Gen. Stat. § 8C-1, Rules 401, 402.

D. Hearsay

¶ 62 Defendant argues the trial court erred in admitting the State's Exhibit 54 over his hearsay objections and admitting Ashley's statements in Exhibit 54 into evidence under Rule 804. N.C. Gen. Stat. § 8C-1, Rule 804 (2021). In ruling on Defendant's objections the trial court found:

> The Court further finds that the witness was a participant in the conversation, the online conversation,

> and as such, read and saw the things that were being said contemporaneously with the publication, that the State will be bound by the requirement that they lay the appropriate foundation with regard to identification of the fact that Ms. Ashley was a participant in this conversation and how the witness knew her. Subject to laying the appropriate foundation, the Court is going to find that the post of Kimberly Ashley is admissible.
>
> With regard to the Facebook messages of Trevon Blount, the Court is going to make the same findings. Further, the Court is going to find that the messages to Trevon Blount indicate further the fact that the witness, Britney Spence, believed the threats to be true that were communicated, and communicated them to Mr. Blount, which gives it some indicia of reliability. Mr. Blount is deceased, therefore he cannot be called as a witness. He is therefore unavailable under Rule 804. The Court is going to find that, subject to the proper foundation, that those Facebook messages are admissible as well, and that they are relevant to establish or make more likely facts at issue in this case.

¶ 63 The trial court later stated: "I think I found that Spence was not hearsay, the one was hearsay, subject to exception under 804, is what I found." Defendant does not challenge Spence's conversation with Blount that is contained in Exhibit 55 on appeal.

1. Standard of Review

¶ 64 This Court reviews a trial court's ruling on the admission of evidence over a party's hearsay objection *de novo*. *State v. Miller*, 197 N.C. App. 78, 87-88, 676 S.E.2d 546, 552, *disc. review denied*, 363 N.C. 586, 683 S.E.2d 216 (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) (citations and internal quotation marks omitted).

2. Analysis

¶ 65 Our North Carolina Rules of Evidence provide: "Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered into evidence to prove the truth of the matter asserted."

N.C. Gen. Stat. § 8C-1, Rule 801 (2021). Hearsay is inadmissible except as provided by the statutes or by the rules of evidence. N.C. Gen. Stat. § 8C-1, Rules 802 (2021).

¶ 66 "The erroneous admission of hearsay testimony is not always so prejudicial as to require a new trial, and the burden is on the defendant to show prejudice." *State v. Allen*, 127 N.C. App. 182, 186, 488 S.E.2d 294, 297 (1997) (citations omitted); *see* N.C. Gen. Stat. § 15A-1443(a) (2021). Prejudicial errors occur when there is a reasonable possibility that a different result would have been reached, had the error not been committed. *Allen*, 127 N.C. App. at 186, 488 S.E.2d at 297.

¶ 67 Our Supreme Court has stated: "The law permits declarations of one person to be admitted into evidence for the purpose of showing that another person has knowledge or notice of the declared facts and to demonstrate his particular state of mind." *State v. Swift*, 290 N.C. 383, 393, 226 S.E.2d 652, 661 (1976). The statement was offered to show the effect and impact of Ashley's messages on Spence and on Blount. Presuming, without deciding, this conversation was inadmissible hearsay, Defendant cannot demonstrate any prejudice. The trial court did not err as a matter of law in admitting State's Exhibit 54 into evidence. Defendant's argument is overruled.

VIII. Conclusion

¶ 68 We hold the trial court had subject matter jurisdiction to try Defendant. We find no prejudicial error in the trial court's denial of his motion for a continuance, the alleged exclusion of Defendant's father from the courtroom, the variance in the jury selection and procedure, and the admission into evidence of State's Exhibits 54, 55, and 57.

¶ 69 Defendant received a fair trial, free from prejudicial errors he preserved and argued. Our review shows no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges CARPENTER and WOOD concur.

ASCOT CORP., LLC v. I&R WATERPROOFING, INC.

[286 N.C. App. 470, 2022-NCCOA-747]

THE ASCOT CORPORATION, LLC; AND HERONSBROOK, LLC; PLAINTIFFS
v.
I&R WATERPROOFING, INC., DEFENDANT/THIRD-PARTY PLAINTIFF
v.
TREMCO BARRIER SOLUTIONS, INC.; TANGLEWOOD LANDSCAPING, LLC; AND PEDRO PACHECO JIMENEZ; THIRD-PARTY DEFENDANTS

No. COA22-19

Filed 15 November 2022

1. Warranties—manufacturer warranty—breach of express warranty—sufficiency of allegations

In a civil action arising from alleged defects in residential construction that resulted in water damage, the trial court properly dismissed defendant subcontractor's third-party claim for breach of express warranty against the manufacturer of the waterproofing barrier that the subcontractor was hired to install, because the warranty's protections were only available to "consumer purchasers" of a new residence or unit, a category that did not include the subcontractor, and the subcontractor did not allege that a consumer's valid claim had been assigned to it to enforce.

2. Warranties—implied warranty of merchantability—breach—sufficiency of allegations

In a civil action arising from alleged defects in residential construction that resulted in water damage, the trial court erred by dismissing defendant subcontractor's third-party claim for breach of an implied warranty of merchantability against the manufacturer of the waterproofing barrier that the subcontractor was hired to install, where the complaint included the necessary allegations of the claim, including that the subcontractor put the barrier to its ordinary use and installed it properly, that the barrier malfunctioned, and that the water damage was a direct and proximate result of the defective product. The subcontractor was not required to allege a specific defect in the product.

3. Civil Procedure—third-party practice—Rule 14—third-party warranty claim—derivative of original claim—properly impleaded

In a civil action arising from alleged defects in residential construction that resulted in water damage, the appellate court found no merit to a third-party defendant's argument that warranty claims asserted against it (as the manufacturer of the waterproofing barrier

that was installed by the defendant/third-party plaintiff subcontractor) were not proper impleader claims under Civil Procedure Rule 14, where the subcontractor's third-party warranty claim was derivative of the original claim asserted against it by plaintiffs (the general contractor and developer).

4. Negligence—common law indemnity—third-party claim—sufficiency of allegations

In a civil action arising from alleged defects in residential construction that resulted in water damage, the trial court properly dismissed defendant subcontractor's third-party claim for negligence based on common law indemnity against the manufacturer of the waterproofing barrier that the subcontractor was hired to install. The subcontractor's general allegation that the manufacturer "was negligent in the production, design, manufacture, assembly, and/or inspection" of the barrier and was therefore "in breach of its duties" to the subcontractor was insufficiently specific to allege the elements of negligence and to allow the manufacturer to prepare a defense.

5. Contribution—residential water damage—third-party claim—sufficiency of allegations

In a civil action arising from alleged defects in residential construction that resulted in water damage, the trial court properly dismissed defendant subcontractor's third-party claim for contribution against the manufacturer of the waterproofing barrier that the subcontractor was hired to install, because the subcontractor failed to properly allege that the manufacturer committed negligent or wrongful acts, and contribution may only be asserted against a joint tortfeasor pursuant to N.C.G.S. § 1B-1.

6. Negligence—common law indemnity—third-party claim—sufficiency of allegations

In a civil action arising from alleged defects in residential construction that resulted in water damage, the trial court erred by dismissing defendant subcontractor's third-party claim for negligence based on common law indemnity against the landscaper of the property, where the subcontractor properly and specifically alleged each element of negligence—including that the landscaper had a legal duty to properly install drainage but breached that duty by failing to do so and, as a result, its failure proximately caused the water damage—and alleged a right to indemnity should the subcontractor be found liable to plaintiffs (the general contractor and developer) on their pending negligence claim.

7. Contribution—residential water damage—third-party claim —sufficiency of allegations—economic loss rule

In a civil action arising from alleged defects in residential construction that resulted in water damage, the trial court erred by dismissing defendant subcontractor's third-party claim for contribution against the landscaper of the property, where the subcontractor had sufficiently alleged negligence, a necessary precursor to contribution, which may only be asserted against a joint tortfeasor. Although the landscaper argued it could not be a joint tortfeasor based on the economic loss rule, the rule did not apply and would not bar the original plaintiffs (the general contractor and developer) from claiming negligence against the landscaper because the damages alleged were to the residence and personal property and not to the landscaping (which was the subject of the contract between the general contractor and the landscaper).

Appeal by Defendant/Third-Party Plaintiff from orders entered 4 August 2021 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 9 August 2022.

Bovis Kyle Burch & Medlin, LLC, by Matthew A. L. Anderson and Brian H. Alligood, for Defendant/Third-Party Plaintiff-Appellant I&R Waterproofing, Inc.

Oak City Law LLP, by M. Caroline Lindsey Trautman and Robert E. Fields, III, for Third-Party Defendant-Appellee Tremco Barrier Solutions, Inc.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, David L. Levy, and Matthew R. Lancaster, for Third-Party Defendant-Appellee Tanglewood Landscape, LLC.

COLLINS, Judge.

¶ 1 Defendant/Third-Party Plaintiff I&R Waterproofing, Inc., appeals from orders dismissing its complaints against Third-Party Defendants Tremco Barrier Solutions, Inc., and Tanglewood Landscape, LLC,[1] for

1. I&R's third-party complaint names "Tanglewood Landscaping, LLC" as the third-party defendant. Tanglewood's Motion to Dismiss asserts that "Tanglewood Landscape, LLC" is the appropriate entity to be named in this action.

failure to state a claim under N.C. Gen. Stat. § 1A-1 Rule 12(b)(6). The trial court properly dismissed I&R's claims against Tremco for breach of express warranty, indemnity, and contribution. However, I&R sufficiently pled breach of implied warranty of merchantability against Tremco, and sufficiently pled indemnity and contribution against Tanglewood, and the trial court erred by dismissing those claims. We affirm in part and reverse in part, and remand for further proceedings.

I. Procedural History and Factual Background

¶ 2 This appeal stems from a complaint filed by Ascot Corporation, LLC, and Heronsbrook, LLC, (collectively, Plaintiffs) against I&R arising from alleged residential construction defects causing water intrusion and resulting damage. In March 2016, Ascot, a residential construction general contractor, contracted with I&R to provide waterproofing services in the basement of a residence owned by Heronsbrook. These services included installing a TUFF-N-DRI waterproofing barrier system manufactured by Tremco. Ascot separately contracted with Tanglewood to landscape the surrounding property.

¶ 3 In July 2016, Heronsbrook sold the property to Steve and Jennifer Stoops.[2] Two years later, the Stoops discovered water intrusion in their basement that had caused significant damage. During the following year, Ascot unsuccessfully attempted to have I&R diagnose and repair the water intrusion. In May 2019, Ascot independently resolved the water intrusion and repaired the damage to the basement, incurring costs in excess of $50,000.

¶ 4 In August 2019, Plaintiffs filed a complaint against I&R, asserting claims for breach of contract, breach of implied warranty of habitability and good workmanship, negligence, and unfair and deceptive trade practices, and seeking to recover the costs incurred for the repairs to the basement, treble damages, and attorneys' fees. With leave of court, I&R filed a third-party complaint pursuant to Rule 14(a) of the North Carolina Rules of Civil Procedure, seeking "compensatory damages and/or contribution" from Tremco and/or Tanglewood, in the event I&R was found liable to Plaintiffs.[3] I&R's complaint asserted claims against Tremco for breach of express warranty, breach of implied warranty of merchantability, negligence, and contribution, and claims against Tanglewood for negligence and contribution.

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2. The Stoops are not parties to the present litigation.

3. I&R also joined third-party defendant Pedro Pacheco Jimenez. The claims against Jimenez are not at issue on this appeal.

¶ 5 Tremco moved to dismiss I&R's complaint under Rule 12(b)(6). Tanglewood answered and moved to dismiss the complaint under Rule 12(b)(6). The trial court heard the motions to dismiss and entered orders on 4 August 2021 dismissing all claims against Tremco and Tanglewood with prejudice. The trial court certified the orders for immediate review under N.C. Gen. Stat. § 1A-1 Rule 54(b). I&R appealed.

II. Discussion

A. Jurisdiction

¶ 6 I&R appeals from orders dismissing all claims against fewer than all parties. A final judgment as to "one or more but fewer than all of the claims or parties" is immediately appealable if the trial court certifies that "there is no just reason [to] delay" the appeal. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2021). Here, the trial court properly certified the orders for immediate review under Rule 54(b). Accordingly, this Court has jurisdiction.

B. Standard of Review

¶ 7 In ruling on a Rule 12(b)(6) motion to dismiss, "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) (citation omitted). "[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (quotation marks and citation omitted). Additionally, "when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." *Oberlin Cap., L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001) (citation omitted).

¶ 8 Dismissal under Rule 12(b)(6) is proper only in the following circumstances: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). We review de novo a trial court's order allowing a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). *Cheryl Lloyd Humphrey Land Inv. Co., v. Resco Prods., Inc.*, 377 N.C. 384, 2021-NCSC-56, ¶ 8 (citation omitted).

C. Claims Against Tremco

1. Breach of Express Warranty

¶ 9 **[1]** I&R first argues that its complaint states a valid claim for relief against Tremco for breach of express warranty. Specifically, I&R argues that it states a valid claim against Tremco for breach of Tremco's 30-Year TUFF-N-DRI Basement Waterproofing Warranty.

¶ 10 An express warranty is created when a seller makes "any affirmation of fact or promise . . . which relates to the goods and becomes part of the basis of the bargain." N.C. Gen. Stat. § 25-2-313(1)(a) (2021). To state a claim for breach of express warranty, a plaintiff must allege (1) that an express warranty was made as to a fact or promise relating to the goods, (2) that the warranty was relied upon by the plaintiff in making his decision to purchase, and (3) that this express warranty was breached by the defendant. *Harbor Point Homeowners' Ass'n v. DJF Enters., Inc.*, 206 N.C. App. 152, 162, 697 S.E.2d 439, 447 (2010) (citation omitted). "A warranty, express or implied, is contractual in nature." *Wyatt v. N.C. Equip. Co.*, 253 N.C. 355, 358, 117 S.E.2d 21, 24 (1960). "As a contract being interpreted, the terms of an express warranty are therefore construed in accordance with their plain meaning[.]" *Hills Mach. Co., LLC v. Pea Creek Mine, LLC*, 265 N.C. App. 408, 416, 828 S.E.2d 709, 715 (2019) (quotation marks and citation omitted). "An issue of contract interpretation is a question of law reviewed de novo." *D.W.H. Painting Co. v. D.W. Ward Constr. Co.*, 174 N.C. App. 327, 330, 620 S.E.2d 887, 890 (2005) (citation omitted).

¶ 11 In its complaint for breach of an express warranty, I&R alleges the following:

> 7. In March 2016, I&R contracted with Plaintiff The Ascot Corporation, LLC to install a waterproofing membrane barrier system at an existing residential construction site located at 590 Heronsbrook Drive, Whispering Pines, North Carolina (the "Property").
>
> 8. On or about March 10, 2016, I&R completed the installation of the waterproofing membrane barrier system, which consisted of the TUFF-N-DRI HS membrane product, the Warm-N-Dri® foundation board, and a DrainStar® Strip Drain (collectively the "Tremco Barrier System").
>
> 9. Upon information and belief, the Tremco Barrier System installed at the Property by I&R was produced,

> designed, manufactured, assembled, inspected, and sold by Third-Party Defendant Tremco.
>
> 10. The Tremco Barrier System installed by I&R was sold with a written 30-year limited warranty, pursuant to which Tremco expressly warranted that the Tremco Barrier System would, under normal use and service, keep the vertical surface of the Property's foundation wall "free of water leakage or seepage" throughout the warranty period."
>
> 11. I&R is a "Tremco Barrier Solutions Contractor" as that phrase is used in Tremco's written 30-year limited warranty.
>
> . . . .
>
> 14. Upon information and belief, Tremco has been notified of the alleged excess water penetration described in Plaintiffs' Complaint, but has refused to honor the terms of its written 30-year limited warranty.
>
> 15. If Plaintiffs should recover damages based on the alleged excess water penetration described in Plaintiffs' Complaint, such recovery will be a proximate result of Tremco's breach of its express written warranty.
>
> 16. As a direct and proximate result of Tremco's breach of its express warranty, I&R is entitled to receive from Tremco any amounts awarded to Plaintiffs against I&R with respect to claims arising from I&R's installation of the Tremco Barrier System during construction of the residence on the Property.

¶ 12 Attached as Exhibit A to Tremco's motion to dismiss was the warranty referenced in I&R's complaint. The warranty states:

> **This Warranty is From:**
>
> This limited warranty ("Warranty") is provided by Tremco Barrier Solutions, Inc. ("TBS") . . . .
>
> **This Warranty is To:**
>
> You if you are a consumer purchaser ("Buyer") of (1) a new single family detached residence, or (2) a

> multi-family unit with separate unit ownership, or (3) a multi-family residence with single ownership which has had TUFF-N-DRI System . . . applied to the building's foundation walls.
>
> . . . .
>
> **Limitations and Exceptions:**
>
> . . . .
>
> B. This Warranty does not apply and TBS has no responsibility for Leakage resulting from:
>
> . . . .
>
> 11. Application of the TUFF-N-DRI System by a contractor other than a TBS Contractor.

¶ 13 I&R did not allege that the warranty was relied upon in making its decision to purchase the TUFF-N-DRI System. *See Harbor Point*, 206 N.C. App. at 162, 697 S.E.2d at 447 (citation omitted); *cf. Ford Motor Credit Co. v. McBride*, 257 N.C. App. 590, 596, 811 S.E.2d 640, 646 (2018) (defendants' allegations were sufficient to state a claim for breach of express warranty where defendants alleged, inter alia, "that they relied on this express warranty when purchasing the vehicle and would not have purchased it had [the] agents not represented to them that the vehicle was in 'good working order and fit to transport' them both"). Furthermore, the terms of the warranty, construed in accordance with their plain meaning, indicate that the warranty does not extend to, and thus is not enforceable by, I&R. According to the terms, the warranty extends to the "consumer purchaser" of a new residence or unit in which the TUFF-N-DRI System has been applied to the building's foundation walls. As I&R did not allege that it is a "consumer purchaser" of a qualifying residence or unit, I&R did not allege that the warranty extends to I&R.

¶ 14 I&R argues that its allegation that it "is a 'Tremco Barrier Solutions Contractor' as that phrase is used in Tremco's written 30-year limited warranty" is sufficient to allege the warranty extends to I&R. This argument belies the plain meaning of the warranty's terms. The phrase "TBS contractor," as used in paragraph 11 under Limitations and Exceptions, is a requirement that the TUFF-N-DRI System be installed by a TBS contractor for a consumer purchaser to be entitled to the warranty's protection; the phrase does not extend the warranty to I&R.

¶ 15 Citing *Sharrard, McGee & Co., P.A. v. Suz's Software, Inc.*, 100 N.C. App. 428, 432, 396 S.E.2d 815, 817 (1990), I&R argues that it "need not even have purchased the Tremco Barrier System itself to recover for Tremco's breach of its express warranty, because North Carolina law does not restrict an action for breach of an express warranty to parties in privity of contract." I&R's reliance on *Sharrard* is misplaced.

¶ 16 In *Sharrard*, this Court addressed whether plaintiff had been assigned its right to sue defendant. 100 N.C. App. at 429, 396 S.E.2d at 816. Plaintiff accounting firm negotiated the purchase of a software system from defendant software company for plaintiff's client, Guilford Plumbing Supply, Inc. ("GPS"). *Id.* at 430, 396 S.E.2d at 816. During the negotiations, defendant wrote a letter to plaintiff, specifically referencing GPS and guaranteeing defendant's programming with full return and refund privileges should the programming not perform as warranted. *Id.* at 432-33, 396 S.E.2d at 818. Defendant also made several oral guarantees to plaintiff and GPS, and provided GPS employees an instruction manual. *Id.* at 430, 396 S.E.2d at 816. Shortly after installation, the software system proved defective. *Id.* at 430, 396 S.E.2d at 816-17. When defendant refused plaintiff's refund demand, plaintiff filed suit. *Id.*

¶ 17 On appeal, this Court analyzed whether GPS had a legally cognizable claim to assign to plaintiff. Rejecting defendant's argument that privity must have existed between it and GPS before GPS would have any right to sue defendant for breach of express warranty, this Court stated, "[p]rivity is not required when the theory is breach of an express warranty." *Id.* at 432, 396 S.E.2d at 817 (citing *Kinlaw v. Long Mfg. N.C., Inc.*, 298 N.C. 494, 259 S.E.2d 552 (1979)). The Court further explained that "[t]he absence of contractual privity no longer bars a direct claim by an ultimate purchaser against the manufacturer for breach of the manufacturer's express warranty which is directed to the purchaser." *Id.* (citation omitted). Accordingly, for plaintiff to show that GPS had a legally cognizable claim to assign, plaintiff had only to show that the warranty was "addressed to the ultimate consumer or user." *Id.* at 433, 396 S.E.2d at 818 (quoting *Wyatt*, 253 N.C. at 359, 117 S.E.2d at 24).

¶ 18 Because defendant's letter was intended to warrant its products to GPS and it was reasonable for GPS to rely upon defendant's representations, this Court affirmed the trial court's conclusion that an express warranty existed between GPS and defendant. *Id.* Because GPS had a valid claim for breach of express warranty that it could assert by itself, plaintiff, as assignee, was entitled to assert its claim against defendant. *Id.*

¶ 19 In this case, the warranty at issue was addressed to the "consumer purchaser" of a new residence or unit in which the TUFF-N-DRI System had been applied to the building's foundation walls – the ultimate consumers or users. Under *Sharrard*, the Stoops, as the ultimate consumers, could have a breach of express warranty claim against Tremco to assign. Unlike *Sharrard*, however, I&R did not assert a claim assigned to it by the Stoops. As I&R did not assert an assigned claim, and the express warranty does not extend to, and thus is not enforceable by, I&R, the trial court did not err by dismissing the breach of express warranty claim.

2. Breach of Implied Warranty of Merchantability

¶ 20 **[2]** I&R next argues its complaint states a valid claim for relief against Tremco for breach of implied warranty of merchantability.

¶ 21 "Unless excluded or modified (G.S. 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for sale if the seller is a merchant with respect to goods of that kind." N.C. Gen. Stat. § 25-2-314(1) (2021). To state a claim for breach of implied warranty of merchantability, a plaintiff must allege

> (1) that the goods bought and sold were subject to an implied warranty of merchantability, (2) that the goods did not comply with the warranty in that the goods were defective at the time of sale, (3) that [plaintiff's] injury was due to the defective nature of the goods, and (4) that damages were suffered as a result.

DeWitt v. Eveready Battery Co., 355 N.C. 672, 683, 565 S.E.2d 140, 147 (2002) (quotation marks and citation omitted). "A product defect may be shown by evidence a specific defect existed in a product. Additionally, when a plaintiff does not produce evidence of a specific defect, a product defect may be inferred from evidence the product was put to its ordinary use and the product malfunctioned." *Id.* at 684, 565 S.E.2d at 147 (citation omitted).

¶ 22 I&R's complaint for breach of implied warranty of merchantability alleges:

> 17. I&R hereby incorporates and re-alleges the allegations set forth above, and incorporates and re-alleges the allegations of the Plaintiffs' Complaint and I&R's Amended Answer and Affirmative Defenses thereto to the extent not inconsistent herewith.

> 18. The Tremco Barrier System sold by Tremco, and purchased and installed at the Property by I&R, was subject to an implied warranty of merchantability, whereby Tremco warranted that the Tremco Barrier System was of merchantable quality and reasonably fit for the purpose for which it was intended.
>
> 19. I&R put the Tremco Barrier System to its ordinary use by installing it on the foundation walls of the Property in a workmanlike manner, in accordance with all product directions and instructions provided by Tremco, and in compliance with all laws, ordinances, rules, regulations, and requirements of all governing authorities having jurisdiction over construction of the residence on the Property.
>
> 20. If the allegations set forth in the Complaint of excess water penetration in the foundation walls of the residence on the Property are true, then the Tremco Barrier System malfunctioned after being put to its ordinary use.
>
> 21. Accordingly, if Plaintiff should recover damages based on the alleged excess water penetration described in Plaintiffs' Complaint, such recovery will be due to the defective nature of the Tremco Barrier System, and a proximate result of Tremco's breach of the implied warranty of merchantability.
>
> 22. As a direct and proximate result of Tremco's breach of the implied warranty of merchantability, I&R is entitled to receive from Tremco any amounts awarded to Plaintiffs against I&R with respect to claims arising from I&R's installation of the Tremco Barrier System during construction of the residence on the Property.

¶ 23 These allegations are sufficient to state a claim for breach of implied warranty of merchantability. I&R alleges that the Tremco Barrier System sold by Tremco and purchased by I&R was subject to an implied warranty of merchantability, satisfying the first element of the claim. I&R also alleges it put the Tremco Barrier System to its ordinary use by installing it on the foundation walls in a workmanlike manner, in accordance with all directions and rules, and that assuming excess water penetrated the foundation walls, the Tremco Barrier System malfunctioned, satisfying

the second element of the claim. I&R further alleges that Plaintiffs' recovery of damages from I&R for excess water penetration would be due to the defective nature of the Tremco Barrier System and that as a direct and proximate result of Tremco's breach of the implied warranty of merchantability, I&R is entitled to receive from Tremco any amounts awarded to Plaintiffs against I&R for the defective Tremco Barrier System. These allegations satisfy the third and fourth elements of the claim.

¶ 24 Tremco argues that "I&R fails to allege anywhere in its pleading that a defect existed in a Tremco product at the time of sale, or what defect existed." However, I&R need not have alleged a specific defect in the Tremco Barrier System. Under what has been referred to as the "malfunction theory" and the "indeterminate defect theory," *DeWitt*, 355 N.C. at 686, 565 S.E.2d at 149, a defect may be inferred from evidence that the Tremco Barrier System was put to its ordinary use and subsequently malfunctioned. I&R's allegations are sufficient to allege a product defect under this theory.

¶ 25 Tremco further argues that I&R's allegation that "if the allegations set forth in Plaintiffs' complaint are true, then the Tremco Barrier System malfunctioned after being put to its ordinary use" is a conclusory statement that fails to establish a necessary element of a claim for breach of implied warranty of merchantability. We disagree.

¶ 26 Plaintiffs made various allegations in their complaint that water penetrated the foundation walls where I&R had applied water proofing; I&R incorporates those allegations into its compliant. I&R further alleges that the Tremco Barrier System was put to its ordinary use when I&R correctly installed it on the foundation walls. I&R thus alleges that if water penetrated the foundation walls, the Tremco Barrier System malfunctioned. Any duty to produce "adequate circumstantial evidence of a defect" does not arise until later stages of the proceedings, and I&R's allegations at this initial pleading stage are sufficient to allege a product defect at the time of sale. *See Coastal Leasing Corp. v. O'Neal*, 103 N.C. App. 230, 237, 405 S.E.2d 208, 213 (1991) (allegations in the crossclaim were sufficient to raise the inference that any defects in the equipment existed at the time of sale).

¶ 27 **[3]** Tremco further argues that I&R's breach of express warranty and breach of implied warranty of merchantability claims should be dismissed as they are not proper impleader claims under Rule 14. We disagree.

¶ 28 Before Rule 14 was enacted in 1967, North Carolina lacked an adequate procedural rule governing third-party practice. Accordingly,

North Carolina courts constructed a set of judicial rules for impleading by drawing upon statutes which suggested impleader was appropriate peripherally or in a specific situation, including: N.C Gen. Stat. § 1-73, which authorized the court to join parties who were necessary for a "complete determination of the controversy"; N.C. Gen. Stat. § 1-222, which provided that judgments may determine "the ultimate rights of the parties on each side, as between themselves"; and N.C. Gen. Stat. § 1-240, which allowed joinder of third-parties who were joint tortfeasors. *See*, *e.g.*, *Davis v. Radford*, 233 N.C. 283, 287-89, 63 S.E.2d 822, 826-27 (1951) (contemplating third-party practice prior to Rule 14's enactment); *Moore v. Massengill*, 227 N.C. 244, 245-46, 41 S.E.2d 655, 656 (1947) (interpreting § 1-73).

¶ 29 As the original Comment to Rule 14 notes, "none of these statutes dealt directly with (1) the grounds for impleading (except § 1-240, dealing narrowly with contribution between joint tort-feasors); (2) the procedure by which a third-party plaintiff impleads a third-party defendant; or (3) the kinds of claims that may, after impleader is accomplished, be asserted[.]" N.C. Gen. Stat. § 1A-1, R. 14, cmt. (2021). Nevertheless, the courts developed procedures for impleading within this statutory framework, and the basic rule which evolved permitted impleading only when the claim by the third-party plaintiff was for: "(1) contribution against an alleged joint tort-feasor under § 1-240, or (2) indemnification, but only when the indemnification right arose as a matter of law, and not by express or implied contract." *Id.*

¶ 30 In contrast to North Carolina's approach at the time, Rule 14 of the Federal Rules of Civil Procedure was adopted in 1937 to govern third-party practice in federal court. Federal Rule 14 provided a "direct and plain statement of the substantive test for impleading," prescribed "clearly and concisely the procedure for impleading where the right exists," and concluded with a clear statement "of the various claims which may, after a third-party defendant is impleaded, be asserted by the various parties[.]" *Id.*

¶ 31 Thirty years after federal Rule 14's adoption, North Carolina enacted Rule 14 of our North Carolina Rules of Civil Procedure which mirrors the federal rule. *See* An Act to Amend the Laws Relating to Civil Procedure, 1967 N.C. Sess. Laws 1274 (enacting the Rules of Civil Procedure and repealing, among others, §§ 1-73 and 1-222).[4] North Carolina Rule 14 provides, in relevant part,

4. The Uniform Contribution Among Tort-Feasors Act, passed the same week as the Act to Amend the Laws Relating to Civil Procedure, repealed § 1-240. An Act to Provide for Contribution Among Joint Tortfeasors and Joint Obligors, § 2, 1967 N.C. Sess. Laws 1091, 1093.

> At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

N.C. Gen. Stat. § 1A-1, R. 14(a) (2021). While this language gives the right to implead for contribution and indemnification based in tort as had judicially evolved under North Carolina practice, this language does not limit the right to implead to solely those situations. For example, like the federal rule, North Carolina Rule 14 allows impleading for indemnification where the right to be indemnified has arisen out of contract. *See id.* (expressly contemplating assignees and third-party beneficiaries of contracts); *see also Brogle v. S.C. Elec. & Gas Co.*, 509 F.2d 1216, 1217 n.1 (4th Cir. 1975) (noting that impleading a party for contractual indemnity is covered by Rule 14).

¶ 32 As with federal Rule 14, "[t]he purpose of [North Carolina] Rule 14 is to promote judicial efficiency and the convenience of parties by eliminating circuity of action." *Heath v. Bd. of Comm'rs*, 292 N.C. 369, 376, 233 S.E.2d 889, 893 (1977).

> When the rights of all three parties center upon a common factual setting, economies of time and expense can be achieved by combining the suits into one action. Doing so eliminates duplication in the presentation of evidence and increases the likelihood that consistent results will be reached when multiple claims turn upon identical or similar proof. Additionally, the third-party practice procedure is advantageous in that a potentially damaging time lag between a judgment against defendant in one action and a judgment in his favor against the party ultimately liable in a subsequent action will be avoided. In short, Rule 14 is intended to provide a mechanism for disposing of multiple claims arising from a single set of facts in one action expeditiously and economically.

Id. (quoting 6 Charles Allen Wright & Arthur R. Miller, *Federal Practice & Procedure* §1442 (1971)); *see also Am. Exp. Lines, Inc. v. Revel*, 262 F.2d 122, 124-25 (4th Cir. 1958).

¶ 33 At the heart of Rule 14 is the notion that the third-party complaint must be derivative of the original claim. "If the original defendant is not

liable to the original plaintiff, the third-party defendant is not liable to the original defendant." *Jones v. Collins*, 58 N.C. App. 753, 756, 294 S.E.2d 384, 385 (1982). Thus, "[a] claim which is independent of the defendant's possible liability to the plaintiff cannot be the basis of impleader under Rule 14." *Spearman v. Pender Cnty. Bd. of Educ.*, 175 N.C. App. 410, 412, 623 S.E.2d 331, 333 (2006) (quotation marks and citations omitted); *see also Horn v. Daniel*, 315 F.2d 471, 474 (10th Cir. 1962) ("[Rule 14] does not permit the joinder of actions of persons who may have a claim against the defendant independently of the plaintiff's claim."). "The crucial characteristic of a Rule 14 claim is that defendant is attempting to transfer to the third-party defendant the liability asserted against defendant by the original plaintiff." 6 Charles Allen Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1446 (3d ed. 2010). Nevertheless, "[t]he third party claim need not be based on the same theory as the main claim." *Id.*

¶ 34 Here, I&R alleges that its harm, an essential element of its breach of implied warranty of merchantability claim, depends on the outcome of Plaintiffs' case against them. Additionally, Plaintiffs' claim forms the basis of I&R's complaint – the facts and circumstances that give rise to Plaintiffs' complaint are the same facts and circumstances that form I&R's breach of implied warranty of merchantability claim. Thus, I&R's claim is derivative of Plaintiffs' claim and properly impleaded under Rule 14.

¶ 35 Because I&R has pled facts sufficient to state a claim for breach of implied warranty of merchantability, and the claim is derivative of Plaintiffs' claims against I&R, the trial court improperly dismissed the claim.

3. Negligence (Common Law Indemnity)

¶ 36 **[4]** I&R next argues that its complaint states a valid claim for relief against Tremco for negligence.

¶ 37 We note that I&R has alleged common law indemnity in the form of indemnity implied-in-law, as opposed to merely negligence. In North Carolina, a party's rights to indemnity can rest on "equitable concepts arising from the tort theory of indemnity, often referred to as a contract implied-in-law." *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 38, 587 S.E.2d 470, 474 (2003) (citations omitted). "[I]ndemnity implied-in-law arises from an underlying tort, where a passive tort-feasor pays the judgment owed by an active tort-feasor to the injured third party." *Id.* at 39, 587 S.E.2d at 474. Therefore, "to successfully assert a right to indemnity based on a contract implied-in-law, a party must [sufficiently allege]

each of the elements of an underlying tort such as negligence." *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs.*, 180 N.C. App. 257, 268, 636 S.E.2d 835, 843 (2006).

¶ 38 "To state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010) (citation omitted). "The mere fact that a pleader alleges that an act is one of negligence does not make it so." *Stamey v. Rutherfordton Elec. Membership Corp.*, 247 N.C. 640, 646, 101 S.E.2d 814, 819 (1958). "An allegation of negligence must be sufficiently specific to give information of the particular acts complained of; a general allegation without such particularity does not set out the nature of plaintiff's demand sufficiently to enable the defendant to prepare his defense." *Id.* at 645, 101 S.E.2d at 818 (citation omitted).

¶ 39 In its third-party complaint, I&R alleges:

> 23. I&R hereby incorporates and re-alleges the allegations set forth above, and incorporates and re-alleges the allegations of the Plaintiffs' Complaint and I&R's Amended Answer and Affirmative Defenses thereto to the extent not inconsistent herewith.
>
> 24. Tremco had a duty to produce, design, manufacture, assemble, and inspect the Tremco Barrier System installed at the Property in the manner of a reasonably prudent manufacturer of the same or similar goods, under the same or similar circumstances, and in accordance with all laws, ordinances, rules, regulations, and requirements of all governing authorities having jurisdiction over construction of the Property.
>
> 25. If the allegations set forth in the Complaint of excess water penetration in the foundation walls of the residence on the Property are true, then Tremco was negligent in the production, design, manufacture, assembly, and/or inspection of the Tremco Barrier System, and in breach of its duties to I&R.
>
> 26. The negligence of Tremco supersedes any alleged negligence or fault of I&R (which negligence or fault is denied).

> 27. Any fault or negligence by I&R (which negligence or fault is denied) was passive and secondary in light of the primary and active fault or negligence of Tremco.
>
> 28. As a direct and proximate result of the negligence of Tremco, I&R is involved in litigation in which it faces liability for Tremco's own negligence, and I&R has incurred costs and expenses in order to defend and protect its interests.
>
> 29. Based on the foregoing, I&R seeks and is entitled to recover damages from Tremco for any amounts that I&R may be found liable to Plaintiffs in this action as a result of Tremco' s negligence.

¶ 40 The allegations set forth in I&R's complaint, including all incorporated allegations, fail to allege facts sufficiently specific to give information of the particular acts complained of. I&R's general allegation that "Tremco was negligent in the production, design, manufacture, assembly, and/or inspection of the Tremco Barrier System, and in breach of its duties to I&R" was not sufficiently specific and thus does not set out the nature of I&R's demand sufficiently to enable Tremco to prepare its defense. *See id.*

¶ 41 Because I&R has not sufficiently alleged each of the elements of negligence, I&R has failed to state a claim for common law indemnity and the claim was properly dismissed.

4. Contribution

¶ 42 **[5]** I&R argues that its complaint states a valid claim for contribution against Tremco.

¶ 43 Contribution is a statutory right of relief in North Carolina governed by the Uniform Contribution Among Tort-Feasors Act, N.C. Gen. Stat. § 1B-1. The Act provides, "where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them." N.C. Gen. Stat. § 1B-1(a) (2021). "Under this statute, there is no right to contribution from one who is not a joint tort-feasor." *Kaleel Builders*, 161 N.C. App. at 43, 587 S.E.2d at 477. Joint tortfeasors are parties whose negligent or wrongful acts are united in time or circumstance such that the two acts concur to cause a single injury to a third party. *State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 470, 380 S.E.2d

100, 103 (1989) (citation omitted). Thus, in order to join a third-party for the purpose of contribution, one must allege that the third-party committed negligent or wrongful acts. *See id.* at 474-76, 380 S.E.2d at 105-06 (holding that a third-party who was not negligent could not be jointly liable for the purpose of contribution).

¶ 44 Here, as discussed above, I&R has failed to sufficiently allege against Tremco each of the elements of negligence. Without sufficiently alleging that Tremco committed a tort, I&R cannot allege that Tremco is a joint tortfeasor. *See id.* Accordingly, I&R's complaint on its face reveals the absence of facts sufficient to state a claim for contribution against Tremco, and its claim for contribution was properly dismissed.

D. Claims against Tanglewood

1. Negligence (Common Law Indemnity)

¶ 45 **[6]** I&R argues that its complaint states a valid claim for negligence against Tanglewood.

¶ 46 As against Tremco, I&R has alleged against Tanglewood common law indemnity in the form of indemnity implied-in-law, as opposed to merely negligence. "North Carolina recognizes an implied-in-law right to indemnity when a passive party is made liable for an active party's tortious conduct flowing to and injuring a third party." *Kaleel Builders*, 161 N.C. App. at 46, 587 S.E.2d at 478 (citation omitted). "[T]o successfully assert a right to indemnity based on a contract implied-in-law, a party must [sufficiently allege] each of the elements of an underlying tort such as negligence." *Schenkel*, 180 N.C. App. at 268, 636 S.E.2d at 843. A party must also allege that primary and secondary liability for the underlying tort exists between the parties. *See Kaleel Builders*, 161 N.C. App. at 41, 587 S.E.2d at 475 (citation omitted).

¶ 47 The underlying tort alleged here is negligence. To state a claim for negligence, a plaintiff must allege "(1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by the breach." *Fussell*, 364 N.C. at 226, 695 S.E.2d at 440 (citation omitted).

¶ 48 First, I&R alleges that "Tanglewood subcontracted with The Ascot Corporation, LLC to perform all landscaping work required during construction of the Property" and "had a duty to perform its work on the Property in the manner of a reasonably prudent landscaping contractor under the same or similar circumstances, and in accordance with all laws, ordinances, rules, regulations, and requirements of all governing authorities having jurisdiction over construction of the Property." These allegations satisfactorily allege a legal duty owed. *See id.* (citation

omitted); *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E.2d 893, 897 (1955) ("[A] duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care[.]").

¶ 49 Second, I&R alleges that Tanglewood "failed to incorporate a trench drain or swale during construction of the residence on the Property, as would have been required to achieve a 5 percent drop in grading within the first 10 feet of the residence, in violation of Section R401.3 of the North Carolina Residential Code"; "failed to properly connect or attach the drainpipes to the strip drain component of the Tremco Barrier System, and failed to install a drainpipe of sufficient length and location to discharge excess water to daylight, in violation of Section R405 of the North Carolina Residential Code"; and "breached its duty perform its work on the Property in the manner of a reasonably prudent landscaping contractor under the same or similar circumstances, and in accordance with all laws, ordinances, rules, regulations, and requirements of all governing authorities having jurisdiction over construction of the Property." These allegations satisfactorily allege a breach of the duty of care. *See Fussell*, 364 N.C. at 226, 695 S.E.2d at 440; *Moore v. Moore*, 268 N.C. 110, 112-13, 150 S.E.2d 75, 77 (1966) ("The breach of duty may be by negligent act or a negligent failure to act."); s*ee also*, *e.g.*, *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 793, 561 S.E.2d 905, 910 (2002) (plaintiff sufficiently alleged breach by alleging defendants negligently failed to construct septic system in compliance with applicable building code).

¶ 50 Third, I&R alleges that "[a]s a direct and proximate result of the negligence of Tanglewood, I&R is involved in litigation in which it faces liability for work performed by Tanglewood, and I&R has incurred costs and expenses in order to defend and protect its interests." In sum, I&R sufficiently states a claim for negligence against Tanglewood.

¶ 51 Furthermore, I&R alleges that "[a]ny fault or negligence by I&R . . . was passive and secondary in light of the primary and active fault or negligence of Tanglewood[,]" and that it "seeks and is entitled to recover damages from Tanglewood for any amounts that I&R may be found liable to Plaintiffs in this action as a result of Tanglewood's negligence." These allegations satisfactorily allege a right to indemnity, should I&R be found liable to Plaintiffs. *See Kaleel Builders*, 162 N.C. App. at 41, 587 S.E.2d at 475 (citation omitted).

¶ 52 Tanglewood argues that the trial court correctly dismissed I&R's indemnity claim because there is no underlying tort. Specifically,

Tanglewood argues that "Plaintiffs' viable claims against I&R sound in contract" so "any tort claim against I&R must fail as a matter of law pursuant to the economic loss rule." However, Plaintiffs sued I&R for negligence and the record contains no order dismissing Plaintiffs' negligence claim. Furthermore, I&R asserts in its brief that its motion to dismiss Plaintiffs' negligence claim was denied, and Plaintiffs do not assert otherwise. Tanglewood essentially asks this Court to decide the viability of Plaintiffs' pending negligence claim against I&R, an issue that is not properly before us.

¶ 53 In sum, Plaintiffs have sued I&R for negligence, and I&R has sufficiently alleged that Tanglewood is derivatively liable should Plaintiffs' claim succeed. Because I&R has stated a claim for indemnity against Tanglewood, the trial court erred by dismissing the claim.

2. Contribution

¶ 54 **[7]** Finally, I&R argues that its complaint states a valid claim for contribution against Tanglewood.

¶ 55 "[W]here two or more persons become jointly or severally liable in tort for the same injury to person or property[,] . . . there is a right of contribution among them . . . ." N.C. Gen. Stat. § 1B-1(a). To join a third-party for the purpose of contribution, one must allege that the third-party committed negligent or wrongful acts, and that those negligent or wrongful acts were "united in time or circumstance such that the two acts . . . cause[d] a single injury." *Holland*, 324 N.C. at 470, 380 S.E.2d at 102-03 (citation omitted).

¶ 56 Here, I&R sufficiently alleges Tanglewood's negligence. Additionally, I&R alleges that it is liable with Tanglewood as joint tortfeasors to Plaintiffs:

> To the extent I&R is subject to liability and damages of any kind, including without limitation direct, indirect, special, general, resulting, consequential, or punitive damages, as well as any costs, expenses, and/or attorney's fees, as a result of any act or omission of Tanglewood, I&R is entitled to seek contribution from Tanglewood pursuant to the North Carolina Uniform Contribution Among Joint Tortfeasors Act and/or other applicable law. Accordingly, I&R expressly reserves the right to seek contribution from Tanglewood.

¶ 57 Tanglewood argues that it cannot be a joint tortfeasor because Plaintiffs do not have a viable tort claim against either I&R or Tanglewood, due to the economic loss rule. Tanglewood again asks this Court to determine the viability of Plaintiffs' pending negligence claim against I&R, an issue not properly before us. Furthermore, based on the pleadings before us, the economic loss rule would not bar Plaintiffs from claiming negligence against Tanglewood.

¶ 58 "[T]he economic loss doctrine 'prohibits recovery for economic loss in tort.' " *Land v. Tall House Bldg. Co.*, 165 N.C. App. 880, 884, 602 S.E.2d 1, 4 (2004) (quoting *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 401, 499 S.E.2d 772, 780 (1998)). "Instead, such claims are governed by contract law[.] The courts have construed the term 'economic losses' to include damage to the product itself." *Id.* (quotation marks and citations omitted). The economic loss doctrine does not apply where "[t]he injury, proximately caused by the promisor's negligent, or willful, act or omission in the performance of his contract, was to property of the promisee other than the property which was the subject of the contract[.]" *N.C. State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 82, 240 S.E.2d 345, 350 (1978) (citing *Firemen's Mut. Ins. Co. v. High Point Sprinkler Co.*, 266 N.C. 134, 146 S.E.2d 53 (1966) (economic loss rule did not apply where contracted-for sprinkler system damaged promisee's merchandise); *Jewell v. Price*, 264 N.C. 459, 142 S.E.2d 1 (1965) (economic loss rule did not apply where contracted-for furnace burned promisee's house)) (other citations omitted).

¶ 59 Here, I&R alleges that "Tanglewood subcontracted with The Ascot Corporation, LLC to perform all landscaping work required during construction of the Property." I&R further alleges that Tanglewood negligently performed its landscaping work.

¶ 60 In Plaintiffs' complaint against I&R, Plaintiffs alleged damages

> including, but not limited to, repair and remediation costs regarding carpet, personal property of the Stoops, the repair and remediation of foundation wall waterproofing systems, the repair and remediation of wall studs, sheetrock, and electrical fixtures[,] remediation of mold associated with the water penetration and the installation of initial French drains and other drainage devices. In addition, Ascot incurred expenses associated with the Stoops inability to occupy and enjoy their basement for an extended period of time."

¶ 61 The damages alleged by Plaintiffs relate to the Stoops' personal property and residence, not the landscaping. Because the injury here was to property "other than the property which was the subject of the contract" between Ascot and Tanglewood, the economic loss rule would not bar a negligence claim by Plaintiffs against Tanglewood. *Ports Auth.*, 294 N.C. at 82, 240 S.E.2d at 350.

¶ 62 Because I&R has stated a claim for contribution against Tanglewood, the trial court erred by dismissing the claim.

III. Conclusion

¶ 63 For the reasons set forth above, I&R has failed to state legally sufficient claims against Tremco for breach of express warranty, indemnity, and contribution. These claims were properly dismissed. However, I&R has stated a legally sufficient claim against Tremco for breach of implied warranty of merchantability. I&R has also stated legally sufficient claims against Tanglewood for indemnity and contribution. Accordingly, the trial court's order dismissing I&R's claims against Tremco is affirmed in part and reversed in part, and the trial court's order dismissing I&R's claims against Tanglewood is reversed. The matter is remanded for further proceedings.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Chief Judge STROUD and Judge ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 NOVEMBER 2022)

A & M REAL EST. DEV. CO. LLC v. G-FORCE CHEER, LLC 2022-NCCOA-748 No. 22-212	Cumberland (20CVS359)	Affirmed
BEST ASSET GRP. v. JACOBS 2022-NCCOA-749 No. 22-164	Forsyth (19CVS5114)	Dismissed
HALL v. PARKER HANNIFIN CORP. 2022-NCCOA-750 No. 22-26	N.C. Industrial Commission (18-036773)	Affirmed
HINES v. NICHOLS 2022-NCCOA-751 No. 22-209	Pitt (18CVD337)	Affirmed in Part, Vacated in Part, and Remanded
IN RE D.D.H. 2022-NCCOA-752 No. 22-67	Cabarrus (20JA73)	Affirmed
IN RE G.L.P. 2022-NCCOA-753 No. 22-290	Henderson (20JT71)	Affirmed
IN RE H.T.S. 2022-NCCOA-754 No. 22-157	Cumberland (12JB301)	Vacated and Remanded
IN RE I.B.M. 2022-NCCOA-755 No. 22-327	Guilford (18JT97) (18JT99)	Affirmed
IN RE J.M.M.C. 2022-NCCOA-756 No. 22-524	Richmond (21JB127)	Remanded
IN RE N.G.L. 2022-NCCOA-757 No. 22-127	Haywood (20JA27) (20JT27)	Affirmed
IN RE EST. OF RESPESS 2022-NCCOA-758 No. 22-345	Durham (20E994)	Affirmed

SEA GATE ASS'N, INC. v. MITCHELL 2022-NCCOA-759 No. 21-585	Carteret (18CVD419)	Affirmed in Part, Reversed in Part, and Remanded
SEA GATE ASS'N, INC. v. RANGE 2022-NCCOA-760 No. 21-581	Carteret (18CVD416)	Affirmed in Part, Reversed in Part, and Remanded
STATE v. ALDRIDGE 2022-NCCOA-761 No. 22-171	Union (19CRS52967)	No Error
STATE v. BAKER 2022-NCCOA-762 No. 22-244	Lee (18CRS51162)	Affirmed.
STATE v. DOUGHTY 2022-NCCOA-763 No. 21-720	New Hanover (20CRS2861) (20CRS53036)	Reversed and Remanded
STATE v. FERGUSON 2022-NCCOA-764 No. 22-583	Wilkes (19CRS322)	Dismissed
STATE v. HARRIS-ALLEN 2022-NCCOA-765 No. 22-87	Wake (19CRS203722)	NO PREJUDICIAL ERROR.
STATE v. HIGHTOWER 2022-NCCOA-766 No. 22-346	Forsyth (19CRS52191)	No Error
STATE v. JOHNSON 2022-NCCOA-767 No. 22-147	Pasquotank (01CRS51440) (97CRS4817) (98CRS193)	Affirmed
STATE v. KURTZ 2022-NCCOA-768 No. 22-233	Brunswick (20CRS51257) (20CRS700)	No Error
STATE v. MARSTON 2022-NCCOA-769 No. 22-251	Brunswick (18CRS53205) (18CRS53215-23) (20CRS863)	No Error
STATE v. MARTIN 2022-NCCOA-770 No. 22-425	Cabarrus (19CRS54275)	Affirmed

STATE v. SOE 2022-NCCOA-771 No. 22-294	Wilkes (20CRS224)	No Error
STATE v. STALLINGS 2022-NCCOA-772 No. 22-45	Mitchell (21CRS168) (21CRS50104)	Dismissed
STATE v. THOMPSON 2022-NCCOA-773 No. 22-195	Rutherford (19CRS50124) (19CRS50125) (19CRS966) (19CRS968)	NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. WILLIAMS 2022-NCCOA-774 No. 22-217	Caswell (15CRS299)	No Error
STATE v. WINGO 2022-NCCOA-775 No. 22-24	Union (18CRS55715) (18CRS55717) (18CRS55721)	No Error
STOCKLI v. N.C. DEP'T OF PUB. SAFETY 2022-NCCOA-776 No. 22-63	Office of Admin. Hearings (21OSP01390)	Affirmed
STRICKLAND v. AHMED 2022-NCCOA-777 No. 22-204	Franklin (19CVD381)	No Error
TOWN OF BOONE v. WATAUGA CNTY. 2022-NCCOA-778 No. 21-586	Watauga (20CVS104)	Affirmed

STATE v. PERKINS

[286 N.C. App. 495, 2022-NCCOA-38]

STATE OF NORTH CAROLINA
v.
GREGORY A. PERKINS, DEFENDANT

No. COA20-572

Filed 6 December 2022

1. Indictment and Information—rape—sexual offense—incest—initials of minor victim—facially valid

The indictments charging defendant with rape and statutory sexual offense were facially valid where the victim was identified only by initials because, pursuant to *State v. McKoy*, 196 N.C. App. 650 (2009), and N.C.G.S. §§ 15-144.1 and -144.2 (allowing short-form indictments), the victim's initials and date of birth in the indictments provided sufficient information to define the offenses and to allow defendant to prepare a defense and any arguments related to double jeopardy. In addition, the indictment charging defendant with incest was facially valid where it contained all the elements of the offense as defined in N.C.G.S. § 14-178(a).

2. Appeal and Error—petition for writ of certiorari—satellite-based monitoring orders—appellate panel split

After defendant's convictions for multiple sexual offenses (for which he was required to enroll in lifetime satellite-based monitoring, or SBM) and subsequent appeals, defendant was eventually resentenced, at which point the trial court also entered new SBM orders. Defendant sought appellate review by notice of appeal and a petition for writ of certiorari. The appellate panel was split in its analysis regarding the appropriate level of review of defendant's constitutional challenge to the new SBM orders. A majority of the appellate court issued a writ of certiorari to review the new SBM orders, while the third member of the panel would have dismissed the portion of the appeal related to those orders. However, of the two members of the panel to issue certiorari, only one would have reached the merits of defendant's constitutional argument (and found no Fourth Amendment violation), while the other would have vacated the new SBM orders because, since by his review the old SBM orders remained in effect, the trial court lacked jurisdiction to enter new ones. The new SBM orders therefore remained undisturbed.

Judge TYSON concurring in result only by separate opinion.

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

Appeal by Defendant from judgments entered 19 February 2020 by Judge Paul C. Ridgeway in Wake County Superior Court. First heard in the Court of Appeals 7 May 2014. Heard in the Court of Appeals again 21 June 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Amy Kunstling Irene and Jonathan P. Babb, for the State.

Jason Christopher Yoder for the Defendant.

JACKSON, Judge.

¶ 1 This is this Court's fourth opinion in this case. On 1 July 2014, this Court issued an unpublished opinion finding no error in a 2012 trial that culminated in Gregory A. Perkins's ("Defendant") conviction of first-degree rape of a child, incest, and two counts of first-degree sexual offense. *See State v. Perkins*, 760 S.E.2d 38, 42 (2014) (unpublished) ("*Perkins I*"). On 21 July 2014, this Court entered an order withdrawing the 1 July 2014 opinion, directing the Clerk of our Court not to certify it, and retaining the cause for disposition by the original panel to which it had been assigned. On 5 August 2014, this Court issued an amended opinion in the case, which was also unpublished. *See State v. Perkins*, 235 N.C. App. 425, 763 S.E.2d 928, 2014 WL 3824261 (2014) (unpublished) ("*Perkins II*"). This amended opinion also found no error in Defendant's trial, *see id.* at *4; however, it corrected an error in this Court's first opinion, omitting some of the analysis in the first opinion because it was erroneous. *Compare Perkins I*, 760 S.E.2d at 42 ("Defendant contends the trial court's use of his prior conviction to calculate his prior record level was prejudicial error, and cites *State v. West*, 180 N.C. App. 664, 638 S.E.2d 508 (2006), in support of his argument. . . . *West* is not applicable to the instant case[.]") *with Perkins II* at 3 ("Defendant contends the trial court's use of his prior conviction to calculate his prior record level was prejudicial error. However, defendant stipulated to his prior record level. . . . [D]efendant's stipulation [] to his prior record level was binding.").[1] The facts of this case are detailed in the Court's 5 August 2014

1. In *State v. West*, 180 N.C. App. 664, 669, 638 S.E.2d 508, 512 (2006), the trial court counted a conviction as a prior conviction for sentencing even though the relevant charge had been joined for trial with the charge for which the defendant was being sentenced

amended opinion, so we repeat only those necessary to understand the disposition of this appeal.

I. Background

¶ 2 On 30 December 2016, Defendant filed a motion for appropriate relief ("MAR") in Wake County Superior Court alleging that he received ineffective assistance of counsel in his 2012 trial because his trial counsel stipulated that his prior record level was II rather than I based on a charge—a count of indecent liberties—that had been originally joined for trial with not only the four charges of which he was convicted in 2012, but also 15 others the State had previously voluntarily dismissed.[2] The MAR court denied the MAR.

¶ 3 On 21 June 2017, Defendant petitioned our Court for a writ of certiorari to review the merits of the MAR court's order. We granted the petition on 10 July 2017, vacating the MAR court's order, and remanding the case to the MAR court for reconsideration of the MAR and for Defendant to conduct post-conviction discovery. On 2 August 2018, the MAR court finally entered an order in which it concluded that trial counsel's stipulation that Defendant had a prior record level of II was erroneous but that counsel's error did not rise to the level of ineffective assistance of counsel.[3] The MAR court therefore ordered a resentencing.

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and thus could not have qualified as a prior conviction. We reasoned that " '[a] person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been *previously* convicted of a crime[,]' " *id.* (quoting N.C. Gen. Stat. § 15A-1340.11(7)) (emphasis added), noting that while "[n]othing within the Sentencing Act specifically addresses the effect of joined charges when calculating previous convictions to arrive at prior record levels[,] . . . the assessment of a defendant's prior record level using joined convictions would be unjust and in contravention of the intent of the General Assembly." *Id.* at 669-70, 638 S.E.2d at 512. We therefore remanded the case for a resentencing.

2. Just over a year before the 2012 trial, Defendant had been tried for 20 counts of various sex crimes and the jury convicted him of only one—taking indecent liberties with a child—and was hung on the remaining 19. Aside from the count of indecent liberties of which Defendant was convicted in 2011, the trial court declared a mistrial. At the 2012 trial, the State elected to proceed on only the four charges of which Defendant was convicted in 2012.

3. As previously noted, under *West*, 180 N.C. App. at 669, 638 S.E.2d at 512, a sentencing court cannot count a conviction as a *prior* conviction if the relevant charge was joined for trial with the charge for which the defendant is being sentenced. The reason is that such a conviction does not qualify as a prior conviction. *Id. See also id.* ("[A]ssessment of a defendant's prior record level using joined convictions would be unjust and in contravention of the intent of the General Assembly."). *Id.* at 669-70, 638 S.E.2d at 512.

¶ 4 On 19 February 2020, Judge Paul C. Ridgeway resentenced Defendant. Correcting the trial court's error, and the error in this Court's two prior opinions, *see Perkins I*, 760 S.E.2d at 42; *Perkins II*, 2014 WL 3824261 at 3, Judge Ridgeway sentenced Defendant as a prior record level I offender rather than a prior record level II offender, but otherwise imposed four consecutive, presumptive-term sentences for the 2012 convictions, like the trial court had. Judge Ridgeway also entered orders on 19 February 2020 requiring Defendant to enroll in satellite-based monitoring ("SBM") for the rest of his life because of the 2012 convictions.

¶ 5 Defendant timely noted appeal from the judgments and on 14 December 2020 petitioned our Court for certiorari to review the SBM orders. On 18 January 2022, this Court issued its third opinion in this case, issuing the writ of certiorari to review the SBM orders per opinion. *See State v. Perkins*, 2022-NCCOA-38 (withdrawn) ("*Perkins III*"). Because the Court issued the writ of certiorari per opinion, it contemporaneously dismissed Defendant's petition for certiorari as moot by order. Nine days later, Defendant petitioned our Court for rehearing en banc or, in the alternative, moved that we stay the mandate and withdraw the 18 January 2022 opinion. On 7 February 2022, we allowed Defendant's motion to withdraw the Court's third opinion and dismissed the petition for rehearing en banc without prejudice to any future petition for rehearing en banc Defendant might file after we issue this opinion.

II. Jurisdiction

¶ 6 The withdrawal of the Court's third opinion made the mooting of the petition for writ of certiorari to review the 2020 SBM orders itself moot. In our discretion and in order to "aid in [our] jurisdiction" we allow Defendant's 14 December 2020 petition for writ of certiorari. N.C. Gen. Stat. § 7A-32(c) (2021).[4]

¶ 7 The final judgments entered by the resentencing court on 19 February 2020 are otherwise properly before us under N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444.

¶ 8 In the exercise of our discretion, we issue the writ of certiorari. While Judge Tyson disagrees with that decision, a majority of the Court concurs in issuance of a writ of certiorari per opinion to review the 2020 orders. I am alone in reaching the merits of Defendant's arguments related to the 2020 SBM orders, however. Judge Murphy concurs in the issuance of certiorari but would hold the trial court lacked jurisdiction

4. As a result of our exercise of jurisdiction, we need not address whether Defendant's written Notice of Appeal satisfied the requirements of Rule 3(a).

to enter the 2020 SBM orders and vacate them as set out in his separate opinion. I would hold that Defendant's arguments related to the 2020 SBM orders lack merit and affirm the orders.

III. Analysis

A. Introduction

¶ 9 In light of the Court's decision to review the 2020 SBM orders, and the disagreement between my colleagues about whether the orders are properly before our Court, this case presents three questions: first, are the indictments facially valid where they identified the victim using the victim's initials and date of birth? Defendant argues in his brief to our Court that they are not. We hold that they are. The panel is unanimous in that holding.

¶ 10 The second question presented is whether the 2020 SBM orders are properly before the Court. A majority of the Court agrees that they are, upon issuance of a writ of certiorari per opinion, in the exercise of our discretion. *See* N.C. R. App. P. 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of . . . orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]").

¶ 11 The third is whether the orders violated the Fourth Amendment. I would hold that they did not, under our Supreme Court's decision in *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, 862 S.E.2d 806, and our Court's recent decisions interpreting and applying *Hilton* in *State v. Carter*, 2022-NCCOA-262 ¶¶ 18-20 and *State v. Anthony*, 2022-NCCOA-414 ¶¶ 24-32—decisions we are bound to follow as an intermediate appellate court that cannot overrule itself—*see, e.g.*, *Upchurch v. Harp Builders, Inc.*, 2022-NCCOA-301 ¶ 11 ("[W]here 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[.]") (quoting *State v. Gonzalez*, 263 N.C. App. 527, 531, 823 S.E.2d 886, 888-89 (2019)). Neither of my colleagues would reach the issue of whether the orders violated the Fourth Amendment.

¶ 12 Their stated reasons differ. Judge Tyson would not issue a writ of certiorari simply because Defendant's Fourth Amendment arguments lack merit, and because Judge Tyson takes our Supreme Court's decision in *State v. Ricks*, 378 N.C. 737, 2021-NCSC-116, to be controlling here. In *Ricks*, the Supreme Court held that our Court abused its discretion when it reviewed an SBM order upon issuance of a writ of certiorari

where the defendant's petition did not "show merit or that error was probably committed below." *Id.* at 743, 2021-NCSC-116 ¶ 11. Under *Ricks*, the jurisdictional question is thus not analytically prior to the merits of the appeal.

¶ 13 A majority of the Court agrees that this case is distinguishable from *Ricks* because of the nature of the division of the panel on the second question presented by the case. But my colleagues disagree about why we cannot review the merits of the 2020 SBM orders. While Judge Tyson argues doing so is an abuse of discretion under *Ricks* because Defendant's Fourth Amendment arguments lack merit, Judge Murphy would hold that we lack subject matter jurisdiction to review the 2020 SBM orders—setting aside whether the arguments about them have merit—even upon issuance of a writ of certiorari, and even though Judge Murphy concurs in the *issuance* of the writ. In other words, Judge Murphy agrees to grant a writ that expands our jurisdiction to address the second issue raised by Defendant in his brief in order to express the view that we have no jurisdiction over the issue, even though issuance of the writ is what gives us jurisdiction over the issue. This is an unusual situation and one unlike *Ricks* in the view of the majority of the Court, which includes Judge Murphy.

¶ 14 In *Ricks*, our Court issued a writ of certiorari and invoked Rule 2 of the North Carolina Rules of Appellate Procedure to suspend the application of the Rules "[t]o prevent manifest injustice[,]" N.C. R. App. P. 2, and reviewed two SBM orders, *State v. Ricks*, 271 N.C. App. 348, 358, 843 S.E.2d 652, 661-62, *rev'd*, 378 N.C. 737, 2021-NCSC-116 (2020), something our Court had been doing as a matter of course for quite some time before the Supreme Court's decision in *Ricks*, *see State v. Barnes*, 278 N.C. App. 245, 247-50, 2021-NCCOA-304 ¶ 8-14; *State v. Sheridan*, 263 N.C. App. 697, 707-08, 824 S.E.2d 146, 154 (2019); *State v. Oxendine*, 206 N.C. App. 205, 209, 696 S.E.2d 850, 853 (2010), notwithstanding the view expressed frequently, if not entirely consistently, *Sheridan*, 263 N.C. App. at 707-08, 824 S.E.2d at 154, by Judge Tyson in this case, who was also the dissenting judge in *Ricks* when the case was at our Court, *see*, *e.g.*, *Ricks*, 271 N.C. App. at 364-65, 843 S.E.2d at 666, (Tyson, J., dissenting) ("To trigger this Court's discretion to allow the petition and issue the writ, Defendant's 'petition for this writ of certiorari must show merit or that error was probably committed below.' ") (marks omitted) (quoting *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)). Judge Tyson's view prevailed at the Supreme Court in *Ricks*, however.

¶ 15 I would invoke Rule 2 and suspend the application of the North Carolina Rules of Appellate Procedure in this case "to prevent manifest

injustice[,]" but the manifest injustice I wish to prevent is *not* the "harsh[] . . . result [that] application of our Appellate Rules . . . [results in] a defendant [being] deprived of any relief from a potentially unconstitutional order[.]" *State v. Cozart*, 260 N.C. App. 96, 104, 817 S.E.2d 599, 604 (2018) (Zachary, J., concurring).

¶ 16 Instead, the manifest injustice I would prevent by invoking Rule 2 to review the SBM orders and holding that they do not violate Defendant's Fourth Amendment rights is what my colleagues' project appears to be, though they disagree about the means to achieve it—which is to avoid following our Court's recent, controlling decisions in *Carter* and *Anthony*, even though that is what *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), *Gonzalez*, and *Upchurch*—controlling precedent from our Court—require. *See, e.g.*, *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37 ("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."); *Gonzalez*, 263 N.C. App. 527, 531, 823 S.E.2d at 888 ("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*."); *Upchurch*, 2022-NCCOA-301 ¶ 12 (noting that our Court cannot overrule itself *unless* "two lines of irreconcilable precedent develop independently—meaning the cases never acknowledge each other or their conflict"). If my colleagues agreed on the means to achieve this end, the manifest injustice that would result would be the deliberate "creation of two lines of irreconcilable precedent[.]" *Gonzalez*, 263 N.C. App. at 531, 823 S.E.2d at 889.

¶ 17 Because (1) a majority of the Court issues a writ of certiorari to review the 2020 SBM orders per opinion; (2) *In re Civil Penalty*, *Gonzalez*, and *Upchurch* mean that our Court's interpretation and application of *Hilton* in *Carter* and *Anthony* control on the issue of whether the 2020 SBM orders violated Defendant's rights under the Fourth Amendment—even over the Supreme Court's decision in *Hilton* itself—*see Gonzalez*, 263 N.C. App. at 531, 823 S.E.2d at 888-89; (3) *Carter* holds that "[o]ur Supreme Court's decision in *Hilton* concluded that for aggravated offenders, [such as Defendant,] the imposition of lifetime SBM causes only a limited intrusion into [a] diminished privacy expectation[,]" 2022-NCCOA-262 ¶ 24, and therefore does not violate the Fourth Amendment; and (4) review of the reasonableness of an SBM order is de novo, *id.* ¶ 14, I would hold that Defendant's Fourth Amendment rights were not violated by the 2020 SBM orders.

B. The Indictments Are Facially Valid

¶ 18 **[1]** Defendant argues that the indictments are facially invalid because rather than identifying the victim by name, they identify the victim by the victim's initials and date of birth. We disagree. The panel is unanimous on this point.

¶ 19 "It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (internal marks and citation omitted). "The purpose of the indictment is to give a defendant reasonable notice of the charge against his so that he may prepare for trial." *Id.* (citation omitted). "[A]n indictment must allege all the essential elements of the offense . . . , but an indictment couched in the language of the statute is generally sufficient[.]" *State v. Mostafavi*, 370 N.C. 681, 685, 811 S.E.2d 138, 141 (2018) (cleaned up). An indictment is facially invalid only if it omits an element of the offense charged. *State v. Sechrest*, 277 N.C. App. 372, 375, 2021-NCCOA-204 ¶ 10.

¶ 20 Short-form indictments specifically authorized by statute are deemed facially valid, even if they omit an element of the offense charged, as long as they comply with the enabling statute. *See, e.g.*, *State v. Lowe*, 295 N.C. 596, 599-604, 247 S.E.2d 878, 881-84 (1978) (affirming the authority of the General Assembly "to relieve the State of the common law requirement that every element of the offense be alleged"). Moreover, we have previously held that under N.C. Gen. Stat. §§ 15-144.1 and -144.2, short-form indictments charging the crimes of rape and statutory sexual offense using the victim's initials to identify the victim are facially valid. *State v. McKoy*, 196 N.C. App. 652, 657-58, 675 S.E.2d 409, 411-14, *disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 215 (2009).

¶ 21 However, because a facially invalid indictment does not "confer subject-matter jurisdiction on the trial court[,]" *State v. Lyons*, 268 N.C. App. 603, 607, 836 S.E.2d 917, 920 (2019), (citation omitted), "[a] defendant can challenge the facial validity of an indictment at any time, and a conviction based on an invalid indictment must be vacated[,]" *Campbell*, 368 N.C. at 86, 772 S.E.2d at 443 (citation omitted). "[W]e review the sufficiency of an indictment *de novo*." *McKoy*, 196 N.C. App. at 652, 675 S.E.2d at 409.

¶ 22 The indictments charging Defendant with rape and statutory sexual offense identify the victim with greater precision than required by *McKoy* or N.C. Gen. Stat. §§ 15-144.1 and -144.2, the statutes authorizing the use of short-form indictments to charge rape and statutory sexual offense, because they include the victim's date of birth as well as the

victim's initials. *McKoy* controls here and we hold that these indictments are facially valid. They provided Defendant with ample notice to prepare a defense, as well as adequately defining the offenses so that Defendant could plead the verdicts in bar of any double jeopardy.

¶ 23 North Carolina General Statute § 14-178(a) defined incest at the relevant time in pertinent part here as the crime of a "person engag[ing] in carnal intercourse with the person's . . . legally adopted child[.]" N.C. Gen. Stat. § 14-178(a) (2008).

¶ 24 The indictment charging Defendant with incest avers in relevant part that

> on or about December 1, 2008 through December 31, 2008, . . . [Defendant] unlawfully, willfully and feloniously did have carnal intercourse with CBA (dob: [XX/XX/XXXX]), who is [] [Defendant's] stepchild and [] [Defendant] was aware that he was CBA's stepfather.

¶ 25 This indictment contains all of the elements of the offense, and the allegations hew carefully to the statutory definition of the crime. It too provided Defendant with ample notice to prepare a defense, as well as defining the offense sufficiently to prevent the risk of double jeopardy. We therefore hold that this indictment is facially valid as well.[5]

C. The SBM Orders Are Properly Before Our Court

¶ 26 **[2]** Certiorari is one means available to appellate courts like ours to enlarge our jurisdiction.[6] *See* N.C. R. App. P. 21(a)(1). It is "a common law

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5. The State argues that this issue is outside the scope of this appeal because it "goes beyond the limited scope of this Court's 10 July 2017 order remanding this case to the superior court for reconsideration of [D]efendant's MAR." While we are sympathetic to the intuition behind this argument—that Defendant is, on some level, getting a second bite at the apple by raising an argument in his second appeal to our Court that was not raised in the first—we note that both appeals were appeals of right, and there is no rule against what Defendant has done. In addition, because the facial validity of an indictment is a subject matter-jurisdictional requirement, *State v. Lyons*, 268 N.C. App. 603, 607, 836 S.E.2d 917, 920 (2019), "[a] defendant can challenge the facial validity of an indictment at any time," *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (citation omitted). It should be familiar learning 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). The State's argument that our consideration of this issue is barred by the doctrine of res judicata fails for the same reason.

6. Another is the express authorization the General Assembly has given us in N.C. Gen. Stat. § 7A-32(c), which confers "[t]he Court of Appeals [with] [] jurisdiction . . . to supervise and control the proceedings of . . . trial courts[.]" N.C. Gen. Stat. § 7A-32(c) (2021).

writ issuing from a superior court to an inferior court, . . . commanding it to send up the record of a particular case for review." *Wheeler v. Thabit*, 261 N.C. 479, 480, 135 S.E.2d 10, 11 (1964) (citations omitted). Issuance of the writ divests the lower court of jurisdiction over the matter. *See id.* at 480-81, 135 S.E.2d at 11. Certiorari is a discretionary writ, and as such, is "not one to which the moving party is entitled as a matter of right." *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927). "[D]iscretion in a legal sense means the power of free decision; undirected choice; the authority to choose between alternative courses of action." *Burton v. City of Reidsville*, 243 N.C. 405, 407, 90 S.E.2d 700, 702 (1956).

¶ 27 In *Ricks*, relying on old cases that emphasized the importance of the underlying merit of a petition for certiorari to a court's decision to issue the writ, our Supreme Court held that our Court abused its discretion when it suspended the application of the Rules of Appellate Procedure under Rule 2 and reviewed two SBM orders upon issuance of a writ of certiorari where the defendant's petition did not "show merit or that error was probably committed below." *Id.* at 741, ¶ 6 (quoting *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9 (citing *In re Snelgrove*, 208 N.C. 670, 672, 182 S.E. 335, 336 (1935)). The language of many of these old cases make issuance of a writ of certiorari seem like an extraordinarily difficult request to get a court to accede to indeed. *See*, *e.g.*, *In re Snelgrove*, 208 N.C. at 671-72, 182 S.E. at 336 ("Certiorari is a discretionary writ, to be issued only for good or sufficient cause shown, and the party seeking it is required, not only to negative laches on his part in prosecuting the appeal, but also to show merit or that he has reasonable grounds for asking that the case be brought up and reviewed on appeal. Simply because a party has not appealed, or has lost his right of appeal, even through no fault of his own, is not sufficient to entitle him to a certiorari. A party is entitled to a writ of certiorari when–and only when–the failure to perfect the appeal is due to some error or act of the court or its officers, and not to any fault or neglect of the party or his agent. Two things, therefore, should be made to appear on application for certiorari: First, diligence in prosecuting the appeal, except in cases where no appeal lies, when

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Our Supreme Court has construed § 7A-32(c) to authorize "the appellate courts of this State in their discretion [to] review an order of the trial court, not otherwise appealable, when such review will serve the expeditious administration of justice or some other exigent purpose." *Stanback v. Stanback*, 287 N.C. 448, 453-54, 215 S.E.2d 30, 34-35 (1975). A third is our Court's precedent that Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure authorizes us to treat an appeal "as a petition for writ of certiorari[.]" *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008).

freedom from laches in applying for the writ should be shown; and, second, merit, or that probable error was committed on the hearing.") (cleaned up).

1. The History of Rule Appellate Rule 21 Suggests that **Ricks** *Was Wrongly Decided*

¶ 28 When the Rules of Appellate Procedure were first adopted on 13 June 1975, *see* 287 N.C. at 671, the language of Rule 21—which is virtually unchanged in the version of Rule 21 in effect today, except for the additions of subsection (e) in 1984, *see* 312 N.C. at 824, and subsection (f) in 1988, *see* 324 N.C. at 662—was, and today still is, much more obliging than the language of those old cases. *Compare* N.C. R. App. P. 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of . . . orders of trial tribunals *when the right to prosecute an appeal has been lost by failure to take timely action*[.]") (emphasis added) *with In re Snelgrove*, 208 N.C. at 672, 182 S.E. at 336 ("Simply because a party has not appealed, *or has lost his right of appeal*, even through no fault of his own, *is not sufficient* to entitle him to a certiorari.") (emphasis added). Instead, Rule 21 provided, as it does today, *see* N.C. R. App. P. 21(a)(1), that "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of . . . orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[,]" 287 N.C. at 728.

¶ 29 The Drafting Committee notes to Rule 21 explain that the Rule "establishes that certiorari may lie from either appellate court to permit review of trial tribunal judgments when [an] ordinary appeal right has been lost or does not exist" and, "following traditional practice in the use of this *discretionary* writ, . . . the question of its timeliness in a particular case is to be determined as a part of the general question of its propriety as an extraordinary mode of review." *Id.* at 730 (emphasis added). The Drafting Committee notes add that the provisions of subsection (c) of Rule 21 that do not relate to timeliness, e.g., that "[t]he petition shall be filed without unreasonable delay[,]" N.C. R. App. P. 21(c), "elaborate upon the more sketchy descriptions of the practice contained in former Sup[erior] C[ourt] R[ule] 34[,]" 287 N.C. at 730, which refers to the good cause requirement that had to be met before a trial court could enter an order granting a motion to compel production of discovery prior to 1975, *Stanback v. Stanback*, 287 N.C. 448, 459, 215 S.E.2d 30, 38 (1975).

¶ 30 In 1975, the Rules of Appellate Procedure—and specifically, the operative language of Rule 21(a) that remains unchanged today—were

adopted, and the previously existing good cause requirement of Rule 34 of the North Carolina Rules of Civil Procedure was removed. *See* 287 N.C. at 671; 1975 S.L. 762 § 2. The Official Commentary to Rule 34 of the North Carolina Rules of Civil Procedure explains that "[t]he overwhelming proportion of the cases in which the formula of good cause ha[d] been applied . . . [we]re those involving trial preparation" and that courts had not been properly "treat[ing] documents as having . . . immunity to discovery[,]" so with the adoption of the new provisions of the Rules of Civil Procedure in 1975 "to govern trial preparation materials and experts, there [was] no longer any occasion to retain the requirement of good cause" in Rule 34. N.C. Gen. Stat. § 1A-1, Rule 34 (2021) (off. cmt.). Thus, according to the Official Commentary to Rule 34, a reduced need for safeguards against the wrongful disclosure of material protected by the work product doctrine was the reason the good faith requirement was no longer needed in Rule 34.

¶ 31 The difference between the text of Rule 21 of the Rules of Appellate Procedure and the language of old cases like *Snelgrove* and *Grundler* our Supreme Court relied upon in holding that we abused our discretion by reviewing the SBM orders at issue in *Ricks* is the same requirement of good cause the General Assembly eliminated from Rule 34 of the Rules of Civil Procedure in 1975, the same year the Rules of Appellate Procedure were adopted. *See* 1975 S.L. 762 § 2; 287 N.C. at 671. While the bodies that made these changes were different—the Drafting Committee drafted the Rules of Appellate Procedure and our Supreme Court approved them, *see* 287 N.C. at 671—and the General Assembly adopted Session Law 1975-762, *see* 1975 S.L. 762—it seems a fair inference that the drafters of Rule 21 of the Rules of Appellate Procedure and our Supreme Court in adopting Rule 21 in 1975 intended to discard, rather than retain, the good cause requirement for issuance of a writ of certiorari the old cases relied upon by our Supreme Court in *Ricks* suggests existed prior to the adoption of the Rules of Appellate Procedure in 1975.

¶ 32 The reason is that certiorari is a *discretionary* writ and the express language of the version of Rule 21 adopted by the Supreme Court in 1975 is flatly inconsistent with the language of the old cases predating its adoption. *See*, *e.g.*, 287 N.C. at 728 ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of . . . orders of trial tribunals *when the right to prosecute an appeal has been lost by failure to take timely action*[.]") (emphasis added); *In re Snelgrove*, 208 N.C. at 672, 182 S.E. at 336 ("Simply because a party has not appealed, *or has lost his right of appeal*, even through no fault of his own, *is not sufficient* to entitle him to a certiorari.") (emphasis added).

¶ 33 Since the best evidence of the inference that the drafters of Rule 21 of the Rules of Appellate Procedure and our Supreme Court in adopting Rule 21 in 1975 intended to discard, rather than retain, the good cause requirement for issuance of a writ of certiorari is the language the drafters chose and the Supreme Court approved in 1975—which is unchanged today—the Supreme Court in *Ricks* should have applied Rule 21 as it is written rather than as it had described the writ of certiorari in an opinion that predated the adoption of Rule 21 by 40 years. Rule 21 provides that "[t]he writ of certiorari may be issued in *appropriate* circumstances by either appellate court to permit review of . . . 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) (emphasis added). *See also* 287 N.C. at 728 ("The writ . . . may be issued in *appropriate* circumstances . . . when the right to prosecute an appeal has been lost by failure to take timely action[.]") (emphasis added). "Appropriate" means "right for the purpose; suitable; fit; proper[.]" *Appropriate*, Webster's New World College Dictionary 70 (5th ed. 2014).

¶ 34 We should first "look to the plain meaning of the [words of Rule 21] to ascertain [our Supreme Court's] intent." *Town of Boone v. State*, 369 N.C. 126, 132, 794 S.E.2d 710, 715. *See also* Antonin Scalia and Bryan A. Garner, *Reading Law*: *The Interpretation of Legal Texts* 69 (2012) ("The ordinary-meaning rule is the most fundamental semantic rule of interpretation. It governs constitutions, statutes, rules, and private instruments. Interpreters should not be required to divine arcane nuances or to discover hidden meanings."). "Because the actual words used" by the drafters and adopted by our Supreme Court "are the clearest manifestation of [their] intent, we [should] give every word . . . effect, presuming . . . [each word was] carefully chose[n.]" *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (citation omitted). As the Drafting Committee notes to Rule 21 explain, the Rule "follow[s] traditional practice in the use of this *discretionary* writ[.]" 287 N.C. at 730 (emphasis added). "Discretion" is "the power of free decision; undirected choice; the authority to choose between alternative courses of action." *Burton*, 243 N.C. at 407, 90 S.E.2d at 702.

¶ 35 We also must be mindful of the longstanding presumption that the lawmakers in 1975 were "fully cognizant of prior and existing law within the subject matter of [their] enactment." *Biddix v. Henredon Furniture Indus., Inc.*, 76 N.C. App. 30, 34, 331 S.E.2d 717, 720 (1985) (citation omitted). In doing so, we must bear in mind "the long-standing rules of interpretation and construction . . . [,] *expressio unius est exclusio alterius*, [i.e.,] the expression of one thing is the exclusion of another."

Mangum v. Raleigh Bd. of Adjustment, 196 N.C. App. 249, 255, 674 S.E.2d 742, 747 (2009). "*Expressio unius*, also known as *inclusio unius*, is . . . the communicative device known as negative implication." Scalia & Garner, *supra*, at 107. Although "application of the *expressio unius* canon depends . . . on context," *Cooper v. Berger*, 371 N.C. 799, 810, 822 S.E.2d 286, 296 (2018) (internal marks and citation omitted), "[t]he doctrine properly applies [] when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved[,]" Scalia & Garner, *supra*, at 107.

¶ 36 I do not believe it is a stretch to infer from the elimination of the good cause requirement in Rule 45 of the Rules of Civil Procedure in 1975 in the "rewrit[ing] [of] the Rules of Civil Procedure [g]overning [d]iscovery and [d]epositions[,]" 1975 S.L. 762 (title), and the absence of a good cause requirement in the text of Rule 21 of the Rules of Appellate Procedure adopted by our Supreme Court that same year, *see* 287 N.C. at 671, that the drafters of Rule 21 in drafting Rule 21 and our Supreme Court in adopting it intended to eliminate the good cause requirement for issuance of a writ of certiorari suggested in such demanding terms by the old cases relied upon by the Supreme Court in *Ricks*. To my mind, the "*unum*, the thing specified[,]" that is, the rules of court applicable in North Carolina in 1975, including not only the Rules of Civil Procedure, but also the Rules of Appellate Procedure, "can reasonably be thought to [have] be[en] an expression of *all* that shares in the . . . [elimination] involved[,]" Scalia & Garner, *supra*, at 107, that is, the good cause requirement articulated in such demanding terms by the Supreme Court in *Snelgrove*, which was decided 40 years before Rule 21 of the Rules of Appellate Procedure was adopted.

2. Ricks *Was a Sharp Rebuke of a Decade-Long Practice of Our Court*

¶ 37 To promote judicial economy and avoid the "harsh[] . . . result [of] . . . a defendant [being] deprived of [] relief from a potentially unconstitutional order[.]" *Cozart*, 260 N.C. App. at 104, 817 S.E.2d at 604 (Zachary, J., concurring), our Court had routinely and efficiently been issuing writs of certiorari and suspending the Rules of Appellate Procedure under Rule 2 in cases involving SBM orders that had not been properly appealed prior to our Supreme Court's decision in *Ricks*. *See Barnes*, 278 N.C. App. at 247-50, 2021-NCCOA-304 ¶ 8-14; *Sheridan*, 263 N.C. App. at 707-08, 824 S.E.2d at 154; *Oxendine*, 206 N.C. App. at 209, 696 S.E.2d at 853. Rule 2 authorizes our Court to "suspend or vary the requirements or provisions" of the North Carolina Rules of Appellate Procedure

"[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, . . . in a case pending before [us] upon application of a party or upon [our] own initiative," allowing us to "order proceedings in accordance with [our] directions." N.C. R. App. P. 2.

¶ 38 The reason SBM orders are frequently not properly appealed is the idiosyncratic requirement that an SBM order be appealed in writing because it is considered civil rather than criminal in nature, *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010), while appeal from the judgment entered upon the jury's verdict containing the rest of a particular offender's sentence can be noticed in open court, N.C. R. App. 4(a)(1). In virtually every case in which our Court had been suspending the Rules of Appellate Procedure under Rule 2 and reviewing an improperly appealed SBM order upon issuance of a writ of certiorari prior to our Supreme Court's decision in *Ricks*, the reason appeal had not been properly noticed from the SBM order was that defense counsel had neglected to enter written notice of appeal of the SBM order separately from the oral notice of appeal counsel gave in open court after the trial court sentenced the defendant. *See*, *e.g.*, *Barnes*, 278 N.C. App. at 247-48, 2021-NCCOA-304 ¶ 9 ("Because of the civil nature of SBM hearings, a defendant must file a written notice of appeal from an SBM order pursuant to Appellate Rule 3. . . . In the present case, because [the] defendant's oral notice of appeal was insufficient to confer jurisdiction on this Court . . . , defendant filed a petition for a writ of certiorari . . . seeking review of the order imposing lifetime enrollment in SBM."); *Sheridan*, 263 N.C. App. at 707, 824 S.E.2d at 154 ("Defendant did not file written notice of appeal for the SBM determination, as required by N.C. R. App. P. 3. Defendant filed a petition for writ of certiorari, requesting this Court to consider his arguments on the merits."); *Oxendine*, 206 N.C. App. at 209, 696 S.E.2d at 853 ("We note that [the] defendant gave oral notice of appeal at the SBM hearing from the trial court's final order. . . . [D]efendant's oral notice of appeal is insufficient to confer jurisdiction on this Court. . . . However, . . . we *ex mero motu* treat [the] defendant's brief as a petition for certiorari and grant said petition to address the merits of defendant's appeal.").

¶ 39 *See also State v. Mack*, 277 N.C. App. 505, 515, 2021-NCCOA-215 ¶ 30-31; *State v. Gordon*, 278 N.C. App. 119, 124, 2021-NCCOA-273 ¶ 15; *State v. Robinson*, 275 N.C. App. 876, 886, 854 S.E.2d 407, 413 (2020); *State v. Mangum*, 270 N.C. App. 327, 333-34, 840 S.E.2d 862, 867-68 (2020); *State v. Thompson*, 273 N.C. App. 686, 689, 852 S.E.2d 365, 369 (2020); *State v. Hutchens*, 272 N.C. App. 156, 159-60, 846 S.E.2d 306, 310 (2020); *State v. Perez*, 275 N.C. App. 860, 864-65, 854 S.E.2d

15, 20 (2020); *State v. Lopez*, 264 N.C. App. 496, 503-04, 826 S.E.2d 498, 503-04 (2019); *State v. Harding*, 258 N.C. App. 306, 320, 813 S.E.2d 254, 265 (2018); *State v. Lindsey*, 260 N.C. App. 640, 642, 818 S.E.2d 344, 346 (2018); *State v. Martinez*, 253 N.C. App. 574, 585 n.7, 801 S.E.2d 356, 363 n.7 (2017); *State v. Dye*, 254 N.C. App. 161, 167-68, 802 S.E.2d 737, 741 (2017); *State v. Shore*, 255 N.C. App. 420, 424, 804 S.E.2d 606, 609 (2017); *State v. Springle*, 244 N.C. App. 760, 762-64, 781 S.E.2d 518, 520-21 (2016); *State v. Robinson*, 249 N.C. App. 568, 571-72, 791 S.E.2d 862, 865 (2016); *State v. Harris*, 243 N.C. App. 728, 732, 778 S.E.2d 875, 878 (2015); *State v. Hick*s, 239 N.C. App. 396, 400, 768 S.E.2d 373, 375-76 (2015); *State v. Green*, 229 N.C. App. 121, 128, 746 S.E.2d 457, 464 (2013); *State v. Lineberry*, 221 N.C. App. 241, 242, 726 S.E.2d 205, 206-07 (2012); *State v. Brown*, 211 N.C. App. 427, 441 n.7, 710 S.E.2d 265, 275 n.7 (2011); *State v. Mann*, 214 N.C. App. 155, 157, 715 S.E.2d 213, 215 (2011); *State v. Towe*, 210 N.C. App. 430, 434, 707 S.E.2d 770, 774 (2011); *State v. Stokes*, 216 N.C. App. 529, 537-38, 718 S.E.2d 174, 180 (2011); *State v. Green*, 211 N.C. App. 599, 600-01, 710 S.E.2d 292, 294 (2011); *State v. Clark*, 211 N.C. App. 60, 70-71, 714 S.E.2d 754, 761-62 (2011); *State v. Sprouse*, 217 N.C. App. 230, 238-39, 719 S.E.2d 234, 241 (2011); *State v. May*, 207 N.C. App. 260, 262, 700 S.E.2d 42, 44 (2010); *State v. Williams*, 207 N.C. App. 499, 501, 700 S.E.2d 774, 775 (2010); *State v. Cowan*, 207 N.C. App. 192, 195-96, 700 S.E.2d 239, 241-42 (2010); *State v. Clayton*, 206 N.C. App. 300, 302-03, 697 S.E.2d 428, 430-31 (2010); *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010).

3. Some of the Consequences of Ricks *May Not have Been Intended*

¶ 40 *Ricks* expresses a judgment that our Court's permissive invocation of Rule 2 and generosity in issuing writs of certiorari to review SBM orders had been excessive over the roughly ten-year course of that practice of our Court documented above. *See*, *e.g.*, 378 N.C. at 742, 2021-NCSC-116 ¶ 10 ("Defendant is no different from other defendants who failed to preserve their constitutional arguments."). And perhaps it had been. Yet, the Supreme Court's holding in *Ricks* has had—and will continue to have—a tremendous practical impact at our Court, which may not have been intended. For *Ricks* is understood to hold not just that the jurisdictional question is *not* analytically prior to the merits of the appeal in a case where an SBM order has not been properly appealed; instead, it is understood to hold that the jurisdictional question is not analytically prior to the merits of the appeal in *all* cases. And that understanding has created conditions favorable to the proliferation of

a shadow docket at our Court, and a shadow docket at our Court has proliferated because of *Ricks*.

¶ 41 In a shadow docket, a court enters "a range of orders and summary decisions that defy its normal procedural regularity." William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & Liberty 1 (2015). Shadow dockets have recently increasingly become the subject of criticism among members of the legal profession and even the general public because the summary disposition of cases in a shadow docket suffers from a lack of transparency. *See id.* The reason is simple: for most everyone, they are black boxes; nobody knows what goes on inside them, and that undermines public confidence in the results they produce.

¶ 42 The proliferation of a shadow docket at our Court also has troubling implications for North Carolinians because in North Carolina, except in exceptional appeals—namely, capital appeals, business court appeals, and class action certification appeals, N.C. Gen. Stat. § 7A-27(a) (2021)—a North Carolinian's right to an appeal of right to our Supreme Court generally depends on whether there was a dissent at our Court in the appellant's first appeal of right, *id.* § 7A-30(2). Although there is an exception from this rule for appeals "that directly involve[] a substantial question arising under the Constitution of the United States or of this State[,]" and the Supreme Court always enjoys the power to review any appeal in its discretion, *id.* § 7A-31(a), generally speaking, an appellant in North Carolina does not have an appeal of right to our Supreme Court unless there is division among the judges of our Court and one of the judges on the three-judge panel assigned to decide the case at our Court authors a dissent, *see id.* § 7A-30(2).

¶ 43 If the jurisdictional question is not analytically prior to the merits of the appeal, as it now no longer is because of our Supreme Court's decision in *Ricks*, then there is a category of cases that will be dismissed by our Court based on the analysis in *Ricks* that would have been the same cases where the appellant had an appeal of right to our Supreme Court before *Ricks* was decided. The shadow docket at our Court after *Ricks* is populated by these cases. See, for example, below, a picture of the first page of an order deciding a case on the shadow docket of our Court that now exists because of *Ricks*. Before *Ricks* was decided, the defendant in that case would have unquestionably enjoyed an appeal of right to our Supreme Court under N.C. Gen. Stat. § 7A-30(2). After *Ricks*, however, it is less clear if this same defendant has such a right.

¶ 44 Orders like the one below also are difficult to access—even for members of the legal profession, let alone by the general public—because they are not available in popular legal research databases and a person interested in reviewing such an order needs to know the case number to access the order on the Court's website.

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From New Hanover
(20CRS51122 20CRS51123 20CRS51124)

No. 21-144

STATE OF NORTH CAROLINA

v.

JAQUALYN ROBINSON

ORDER

The following order was entered:

The motion filed in the cause by the State on 6 July 2021 and designated 'Motion to Dismiss Appeal' is allowed. Defendant's appeal is dismissed. Defendant's 24 March 2021 'Petition for Writ of Certiorari' is denied. Appellant to pay costs.

Panel consisting of Judge MURPHY, Judge GRIFFIN, and Judge JACKSON.

JACKSON, Judge, dissenting.

Jaqualyn Robinson ('Defendant') appeals from an order denying his motion to suppress evidence entered by the Honorable R. Kent Harrell on 29 October 2020 in New Hanover County Superior Court. The majority denies Defendant's Petition for Writ of Certiorari and grants the State's Motion to Dismiss Appeal because they do not find merit in Defendant's argument on appeal. I believe Defendant's argument has merit and would grant his Petition for Writ of Certiorari and reach the meritorious issue. Therefore, I respectfully dissent.

I. Factual and Procedural Background

On 5 February 2020, Wilmington Police Department Officer B. Galluppi ('Officer Galluppi') conducted a traffic stop on a Chrysler 300 being driven by Defendant because the car's window tint was too dark. While speaking with Defendant through the driver's side window, Officer Galluppi 'detect[ed] a very faint odor of marijuana . . . coming from inside the vehicle.' After running Defendant's registration, Officer Galluppi had Defendant step out of the Chrysler and sit in Officer Galluppi's patrol car 'due to [his] experience with people who have partaken with [sic] marijuana[,]' Officer Galluppi did not want Defendant to tamper with any evidence inside the car. Officer Galluppi next ran Defendant's license and learned it was suspended.

While discussing the circumstances of his license suspension with Defendant, Officer Galluppi 'could still smell the odor of marijuana coming from his person at that point.' Officer Galluppi asked Defendant if there was a reason his vehicle smelled like marijuana. Defendant told Officer Galluppi 'that he didn't smoke or do anything or have anybody inside his vehicle for that.' (The trial court granted Defendant's motion to suppress these statements as the trial court found that placing Defendant in the patrol car constituted a custodial interrogation and Defendant should have been Mirandized.) After this exchange, Officer Galluppi then searched the vehicle while another officer remained with Defendant and Defendant was subsequently arrested.

¶ 45 Nevertheless, a majority of the Court in this case issues a writ of certiorari. *Ricks* is therefore distinguishable from this case in my view because of the nature of the division of the Court on both the second and

third issues presented in this case, with each judge writing an opinion *in seriatim* because none agrees with the other. While Judge Tyson believes *Ricks* controls here, a majority of the Court holds that this case is distinguishable from *Ricks* because of the nature of the division of the Court. *Ricks* involved a more straightforward voting breakdown, with two judges in full agreement in the majority and Judge Tyson dissenting. Because of the lack of agreement among the judges of this panel on the second and third issues in the case, Judge Murphy and I issue a writ of certiorari on behalf of the Court to review the 2020 SBM orders.

D. *Carter* Requires Us to Affirm the 2020 Orders

¶ 46 I would invoke Rule 2 and suspend the application of the North Carolina Rules of Appellate Procedure to review the SBM orders and hold that they do not violate Defendant's Fourth Amendment rights. Our Court's recent decisions in *Carter* and *Anthony* hold that review of the reasonableness of an SBM order is de novo, 2022-NCCOA-262 ¶ 14; 2022-NCCOA-414 ¶ 9, and "that the SBM statute as applied to aggravated offenders [such as Defendant, all of whose four convictions at issue in this appeal qualify as aggravated offenses under N.C. Gen. Stat. § 14-208.6,] is not unconstitutional[,]" 2022-NCCOA-262 ¶ 18. I would therefore affirm the 2020 SBM orders.

¶ 47 I concede that the reasonableness of the 2020 SBM orders has not been preserved for appellate review as required by precedent from our Court, *Cozart*, 260 N.C. at 101, 817 S.E.2d at 603, and our Supreme Court, *Ricks*, 2021-NCSC-116 ¶ 10, because Defendant's MAR counsel did not dispute the reasonableness of Defendant being required to enroll in lifetime SBM at the 2020 resentencing. This is not entirely surprising based on Defendant's age at the time of the resentencing hearing, however: the resentencing court's decision whether to impose consecutive, presumptive-term sentences for the convictions like the trial court had, but with a correct prior record level calculation, or to instead impose concurrent sentences for the convictions was the difference between Defendant ever being released from prison or not. It is not surprising then that Defendant's MAR counsel did not dispute the reasonableness of the resentencing court's decision to order Defendant to enroll in lifetime SBM after the resentencing court had decided to impose consecutive, presumptive-term sentences for the convictions like the trial court had and *not* run the four sentences concurrently: being required to enroll in lifetime SBM matters little to someone who is never getting out of prison.

¶ 48 Fully cognizant that I am "tak[ing] *two* extraordinary steps to reach the merits[,]" *State v. Bishop*, 255 N.C. App. 767, 768-69, 805 S.E.2d 367,

369 (2017) (emphasis in original), and entirely persuaded that "[f]undamental fairness . . . depend[s] upon the consistent exercise" of our Court's discretion to take "the extraordinary step of suspending the operation of the appellate rules[,]" *State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007), I would invoke Rule 2 to review the constitutionality of the 2020 orders because, as noted above, it appears to me that my colleagues intend to avoid following our Court's recent, controlling decisions in *Carter* and *Anthony*, even though that is what *In re Civil Penalty*, *Gonzalez*, and *Upchurch* require. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37; *Gonzalez*, 263 N.C. App. at 531, 823 S.E.2d at 888; *Upchurch*, 2022-NCCOA-301 ¶ 12. As noted above, if my colleagues agreed on the means to achieve this end, the manifest injustice that would result would be the deliberate "creation of two lines of irreconcilable precedent[.]" *Gonzalez*, 263 N.C. App. at 531, 823 S.E.2d at 889.

¶ 49 In my view, this is not a situation where "similarly situated litigants are permitted to benefit from [Rule 2] but others are not[,]" *Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370, because as to Defendant, the outcome of our Court's resolution of this third and final issue presented by this appeal would be the same if any of the judges' opinions were the opinion of the Court: (1) I would affirm the 2020 orders because *Carter* requires that result (while suspending the rules to review an unpreserved constitutional argument to prevent *In re Civil Penalty* from being violated); (2) Judge Tyson would dismiss this portion of the appeal, leaving the 2020 orders in effect; and (3) Judge Murphy would hold that the trial court lacked jurisdiction to enter the 2020 SBM orders and they should be vacated, as the 2012 orders are still in effect today. Thus, no litigant situated similarly to Defendant would benefit any more or less than Defendant from my invocation of Rule 2 here because not even Defendant benefits from it.

¶ 50 But our law does. As noted above, *In re Civil Penalty* means that our Court's interpretation and application of *Hilton* in *Carter* controls on the issues of whether the 2020 SBM orders violated Defendant's rights under the Fourth Amendment and whether review of preserved challenges to the reasonableness of lifetime SBM orders is de novo, 2022-NCCOA-262 ¶ 14, and *Carter* holds that "[o]ur Supreme Court's decision in *Hilton* concluded that for aggravated offenders, [such as Defendant,] the imposition of lifetime SBM causes only a limited intrusion into [a] diminished privacy expectation[,]" 2022-NCCOA-262 ¶ 24, and therefore does not violate the Fourth Amendment, ¶ 18. As North Carolina's intermediate appellate court, we must follow our prior decisions, *Upchurch*, 2022-NCCOA-301 ¶ 11, unless "two lines of irreconcilable

precedent develop . . . [that] never acknowledge each other or their conflict[,]" ¶ 12, as would be true if Judge Murphy's separate opinion were a majority opinion.

4. The Separate Opinions

¶ 51 Judge Tyson's opinion reads *Ricks* too broadly. As noted above, I believe that this case is distinguishable from *Ricks* and Judge Murphy concurs in issuing a writ of certiorari in this case per opinion. Also as previously noted, I believe that the history of Rule 21 suggests that *Ricks* was wrongly decided, and that *Ricks* has had negative—and perhaps, unintended—consequences, creating a shadow docket at our Court.

¶ 52 I must also conclude that Judge Murphy's conclusion that the trial court lacked jurisdiction to enter the 2020 SBM orders is erroneous. Judge Murphy cites our Court's decision in *State v. Clayton*, 206 N.C. App. 300, 697 S.E.2d 428 (2010), in support of this conclusion. This conclusion, however, appears to be based on a serious misreading of *Clayton*.

¶ 53 *Clayton* involved an offender who a trial judge purported to order to enroll in SBM for ten years on the basis of a *probation violation*, 206 N.C. App. at 301-02, 697 S.E.2d at 430, when the statute that authorizes trial courts to enter SBM orders only does so upon an offender's *conviction* "of a reportable *conviction* as defined by G.S. 14-208.6(4)[.]" N.C. Gen. Stat. § 14-208.40B(a) (2008) (emphasis added). *See also* N.C. Gen. Stat. § 14-208.40B(a) (2021) (same). At the risk of stating the obvious, probation violations are not and were not included in the list of reportable convictions contained in § 14-208.6(4), *see* N.C. Gen. Stat. § 14-208.6(4) (2021); N.C. Gen. Stat. § 14-208.6(4) (2008), because probation violations are not *crimes*, *see*, *e.g.*, *State v. Sparks*, 362 N.C. 181, 187, 657 S.E.2d 655, 659 (2008) ("[A] proceeding to revoke probation is not a criminal prosecution.") (internal marks and citation omitted). Although refraining from committing additional crimes is a regular condition of probation in North Carolina, N.C. Gen. Stat. § 15A-1343(b)(1) (2021), "a probation violation is not a crime in itself," *Clayton*, 206 N.C. App. at 305, 697 S.E.2d at 432.

¶ 54 Probation revocation hearings are frequently described as informal and summary, *Sparks*, 362 N.C. at 187, 657 S.E.2d at 659, where the North Carolina Rules of Evidence do not apply, *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014). Unlike at a criminal trial, at a probation revocation hearing, "the alleged violation . . . need not be proven beyond a reasonable doubt" and all that is required instead is "that the evidence be such as to reasonably satisfy the judge in the exercise of h[er] sound discretion that the defendant has willfully violated a

valid condition of probation." *Id.* (internal marks and citations omitted). "Accordingly, the decision of the trial court is reviewed for abuse of discretion." *Id.* (citation omitted).

¶ 55 Writing for our Court in *Clayton*, Judge, now Chief Judge, Donna Stroud reasoned that in the absence of any indication in the record that there had been compliance with the notice requirements of N.C. Gen. Stat. § 14-208.40B—the statute authorizing trial courts to enter orders requiring offenders to enroll in SBM—or any of the findings of fact in the order at issue that are required by that statute, and more fundamentally, because "a probation violation is not a crime . . . , much less a 'reportable conviction[,]' " the trial court in that case lacked jurisdiction either to conduct the hearing or to order the defendant to enroll in SBM for ten years. 206 N.C. App. at 305-06, 697 S.E.2d at 432-33.

¶ 56 *Clayton* was thus a straightforward application of the timeworn principle that where jurisdiction is statutorily conferred—as it is in the probation revocation context as well as the SBM context—a court cannot run afoul of its statutory remit, and when it does so, the extent of the excess is a nullity. *Wooten*, 194 N.C. App. at 527, 669 S.E.2d at 750. Judge Murphy reads *Clayton* as standing for a much broader proposition—that a trial court lacks jurisdiction to order an offender to enroll in SBM at any sentencing hearing other than the first sentencing that occurs after the offender is found guilty of a reportable offense and the original SBM order has not been specifically set aside. Judge Murphy's theory is that an SBM order does not qualify as a "sentence."

¶ 57 I disagree with this theory. For one, it was not the rationale for our Court's holding in *Clayton*, nor is it compelled or even supported by *Clayton*. Second, it does not follow from our Supreme Court's holding that "the SBM program . . . is not punitive in purpose or effect[,]" *State v. Bowditch*, 364 N.C. 335, 336, 700 S.E.2d 1, 2 (2010), as Judge Murphy suggests. *See, e.g.*, *infra*, at 536 ("As SBM is not a criminal sentence of punishment resulting from criminal judgment, but is instead a 'civil, regulatory scheme,' I conclude the trial court did not vacate the 2012 SBM orders by vacating Defendant's sentence.") (citations omitted).

a. North Carolina Law Embraces an Expansive View of the Purposes and Kinds of Sentences Offenders Can Face in State Court

¶ 58 The word "sentence" is a broad one. It is true that it has been defined as "[t]he judgment that a court formally pronounces after finding a criminal defendant guilty" or "the punishment imposed on a criminal wrongdoer." *Sentence*, Black's Law Dictionary (11th ed. 2019). But

not all sentences a criminal defendant can face in state court in North Carolina are solely punitive in nature—some are remedial, at least in part. *See*, *e.g.*, N.C. Gen. Stat. § 15A-1340.34(a) (2021) ("When sentencing a defendant convicted of a criminal offense, the court shall determine whether the defendant shall be ordered to make restitution to any victim of the offense in question."). In other words, Judge Murphy's theory that an SBM order cannot be a sentence because our Supreme Court has held that the SBM program is not punitive draws an equivalence between something definitionally qualifying as a sentence and having a purely punitive purpose, which excludes a sentence—restitution—from qualifying as a sentence—when a trial court is required to consider it as a sentence under N.C. Gen. Stat. § 15A-1340.34(a) in every criminal case in North Carolina resulting in conviction. *See id.*

¶ 59 Our General Assembly has not taken the narrow view of what the word "sentence" means that Judge Murphy's separate opinion does. Section 15A-1340.12 of the General Statutes articulates four, interrelated yet distinct purposes of sentencing in criminal cases in state court in North Carolina:

> [(1)] impos[ing] a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability;
>
> [(2)] protect[ing] the public by restraining offenders;
>
> [(3)] assist[ing] the offender toward rehabilitation and restoration to the community as a lawful citizen; and
>
> [(4)] provid[ing] a general deterrent to criminal behavior.

N.C. Gen. Stat. § 15A-1340.12 (2021). Judge Murphy's separate opinion ignores the clearly expressed intent of the General Assembly in § 15A-1340.12 by insisting that the only purpose of a sentence can be punishment and if the SBM program does not qualify as punishment then it cannot be a sentence. But that insistence ignores codified evidence of legislative intent to the contrary.

¶ 60 Consistent with the third purpose of sentencing in North Carolina articulated by our General Assembly in N.C. Gen. Stat. § 15A-1340.12, some sentences imposed by North Carolina trial courts have purely rehabilitative purposes, or at least the potential to be purely rehabilitative. As our Court has held, the purpose of suspending an offender's

sentence and imposing a sentence of probation is "to further the reform of the defendant." *State v. Simpson*, 25 N.C. App. 176, 180, 212 S.E.2d 566, 569 (1975). Section 15A-1343(b1) of the General Statutes authorizes trial courts to sentence offenders to probation that includes special conditions of probation in addition to the regular conditions of probation, such as receiving medical or psychiatric treatment, "[a]ttend[ing] or resid[ing] in a facility providing rehabilitation, counseling, treatment, social skills, or employment training, instruction, recreation, or residence[,]" participating in rehabilitative treatment for sexual abuse in cases where evidence exists of "physical, mental or sexual abuse of a minor[,]" or "[s]atisfy[ing] [] other conditions determined by the court to be reasonably related to [the offender's] *rehabilitation*." N.C. Gen. Stat. § 15A-1343(b1)(1), (2), (9), (10) (2021) (emphasis added).

¶ 61 According to Judge Murphy's theory of what qualifies as a sentence, an offender sentenced to one of the special conditions of probation listed above has not been sentenced, or at least, the portion of the offender's sentence that has a rehabilitative purpose does not qualify as part of the offender's sentence. Put another way, Judge Murphy's theory of what a sentence is cannot account for a sentence with a rehabilitative purpose qualifying as a sentence at all and a suspended sentence is a contradiction in terms rather than a disposition available to sentencing courts across North Carolina.

¶ 62 Not all sentences North Carolina law authorizes our trial courts to impose have a punitive, or primarily punitive, purpose. Our General Assembly has made express provision for rehabilitation as a purpose of sentencing under North Carolina's criminal law and for the imposition of remedial and rehabilitative sentences in our state courts. In my view, Judge Murphy's separate opinion errs in suggesting otherwise. Because I would hold that the 2020 SBM orders *did* qualify as part of Defendant's sentence, I would hold that the trial court had subject matter jurisdiction to enter these orders at the 19 February 2020 resentencing.

b. An Offender Should Not Need to Preserve a Challenge to the Reasonableness of an SBM Order to Preserve It for Our Review

¶ 63 I would like to add that I disagree with the precedent from our Supreme Court and from our Court about whether Defendant's Fourth Amendment arguments are properly before us because they were not raised first in the court below at the resentencing hearing before Judge Ridgeway. I take this opportunity to do so because the only portion of this opinion with precedential value is Part B—the Court's holding

related to the facial validity of the indictments. The decision by a majority of the Court consisting of Judge Murphy and I concurring to issue a writ of certiorari per opinion is a discretionary one that has no precedential value.

¶ 64 As we observed in *State v. Dye*, 254 N.C. App. 161, 802 S.E.2d 737 (2017), "N.C. Gen. Stat. § 15A-1446(d) provides that when a defendant asserts that a 'sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law[,]' appellate review of such errors may be obtained regardless of whether an objection was made at trial." 254 N.C. App. at 168, 802 S.E.2d at 742 (quoting N.C. Gen. Stat. § 15A-1446(d)(18)). Regardless of whether one agrees that the SBM system is merely a civil regulatory enforcement regime or not, I believe it is abundantly obvious that being required to enroll in SBM for the remainder of one's life for committing an offense defined as an aggravated offense by N.C. Gen. Stat. § 14-208.6 is part of an offender's sentence. The purpose of this portion of the sentence, in my view, is the second purpose of sentencing articulated by our General Assembly in N.C. Gen. Stat. § 15A-1340.12—protecting the public. I concede that our decision in *Dye* not only has not stood the test of time, it was inconsistent with controlling precedent from our Court when it was decided in 2017. I still think it is right. Were it not for the precedent from our Court and our Supreme Court dictating a contrary result, in this case, as in *Dye*, I would hold that "Defendant's argument was preserved, notwithstanding his failure to object in the trial court[.]" 254 N.C. App. at 168, 802 S.E.2d at 742.

IV. Conclusion

¶ 65 We hold that the indictments are facially valid. A majority of the Court issues a writ of certiorari per opinion. This opinion otherwise is the opinion of only one judge of the Court, but the 2020 SBM orders remain undisturbed.

AFFIRMED.

Judge TYSON concurs in result only by separate opinion.

Judge MURPHY concurs in part, concurs in result only in part, and dissents by separate opinion.

TYSON, Judge, concurring in the result only.

¶ 66 We all agree Defendant's indictments are sufficient and valid to support his underlying convictions. Defendant argues the trial court erred in imposing lifetime satellite-based monitoring ("SBM"). He asserts the State failed to meet its burden of proving the imposition of lifetime SBM is a reasonable search under the Fourth Amendment and he was ordered to SBM without any argument or evidence to support the reasonableness of the SBM's Fourth Amendment search. U.S. Const. amend. IV and XIV. Defendant's appeal is properly dismissed.

I. Petition for Writ of Certiorari

¶ 67 The State responds and argues Defendant failed to properly preserve this issue because Defendant failed to object on any basis, constitutional or otherwise, to the imposition of lifetime SBM, did not appeal, waived appellate review, and has shown no merit or prejudice to warrant the issuance of a writ of certiorari ("PWC"). *See State v. Grundler*, 251 N.C. 177, 188-89, 111 S.E.2d 1, 9 (1959) (death penalty appeal) ("Ordinarily an order or judgment will not be set aside unless it appears that there is merit and that a different result probably will be reached by so doing."); *State v. Ricks*, 378 N.C. 737, 741, 2021-NCSC-116, ¶ 6-7, 862 S.E.2d 835, 838-39 (2021) (holding that certiorari is purely a discretionary writ, a defendant's petition must show merit and prejudice, and a defendant's failure to object to an SBM order at trial prevents him from raising the issue on appeal).

¶ 68 I agree with the State that Defendant has not carried his burden, vote to deny Defendant's PWC and to dismiss his petition. *Grundler*, 251 N.C. at 188-89, 111 S.E.2d at 9; *Ricks*, 378 N.C. at 741, 2021-NCSC-116, ¶ 6-7, 862 S.E.2d at 838-39.

II. Appellate Rule 10

¶ 69 Rule 10 of our Rules of Appellate Procedure clearly requires a defendant to make "a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the [trial] court to make[.]" N.C. R. App. P. 10(a)(1). Our Supreme Court has held: "It is well settled that an error, even one of constitutional magnitude, that [the] defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Bell*, 359 N.C. 1, 28, 603 S.E.2d 93, 112 (2004) (death penalty appeal) (citing *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002), *cert. denied*, 537 U.S. 1117, 154 L.Ed.2d 795 (2003)).

¶ 70 The record clearly shows Defendant failed to make the required objection before the trial court or to assert any constitutional challenge and he has waived appellate review of this issue. *See Ricks*, 378 N.C. at 740, 2021-NCSC-116, ¶ 5, 862 S.E.2d at 838 (holding that certiorari is purely a discretionary writ and citing to N.C. R. App. P. 10(a)(1) in reviewing the imposition of lifetime SBM). "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) (emphasis supplied).

¶ 71 As Chief Justice Frye reminded us in *Dunn v. Pate*: "[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.' " 334 N.C. 115, 118, 431 S.E.2d 178,180 (1993); *see also Dunn v. Pate*, 106 N.C. App. 56, 60, 415 S.E.2d 102, 104 (quoting *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985)). A judge's personal opinion or notion to the contrary is immaterial.

III. Appellate Rule 2

¶ 72 Defendant also requests this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure and exercise its discretion to reach the merits of his argument. N.C. R. App. P. 2. This argument has no merit. "[W]e will not ordinarily consider a constitutional question not raised before the trial court, [and] Defendant cannot prevail on this issue without our invoking Rule 2, because his constitutional argument was waived." *State v. Spinks*, 277 N.C. App. 554, 571, 2021-NCCOA-218, ¶ 51, 860 S.E.2d 306, 320 (2021) (citations and quotations omitted); *see also Ricks*, 378 N.C. at 740, 2021-NCSC-116, ¶ 5, 862 S.E.2d at 838 ("An appellate court, however, may only invoke Rule 2 in exceptional circumstances when "injustice . . . appears manifest to the [c]ourt or when the case presents significant issues of importance in the public interest.") (citations and internal quotation marks omitted). Defendant is "no different from other defendants who failed to preserve their constitutional arguments in the trial court[.]" *State v. Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017).

IV. Appellate Rule 3

¶ 73 Contrary to the plurality opinion's assertions and notion in its footnote concerning our Rules 3 and 4 of Appellate Procedure, our Supreme Court has also held in *Ricks*, which is directly on point and binding upon this Court:

> Further, a party appealing an order rendered in a civil action must fil[e] notice of appeal with the clerk of superior court and serv[e] copies thereof upon all other parties in a timely manner. The Court of Appeals thus does not have jurisdiction to review a trial court's SBM order unless the party seeking review complies with Rule 3(a) by filing a written notice of appeal. Though the Court of Appeals may issue a writ of certiorari to review a trial court's order when the right to prosecute an appeal has been lost by failure to take timely action, the petition must show merit or that error was probably committed below[.] A *writ of certiorari is not intended as a substitute for a notice of appeal because such a practice would render meaningless the rules governing the time and manner of noticing appeals*.

Ricks, 378 N.C. at 740-41, 2021-NCSC-116, ¶ 6, 862 S.E.2d at 838-39 (internal citations and quotations omitted) (emphasis supplied). *See State v. Hawkins*, 286 N.C. App. 427, 433, 2022-NCCOA-744, ¶ 34, 880 S.E.2d 753, 757-58 (2022) (citation omitted).

V. Conclusion

¶ 74 I concur with Judge Murphy in the exercise of our discretion for this Court not to invoke Rule 2 to review Defendant's unpreserved and waived argument, and his assertion of a purported constitutional violation for the first time on appeal. *Ricks*, 378 N.C. at 740, 2021-NCSC-116, ¶ 5, 862 S.E.2d at 838 (citing PWC and proper imposition of Rules of Appellate Procedure 2 and 10(a)(1) in reviewing the imposition of lifetime SBM); *Bell*, 359 N.C. at 28, 603 S.E.2d at 112; *see also* N.C. R. App. P. 2 & 10(a)(1).

¶ 75 While I vote to deny Defendant's frivolous PWC and dismiss, I concur in the result only with Judge Jackson's mandate to affirm the trial court's judgment.

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

¶ 76 As explained in more detail below, I respectfully concur with Judge Jackson in part as to the validity of the indictments, concur in result only in part as to the issuance of a petition for writ of certiorari to review

the 2020 SBM Orders, and dissent in part as to the validity of the 2020 SBM Orders.

¶ 77 An indictment for a sex crime that refers to a victim by her initials is facially valid when (1) a person of common understanding would know the intent of the indictment was to charge the offender with the offense stated in the indictment and (2) the offender's constitutional rights to notice and freedom from double jeopardy are adequately protected. Here, the use of the victim's initials in two sex offense with a child indictments, one first-degree rape indictment, and one incest indictment did not render the indictments fatally defective because a person of common understanding would know the intent of the indictments was to charge Defendant with the offenses as stated in the indictments and Defendant's constitutional rights to notice and freedom from double jeopardy were adequately protected.

¶ 78 A trial court's subject matter jurisdiction to enter a satellite-based monitoring ("SBM") order is statutorily limited. Where a trial court purports to enter additional SBM Orders at a resentencing hearing and the original SBM Orders remain binding, it acts beyond its statutory authority and without jurisdiction, rendering the additional SBM Orders invalid and leaving the original SBM Orders in effect.

BACKGROUND

¶ 79 This appeal includes a lengthy procedural history. We summarized the underlying facts of this case in one of Defendant's earlier appeals as follows:

> In June 1998, [D]efendant [Gregory Aldon Perkins] was hired by "Jane"[1] to perform computer system work for the Town of Albemarle. At that time, Jane was married with two girls, [Katrina] and [Maria]; [D]efendant was also married but had no children. Defendant and Jane separated from their spouses to begin dating each other. They married in June 2001 and subsequently moved from Albemarle to Apex.
>
> [Maria] testified that when she was in the third grade, [D]efendant began to sexually abuse her. Defendant would give [Maria] a back rub before moving his hands beneath her clothes. The sexual abuse included

1. I use pseudonyms for all relevant persons throughout this opinion to protect the identity of the juveniles and for ease of reading.

[D]efendant digitally penetrating her vagina and performing oral sex on her. Defendant also taught [Maria] how to perform oral sex on him. According to [Maria], the abuse occurred as many as four times a week.

In the summer before she began the sixth grade, [D]efendant had vaginal intercourse with [Maria]. Defendant offered [Maria] a "deal" by which she could receive things such as new clothes, no curfew restrictions, or spending more time with friends if she cooperated with his requests for sex. When [Maria] was in the ninth grade, [D]efendant convinced Jane to let [Maria] start taking birth control. [Maria] reiterated that [D]efendant would typically abuse her about four times a week.

In 2008, [D]efendant announced that he was unhappy with his marriage to Jane and wanted to move out of the house. Defendant's last sexual encounter with [Maria] occurred sometime between Christmas 2008 and January 2009 when he moved out.

In October 2009, [Maria] became upset while looking at pictures of accused sexual offenders in a newspaper and told her boyfriend that [D]efendant had sexually abused her. [Maria] then told her sister, [Katrina], and her mother, Jane, that [D]efendant had abused her "for a long time." Jane called the Apex Police Department.

The Apex Police interviewed [Maria], [Katrina], Jane, and [Maria's] boyfriend. They also interviewed two childhood friends of [Maria] who, years before, had been told by [Maria] that she was being sexually abused by [D]efendant. Mental health counselors determined that [Maria] was depressed and exhibited symptoms of post-traumatic stress disorder associated with long-term child sexual abuse. When interviewed by the Apex Police, [D]efendant denied [Maria's] allegations and stated that [Maria] created the allegations against him because she did not want [D]efendant to reconcile with Jane.

State v. Perkins, COA13-1352, 235 N.C. App. 425, 763 S.E.2d 928, 2014 WL 3824261, at *2 (2014) (unpublished) ("*Perkins I*"), *disc. rev. denied*, (further citation omitted) (2015).[2] On 5 January 2010, Defendant was indicted, *inter alia*, for two counts of first-degree sexual offense with a child (one count by digital vaginal penetration and one count by cunnilingus), one count of indecent liberties with a child, one count of first-degree rape of a child, and one count of incest.

¶ 80 Defendant's first trial began in November 2010. On 29 November 2010, a mistrial was declared after the jury failed to reach a unanimous verdict. Defendant was retried on 19 September 2011. The jury found Defendant guilty of one count of taking indecent liberties with a child but was unable to reach unanimous verdicts on the other charges. As a result, the trial court declared a mistrial for the remaining charges and sentenced Defendant on the one indecent liberties conviction. Defendant received, as a Prior Record Level I offender, an active sentence of 16 to 20 months.

¶ 81 Defendant did not timely appeal the indecent liberties conviction. As the only remaining avenue to appellate review, Defendant filed a *Petition for Writ of Certiorari* with this Court for the purpose of reviewing the judgment entered upon his indecent liberties conviction. We allowed his petition and found no error. *State v. Perkins*, COA15-5, 243 N.C. App. 208, 778 S.E.2d 475, 2015 WL 5123912 (2015) (unpublished) ("*Perkins II*"), *disc. rev. denied*, *appeal dismissed*, (further citation omitted) (2015).

¶ 82 In 2012, Defendant was retried for the remaining charges: two counts of first-degree sexual offense with a child, one count of first-degree rape, and one count of incest. On 4 December 2012, the jury found Defendant guilty on these charges. During sentencing, Defense Counsel stipulated to Defendant being sentenced as a Prior Record Level II offender, with his indecent liberties conviction from the second trial listed on the prior record level worksheet as his only prior conviction. Defendant received three consecutive active sentences of 276 to 341 months for the two

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2. To further protect the minor and consistent with our evolving practices regarding protection of innocent persons, I exercise my discretion to prevent the unnecessary inclusion of potentially identifying information regarding the victim in this case and her family. I note that this exercise of discretion, an inherent authority of our Court, is consistent with changes in the protection of victims' rights as reflected in Article I, § 37 (titled Rights of Victims of Crime) of our State's Constitution (commonly known as Marsy's Law), as enabled by N.C. Session Law 2019-216, and is in furtherance of the procedures adopted by our Supreme Court's 2019 amendments to Rule 42 of the North Carolina Rules of Appellate Procedure. N.C. Const. art. I, § 37; *see* 2019 S.L. 216; N.C. R. App. P. 42 (2019).

first-degree sexual offense with a child convictions and the first-degree rape conviction. Defendant further received a consecutive sentence of 19 to 23 months for the incest conviction. Defendant was also ordered to register as a sex offender for his natural life and to enroll in SBM for his natural life upon his release from imprisonment.

¶ 83 Defendant timely appealed the judgments from his third trial, arguing the trial court erred (1) "in ruling that Defendant's prior [indecent liberties with a child] conviction was admissible"; (2) "in using Defendant's prior [indecent liberties with a child conviction] to calculate his prior record level"; and (3) "by failing to intervene *ex mero motu* during the prosecutor's arguments during sentencing." *Perkins I*. We found no error. *Id*.

¶ 84 On 30 December 2016, Defendant filed a motion for appropriate relief ("MAR"), arguing he received ineffective assistance of counsel at his third trial when Defense Counsel stipulated to sentencing Defendant as a Prior Record Level II offender. Defendant further argued he should be resentenced on the two first-degree sexual offense with a child convictions, the first-degree rape conviction, and the incest conviction as a Prior Record Level I offender. The trial court denied Defendant's MAR.

¶ 85 Defendant subsequently filed a *Petition for Writ of Certiorari* with this Court seeking review of the trial court's order denying his MAR. We allowed the petition, vacated the trial court's order denying the MAR, and remanded the case for reconsideration in light of our holdings in *State v. West*, 180 N.C. App. 664, 638 S.E.2d 508 (2006), *disc. rev. denied*, *appeal dismissed*, 361 N.C. 368, 644 S.E.2d 562 (2007), and *State v. Watlington*, 234 N.C. App. 601, 759 S.E.2d 392, *disc. rev. denied*, 367 N.C. 791, 766 S.E.2d 644 (2014). On remand, the trial court "[found] the stipulation to be erroneous" but did "not find that the stipulation by trial counsel [rose] to the level of ineffective assistance of counsel[.]" As a result, the trial court ordered a new sentencing hearing.

¶ 86 On 19 February 2020, Defendant was resentenced as a Prior Record Level I offender for the two first-degree sexual offense with a child convictions, the first-degree rape conviction, and the incest conviction. Pursuant to the trial court's judgments dated 19 February 2020, Defendant received three consecutive active sentences of 240 to 297 months each for the two first-degree sexual offense with a child convictions and the first-degree rape conviction. Defendant further received a consecutive sentence of 16 to 23 months for the incest conviction. The trial court further ordered that, "upon release from imprisonment, [Defendant] shall enroll in [SBM] for his[] natural life[.]"

¶ 87 On 2 March 2020, Defendant timely filed a written *Notice of Appeal*. On 14 December 2020, Defendant filed a *Petition for Writ of Certiorari*, seeking our review of the order requiring him to enroll in lifetime SBM in the event we conclude his written *Notice of Appeal* failed to comply with Rule 3 of our Rules of Appellate Procedure for appeal in a civil matter. In my discretion, I join Judge Jackson in allowing Defendant's *Petition for Writ of Certiorari* to review the 2020 SBM Orders.

ANALYSIS

¶ 88 On appeal, Defendant (A) challenges the facial validity of the indictments charging him with first-degree sexual offense with a child, first-degree rape, and incest; (B) argues the trial court erred by imposing lifetime SBM because the findings do not support it; and (C) argues the trial court erred by imposing lifetime SBM because the trial court did not hold a hearing to determine if lifetime SBM was a reasonable Fourth Amendment search. After we allowed Defendant's motion for supplemental briefing on 24 May 2021, Defendant filed a supplemental brief arguing, alternatively, he "received statutory ineffective assistance of counsel when his resentencing lawyer failed to object to the imposition of lifetime [SBM]."

A. Sufficiency of the Indictments

¶ 89 First, Defendant argues that, because the sex offense with a child indictments, first-degree rape indictment, and incest indictment referenced the victim only by her initials and not her full name, they were facially defective and the defect rendered the trial court without subject matter jurisdiction to enter judgment on these convictions against Defendant. "[W]e review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409, *disc. rev. denied*, *appeal dismissed*, 363 N.C. 586, 683 S.E.2d 215 (2009).

¶ 90 Defendant failed to object to the sufficiency of the indictments at trial and raises this argument for the first time on appeal. Despite this, the issue is preserved because "[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*." *State v. Harwood*, 243 N.C. App. 425, 427-28, 777 S.E.2d 116, 118 (2015). Since indictments confer subject matter jurisdiction on the trial court, Defendant's argument may be raised for the first time on appeal. *See State v. Rogers*, 256 N.C. App. 328, 337, 808 S.E.2d 156, 162 (2017) ("In criminal cases, a valid indictment gives the trial court its subject matter jurisdiction over the case.").

¶ 91 Generally, "[a] criminal pleading, such as an [indictment], is fatally defective if it 'fails to state some essential and necessary element of the

offense of which the defendant is found guilty.' " *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (quoting *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943)).

> [I]t is not the function of an indictment 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.

State v. Sturdivant, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981).

¶ 92 We previously determined the use of initials to identify a victim is sufficient for a second-degree rape and second-degree sexual offense indictment. *See McKoy*, 196 N.C. App. at 654, 675 S.E.2d at 410. Defendant argues *McKoy* is no longer binding after our Supreme Court's opinion in *State v. White*, 372 N.C. 248, 827 S.E.2d 80 (2019). Defendant asks us to extend the holding of *White* as "the logic of *White* undercuts the continued viability of *McKoy*."

¶ 93 We recently addressed this same argument in *State v. Sechrest* and held:

> Nowhere in *White* does our Supreme Court explicitly or implicitly overrule our decision in *McKoy*. Additionally, *White* does not address the issue of naming a victim solely by their initials since the indictment there referenced the victim as "Victim #1." *McKoy* remains our binding precedent and "the use of initials to identify a victim requires us to employ the *Coker* and *Lowe* tests to determine if the indictment was sufficient to impart subject matter jurisdiction."

State v. Sechrest, 277 N.C. App. 372, 2021-NCCOA-204, ¶ 11 (quoting *McKoy*, 196 N.C. App. at 658, 675 S.E.2d at 412) (marks omitted).

1. *Coker*

¶ 94 In order to determine if the lack of the victim's full name renders an indictment fatally defective, *Coker* requires us to inquire whether a person of common understanding would know the intent of the indictments was to charge Defendant with the offense. *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984).

a. First-Degree Sexual Offenses

¶ 95 Defendant was indicted for two counts of first-degree sexual offense with a child: one count by digital vaginal penetration and one count by cunnilingus. Defendant's indictment for first-degree sexual offense with a child by digital vaginal penetration alleges:

> The Grand Jurors for the State upon their oath present that between [1 November 2002] and [30 November 2002], in Wake County, [Defendant] unlawfully, willfully and feloniously did engage in a sex offense with [MXX (DOB: XX/XX/19XX)[3]], a child under the age of 13 years, to wit: digital-vaginal penetration. At the time of the offense, [Defendant] was at least 12 years old and at least 4 years older than [MXX]. This act was done in violation of N.C.G.S. § 14-27.4(a)(1).

Similarly, Defendant's indictment for first-degree sexual offense with a child by cunnilingus alleges:

> The Grand Jurors for the State upon their oath present that between [1 April 2003] and [31 May 2003], in Wake County, [Defendant] unlawfully, willfully and feloniously did engage in a sex offense, to wit: cunnilingus, with [MXX DOB: XX/XX/19XX)], a child under the age of 13 years. At the time of the offense, [Defendant] was at least 12 years old and at least 4 years older than [MXX][.] This act was done in violation of N.C.G.S. § 14-27.4(a)(1).

¶ 96 At the time of the offenses, N.C.G.S. § 14-27.4(a)(1) provided:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

N.C.G.S. § 14-27.4(a)(1) (2002).[4] Both indictments tracked the statutory language of N.C.G.S. § 14-27.4. *Id.* While the statute defining a sexual

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3. The juvenile's date of birth is redacted throughout this opinion to protect her identity.

4. N.C.G.S. § 14-27.4(a)(1) was recodified as N.C.G.S. § 14-27.26, effective 1 December 2015. As the dates of these offenses were from 1 November 2002 to 30 November 2002 and

offense in the first degree requires the offense to be with "a child under the age of 13 years[,]" *id.*, "the indictment charging this offense 'does not need to state the victim's full name, nor does it need to add periods after each letter in initials in order to accomplish the common sense understanding that initials represent a person.' " *Sechrest*, 2021-NCCOA-204 at ¶ 13 (quoting *McKoy*, 196 N.C. App. at 654, 675 S.E.2d at 410) (marks omitted). A person of common understanding would know the intent of the indictments was to charge Defendant with first-degree sexual offense with a child. The *Coker* prong of *McKoy* is satisfied for these indictments.

b. First-Degree Rape

¶ 97 Defendant's indictment for first-degree rape alleges:

> The Grand Jurors for the State upon their oath present that from [1 June 2004] through [30 June 2004], in Wake County, [Defendant] unlawfully, willfully and feloniously did engage in vaginal intercourse with [MXX (DOB: XX/XX/19XX)], a child under the age of 13 years. At the time of the offense, [Defendant] was at least 12 years old and at least 4 years older than [MXX]. This was done in violation of [N.C.G.S.] § 14-27.2[(a)].

¶ 98 At the time of the offense, N.C.G.S. § 14-27.2(a) provided:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

¶ 99 N.C.G.S. § 14-27.2(a)(1) (2004).[5] The indictment tracked the statutory language of N.C.G.S. § 14-27.2. *Id.* While the statute defining rape in the first degree requires the offense to be with "a child under the age of 13 years[,]" *id.*, "the indictment charging this offense 'does not need to state the victim's full name, nor does it need to add periods after each

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1 April 2003 to 31 May 2003, I use the then-existing version of the statute, N.C.G.S. § 14-27.4(a)(1), which was effective from 1 October 1994 until 30 November 2015.

5. N.C.G.S. § 14-27.2 was recodified as N.C.G.S. § 14-27.21, effective 1 December 2015. As the dates of the offense were between 1 June 2004 to 30 June 2004, I use the then-existing version of the statute, N.C.G.S. § 14-27.2, which was effective until 30 November 2015.

letter in initials in order to accomplish the common sense understanding that initials represent a person.' " *Sechrest*, 2021-NCCOA-204 at ¶ 13 (quoting *McKoy*, 196 N.C. App. at 654, 675 S.E.2d at 410). A person of common understanding would know the intent of the indictment was to charge Defendant with first-degree rape. The *Coker* prong of *McKoy* is satisfied for this indictment as well.

c. Incest

¶ 100 Defendant's indictment for incest alleges:

> The Grand Jurors for the State upon their oath present that on or about [1 December 2008] through [31 December 2008], in Wake County, [Defendant] unlawfully, willfully and feloniously did have carnal intercourse with [MXX (DOB: XX/XX/19XX)], who is [Defendant's] stepchild and [Defendant] was aware that he was [MXX's] stepfather. This was done in violation of N.C.G.S. § 14-178.

¶ 101 N.C.G.S. § 14-178 provides, *inter alia*:

> (a) Offense. – A person commits the offense of incest if the person engages in carnal intercourse with the person's . . . parent or child or stepchild or legally adopted child . . . .

N.C.G.S. § 14-178 (2019).[6] The indictment tracked the statutory language of N.C.G.S. § 14-178. *Id.* While the statute defining incest requires the offense to be with "a parent or child or stepchild or legally adopted child[,]" *id.*, I see no reason to differentiate the use of initials here from those in other sex offenses[7] where "the indictment charging this offense 'does not need to state the victim's full name, nor does it need to add periods after each letter in initials in order to accomplish the common sense understanding that initials represent a person.' " *Sechrest*, 2021-NCCOA-204 at ¶ 13 (quoting *McKoy*, 196 N.C. App. at 654, 675 S.E.2d at 410). A person of common understanding would know the intent of the indictment was to charge Defendant with incest. The *Coker* prong of *McKoy* is satisfied for this indictment.

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6. The language of N.C.G.S. § 14-178 has remained the same since 1 December 2002. As the dates of this offense were between 1 December 2008 to 31 December 2008, I use the now-existing version of N.C.G.S. § 14-178.

7. I note that this reference to incest as a "sex offense" is merely to address Defendant's only argument on appeal regarding jurisdiction and assume, without deciding, that incest is a "sex offense" subject to the requirements of N.C.G.S. § 15-144.2(b).

¶ 102 Defendant's indictments for first-degree sexual offenses with a child, first-degree rape, and incest tracked the statutory language of the applicable statutes and a person of common understanding would know the intent of each indictment. Each of Defendant's indictments satisfies the *Coker* prong of the *McKoy* analysis.

2. *Lowe*

¶ 103 In order to determine if the lack of the victim's full name renders the indictments fatally defective, *Lowe* requires us to inquire whether Defendant's constitutional rights to notice and freedom from double jeopardy were adequately protected by the use of the victim's initials. *See State v. Lowe*, 295 N.C. 596, 603, 247 S.E.2d 878, 883 (1978).

¶ 104 The Record demonstrates Defendant had notice of the identity of the victim. The indictments alleged the victim is Defendant's stepchild and Defendant was aware that he was the victim's stepfather. The indictments also contained the victim's date of birth, a unique piece of information that enabled Defendant to distinguish between the named victim and all other people in conjunction with the victim's initials. Further, Defendant makes no argument on appeal he had difficulty preparing his case because of the use of "[MXX]" instead of the victim's full name. *See McKoy*, 196 N.C. App. at 657-58, 675 S.E.2d at 412; *Sechrest*, 2021-NCCOA-204 at ¶ 14. In addition, the victim testified at Defendant's third trial and identified herself by her full name in open court. *See McKoy*, 196 N.C. App. at 658, 675 S.E.2d at 412; *Sechrest*, 2021-NCCOA-204 at ¶ 14. There is no possibility that Defendant was confused regarding the identity of the victim. The use of "[MXX]," together with the date of birth, in the indictments provided Defendant with sufficient notice to prepare his defense and protect himself against future prosecutions for the same crimes.

3. Conclusion

¶ 105 The indictments charging Defendant with first-degree sexual offenses with a child, first-degree rape, and incest are sufficient to meet the analysis emphasized by *McKoy* as outlined in *Coker* and *Lowe*. The use of the victim's initials and her date of birth in the indictments did not render them fatally defective, and the trial court had subject matter jurisdiction over these charges.

B. 2020 SBM Orders

¶ 106 Next, Defendant challenges the 2020 SBM Orders. Defendant filed a *Petition for Writ of Certiorari* seeking our review of the merits of his SBM arguments. Defendant argues the trial court erred by finding he is a recidivist and by finding that incest is an aggravated offense. He further

contends that if he is not a recidivist and incest is not an aggravated offense, then it was a violation of N.C.G.S. § 14-208.40A(c) for the trial court to order lifetime enrollment in SBM.

¶ 107 Defendant also argues the trial court erred in imposing lifetime SBM because the State failed to meet its burden of proving that the imposition of lifetime SBM amounted to a reasonable search under the Fourth Amendment and lifetime SBM was ordered without any argument or evidence regarding the reasonableness of the Fourth Amendment search effected by SBM.

¶ 108 Finally, on 24 May 2021, we allowed Defendant's motion for leave to file a supplemental brief based on our decision in *Spinks*, where we held an indigent defendant has a statutory right to effective assistance of counsel in an SBM hearing. *State v. Spinks*, 277 N.C. App. 554, 2021-NCCOA-218, ¶ 60. In his supplemental brief, Defendant argues his attorney's failure to object to the imposition of lifetime SBM rises to the level of ineffective assistance of counsel, which deprived Defendant of a fair hearing because the State did not put forth any evidence in support of the 2020 SBM Orders and no hearing was held.

¶ 109 Defendant filed a *Petition for Writ of Certiorari* requesting our review of the 2020 SBM Orders, which I join Judge Jackson in exercising our discretion to allow, albeit for a separate reason. However, because I conclude that the trial court lacked subject matter jurisdiction to enter the 2020 SBM Orders, I would vacate them, rendering Defendant's arguments concerning the 2020 SBM Orders moot and leaving the 2012 SBM Orders in effect.

¶ 110 Although no party raises the issue on appeal, my review of the Record leads me to conclude that the trial court lacked jurisdiction to enter the 2020 SBM Orders. As a result, I would vacate the 2020 SBM Orders and need not address Defendant's substantive challenges to the 2020 SBM Orders.

¶ 111 "It is well-established that the 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*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008). "The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent." *State v. Williams*, 368 N.C. 620, 628, 781 S.E.2d 268, 274 (2016) (marks and citation omitted). "[W]hether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal de novo." *State v. Black*, 197 N.C. App. 373, 377, 677 S.E.2d 199, 202 (2009). We have stated that

> jurisdiction is the legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it. The court must have subject matter jurisdiction, or jurisdiction over the nature of the case and the type of relief sought, in order to decide a case. A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity. The General Assembly within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State. Where jurisdiction is statutory and the [General Assembly] requires the [c]ourt to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the [c]ourt to certain limitations, an act of the [c]ourt beyond these limits is in excess of its jurisdiction.

State v. Clayton, 206 N.C. App. 300, 303-04, 697 S.E.2d 428, 431 (2010) (marks and citations omitted).

¶ 112 In *State v. Clayton*, we held that a trial court lacked jurisdiction to enroll a defendant in SBM where the trial court had previously held an SBM hearing and determined that the defendant was not required to enroll in SBM. *Id.* at 305, 697 S.E.2d at 432. There, the defendant was convicted of two counts of indecent liberties and was placed on probation. *Id.* at 301, 697 S.E.2d at 430. Following these convictions, the trial court determined that the defendant was not required to enroll in SBM. *Id.* At a subsequent probation violation hearing, the trial court reconsidered SBM and ordered that the defendant enroll in SBM for 10 years. *Id.* at 301-02, 697 S.E.2d at 430. The defendant appealed from the second SBM order only. *Id.* at 305, 697 S.E.2d at 432. In light of the SBM procedures set forth in N.C.G.S. § 14-208.40A and N.C.G.S. § 14-208.40B, we held that "[t]he trial court did not have any basis to conduct another SBM hearing, where it had already held an SBM hearing based upon the same reportable convictions . . . ." *Id.* We concluded that "the trial court did not have jurisdiction to conduct the [later] SBM hearing or to order [the] defendant to enroll in SBM for a period of 10 years. The SBM statutes do not provide for reassessment of [the] defendant's SBM eligibility based on the same reportable conviction, after the initial SBM determination is made based on that conviction." *Id.* at 305-06, 697 S.E.2d at 432 (marks and citation omitted). We then "vacate[d] the trial court's order enrolling [the] defendant in SBM for a period of 10 years" and determined that we did not "need [to] address [the] defendant's remaining arguments

challenging the trial court's enrollment of [the] defendant in SBM." *Id.* at 306, 697 S.E.2d at 433.

¶ 113 We have applied *Clayton* in a similar factual scenario to the one *sub judice* in our prior unpublished decision *State v. Streater*, COA 10-740, 209 N.C. App. 756, 710 S.E.2d 707, 2011 WL 705168 (2011) (unpublished) ("*Streater II*"). In *Streater II*, the defendant was resentenced in 2010 for a 2008 conviction of first-degree rape after we remanded the 2008 sentence for a new sentencing hearing in an earlier appeal ("*Streater I*"). *Id.* at *1; *see also State v. Streater*, 197 N.C. App. 632, 634, 678 S.E.2d 367, 370, *disc. rev. denied*, 363 N.C. 661, 687 S.E.2d 293 (2009). The 2008 conviction had resulted in the entry of an SBM order. *Streater II* at *1 n.2. In *Streater I*, the defendant did not challenge the 2008 SBM order and we did not rule on it. *Id.*; *see also Streater I*, 197 N.C. App. 632, 678 S.E.2d 367. Nonetheless, the trial court entered a new SBM order at the 2010 resentencing. *Streater II* at *1. On appeal from the 2010 resentencing, we held that there was no indication that the 2008 SBM order was no longer in effect, and, relying on *Clayton*, concluded that "the trial court was without jurisdiction to again direct [the] [d]efendant to register and enroll in the SBM program." *Id.* at *3. Ultimately, we vacated the trial court's 2010 SBM order and held the 2008 SBM order was still in effect, as the 2008 order "remain[ed] unchallenged and unreversed such that the trial court was without jurisdiction to again require [the] [d]efendant to register as a sex offender and enroll in SBM in 2010." *Id.* at *5. Although *Streater II* is unpublished, I find then-Judge, now-former Chief Justice, Beasley's reasoning persuasive and adopt the case here.

¶ 114 Like the trial court in *Streater II* and *Clayton*, here, the trial court lacked jurisdiction to enter the 2020 SBM Orders. In his second trial, Defendant was convicted of one count of indecent liberties with a child on 29 September 2011, while a mistrial was declared for the remaining charges. At a subsequent hearing, after receiving a risk assessment for Defendant, the trial court ultimately concluded that Defendant "[did] not require the highest possible level of supervision and monitoring and shall not [enroll] in [SBM]" for this conviction. In 2012, following his third trial, Defendant was convicted of two counts of first-degree sexual offense with a child under the age of thirteen, one count of first-degree rape with a child under the age of thirteen, and one count of incest. Immediately after trial, the trial court entered orders requiring Defendant "[to] enroll in [SBM] for his[] natural life, unless monitoring is terminated pursuant to [N.C.G.S. §] 14-208.43" for each conviction. Although Defendant appealed from his second and third trials, he did not raise any issues related to SBM, and we found no error in each appeal. *See Perkins I*; *Perkins II*.

¶ 115 Additionally, although Defendant filed an MAR in 2016, he only contended that he received ineffective assistance of counsel due to his trial attorney in the third trial erroneously stipulating to a Prior Record Level II. Nowhere in his MAR did he challenge the 2012 SBM Orders. The trial court initially denied this MAR, but we allowed Defendant's petition for writ of certiorari for the limited purpose of vacating the trial court's order that denied the MAR and remanding for reconsideration of the MAR in light of two cases. On remand, the trial court granted a new sentencing hearing, like we did in *Streater I*, stating:

> [T]he [c]ourt finds the [MAR] to have merit in regard to [] Defendant's prior record level for felony sentencing. While the [c]ourt does not find that the stipulation by trial counsel rises to the level of ineffective assistance of counsel, the [c]ourt does find the stipulation to be erroneous and, therefore, [] *Defendant's motion for a new sentencing hearing is GRANTED*.

(Emphasis added). Following the trial court's resentencing hearing in 2020, the trial court entered an order that indicated "Defendant's [MAR] is granted in part in regard to [] Defendant's prior record level for felony sentencing. Thus, the *sentence* imposed by the Honorable Judge Gessner on 12/04/2012 is vacated and [] Defendant is resentenced." (Emphasis added). The trial court then entered new judgments along with new SBM and sex offender registration orders; however, the 2020 SBM Orders were entered without jurisdiction.

¶ 116 The trial court's MAR order remanded for a new sentencing hearing, and, following the new sentencing hearing, the trial court vacated Defendant's *sentence* from the convictions at the third trial. I note that Defendant did not challenge the 2012 SBM Orders from the third trial in his prior appeal or his MAR, and the trial court did not address the 2012 SBM Orders in any of its orders. As SBM is not a criminal sentence resulting from criminal judgment, but is instead a "civil, regulatory scheme," I conclude the trial court did not vacate the 2012 SBM Orders by vacating Defendant's sentence. *See State v. Grady*, 372 N.C. 509, 543, 831 S.E.2d 542, 567 (2019) (acknowledging that "the SBM program is not a form of criminal punishment, but rather a 'civil, regulatory scheme' "); *State v. Singleton*, 201 N.C. App. 620, 625, 689 S.E.2d 562, 565 (2010) ("[T]he SBM determination hearing has no effect whatsoever upon the defendant's prior criminal convictions or sentencing and is not a part of any 'criminal proceedings' or 'criminal prosecution' of the defendant."); N.C.G.S. § 14-208.42 (2012) (emphasis added) ("[W]hen an offender is required to enroll in [SBM] pursuant to [N.C.G.S. §] 14-208.40A or [N.C.G.S.

§] 14-208.40B, *upon completion of the offender's sentence* and any term of parole, post-release supervision, intermediate punishment, or supervised probation that follows the sentence, the offender shall continue to be enrolled in the [SBM] program for the period required by [N.C.G.S. §] 14-208.40A or [N.C.G.S. §] 14-208.40B unless the requirement that the person enroll in a[n] [SBM] program is terminated pursuant to [N.C.G.S. §] 14-208.43."); *see generally Streater II*.

¶ 117 I have found nothing in the Record indicating the trial court vacated the 2012 SBM Orders, and there is nothing to suggest either party presented any arguments to the trial court related to the validity of the 2012 SBM Orders. In fact, Defendant's attorney at the resentencing hearing appears to have expected the 2012 SBM Orders to remain in effect following Defendant's resentencing:

> If [Defendant] were to be released after serving the maximum on [the Defendant's requested sentence], he would be over 60 years old. He would still have to undergo five years of intensive post-release supervision as well as be *subject to lifetime [SBM] and sex offender registration that this [c]ourt has already ordered* for all of the rest of his natural life.

(Emphasis added). Since the 2012 SBM Orders were still in effect at the time of Defendant's resentencing, like in *Streater II*, I conclude the trial court's purported SBM orders entered at the resentencing hearing were entered without jurisdiction. As stated in *Clayton*, "[t]he 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." *Clayton*, 206 N.C. App. at 305-06, 697 S.E.2d at 432. This is true of both the current SBM statutes and those in place at the time of Defendant's 2012 sentencing. *See generally* N.C.G.S. § 14-208.40A (2012); N.C.G.S. § 14-208.40B (2012); N.C.G.S. § 14-208.40A (2020); N.C.G.S. § 14-208.40B (2020).

¶ 118 Mirroring our conclusions in *Clayton* and *Streater II*, I conclude that the trial court acted beyond its statutory authority and, thus, without jurisdiction when it entered its additional 2020 SBM Orders at the resentencing hearing because the 2012 SBM Orders remained in effect. As a result, I would vacate the trial court's 2020 SBM Orders and emphasize that Defendant is still required to comply with the 2012 SBM Orders.

¶ 119 Determining the 2020 SBM Orders should be vacated, Defendant's challenges on appeal based upon the entry of the 2020 SBM Orders and the ineffective assistance of counsel regarding the 2020 SBM

Orders are moot, and I would dismiss this portion of Defendant's appeal. Furthermore, in my discretion, I decline to invoke Rule 2 or treat Defendant's appeal as a petition for writ of certiorari to review Defendant's 2012 SBM Orders.

CONCLUSION

¶ 120 The use of the victim's initials in all four indictments did not render the indictments fatally defective. The trial court had subject matter jurisdiction over the charges of first-degree sexual offense with a child by digital vaginal penetration, first-degree sexual offense with a child by cunnilingus, first-degree rape, and incest.

¶ 121 The trial court acted without jurisdiction when it purported to enter the new 2020 SBM Orders following the resentencing hearing, as the 2012 SBM Orders still were, and are, in effect. As a result, I would vacate the trial court's 2020 SBM Orders and dismiss the portion of Defendant's appeal substantively challenging the 2020 SBM Orders and the efficacy of his counsel in relation to the 2020 SBM Orders.

¶ 122 As a result, I respectfully concur with Judge Jackson in part as to the validity of the indictments, concur in result only in part as to the issuance of a petition for writ of certiorari to review the 2020 SBM Orders, and dissent in part as to the validity of the 2020 SBM Orders.

CANTEEN v. CHARLOTTE METRO CREDIT UNION

[286 N.C. App. 539, 2022-NCCOA-779]

LATOYA CANTEEN AND PAMELA PHILLIPS, PLAINTIFF-APPELLEES
v.
CHARLOTTE METRO CREDIT UNION, DEFENDANT-APPELLANT

No. COA22-59

Filed 6 December 2022

Arbitration and Mediation—checking account agreement—amended—notice via email—choice of law and forum

In a class action against a bank in connection with the alleged charging of unauthorized overdraft fees, the trial court erred by denying the bank's motion to stay and compel arbitration where the agreement that plaintiff signed upon opening her checking account provided that the bank reserved the right to change the terms of the agreement and contemporaneously notify customers of any such change (and could do so electronically). When the bank later sent plaintiff an email (monthly, for three consecutive months) containing her account statement and hyperlinks to web pages showing amendments to her agreement that would now require arbitration unless she opted out (which she did not), such changes to the forum selection procedure were authorized by the original agreement and did not constitute an addition of entirely new terms, and the bank's notification via email was sufficient.

Judge ARROWOOD dissenting.

Appeal by Defendant-Appellant from Order entered 28 July 2021 by Judge George C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 October 2022.

Cohen & Malad, LLP, by Vess A. Miller, pro hac vice, and Van Kampen Law, PC, by Josh Van Kampen, for Plaintiff-Appellee.

Cranfill Sumner, LLP, by Mica N. Worthy, Steven A. Bader, & Ryan D. Bolick, for Defendant-Appellant.

DILLON, Judge.

¶ 1 Plaintiff Pamela Phillips was a deposit customer of Defendant Charlotte Metro Credit Union ("CMCU"). Plaintiff commenced this action alleging that CMCU charged her numerous overdraft and

non-sufficient funds fees that were not authorized by the deposit agreement (the "Agreement"). Defendant appeals an interlocutory order denying its motion to compel arbitration. We reverse and remand.

I. Background

¶ 2 In 2014, Plaintiff opened a checking account with CMCU, signing the Agreement. This Agreement provided that CMCU reserved the right to "change the terms of [the] agreement" and contemporaneously notify customers of any such modification.

¶ 3 From 2018 to 2020, CMCU allegedly charged Plaintiff fees not authorized by the Agreement.

¶ 4 In 2021, CMCU amended the Agreement to include provisions requiring any dispute thereunder to be decided through arbitration and waiving class actions (the "Amendment").

¶ 5 In March 2021, Plaintiff commenced this class action against CMCU seeking monetary damages, restitution, and declaratory relief in connection with CMCU's unauthorized overdraft fees. CMCU answered with a motion to stay and to compel arbitration, claiming that Plaintiff was bound by the terms of the Amendment.

¶ 6 The trial court entered an order denying CMCU's motion. CMCU timely appealed.

II. Appellate Jurisdiction

¶ 7 This appeal is from an interlocutory order. Interlocutory orders are generally not immediately appealable; however, an interlocutory order which affects a substantial right is immediately appealable. N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a) (2021). Our Court has held that an order *denying* arbitration affects a substantial right and is, therefore, immediately appealable. *Gay v. Saber Healthcare Grp., L.L.C.*, 271 N.C. App. 1, 5, 842 S.E.2d 635, 638 (2020). Therefore, we have appellate jurisdiction.

III. Analysis

¶ 8 Public policy favors settling disputes by means of arbitration. *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984). *See also* N.C. Gen. Stat. § 1-569.3 (2020). "However, before a dispute can be settled [by arbitration], there must first exist a valid agreement to arbitrate." *Routh v. Snap-On Corp.*, 108 N.C. App. 268, 271, 423 S.E.2d 791, 794 (1992). In determining whether a valid agreement to arbitrate exists, we are bound by the principles of general contract law. *Southern Spindle v. Milliken & Co.*, 53 N.C. App. 785, 786, 281 S.E.2d 734, 735 (1981). There is no presumption favoring

arbitration when addressing this threshold issue. *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 362, 826 S.E.2d 567, 576 (2019).

¶ 9 The Agreement executed by Plaintiff in 2014 contained a provision which provided the choice of law and procedure, including the appropriate forum, to resolve any disputes thereunder:

> **GOVERNING LAW** – This Agreement is governed by . . . the laws . . . and regulations of the state in which the credit union's main office is located . . . . As permitted by applicable law, you agree that any legal action regarding this Agreement shall be brought in the county in which the credit union is located.

This signed Agreement also contained a provision allowing CMCU to change the terms of the Agreement by notifying Plaintiff of any such change:

> **Notice of Amendments.** Except as prohibited by applicable law, we may change the terms of this Agreement. We will notify you, in a manner we deem appropriate under the circumstances, of any changes in terms, rates or fees as required by law. We reserve the right to waive any terms of this Agreement. Any such waiver shall not affect our right to future enforcement.

The Agreement further provided that CMCU could provide said notice electronically.

¶ 10 Plaintiff assented to these provisions when she executed the Agreement in 2014.

¶ 11 For three consecutive months in 2021, CMCU emailed Plaintiff her statement along with a notice of "Changes to the Membership and Account Agreements." The email contained hyperlinks entitled "Information about Arbitration", "Arbitration and Class Action Waiver" and "Membership and Account Agreement Change in Terms", all under the heading "Additional Forms and Notices." The email message itself was short, with the hyperlinks following a message regarding Plaintiff's monthly account statement.

¶ 12 Plaintiff states that she never noticed these emails. In any event, the "Arbitration and Class Action Waiver" hyperlink led to a 2-page document which contained a provision amending the Agreement to require arbitration and a provision allowing Plaintiff a means to opt-out of the new arbitration provision.

¶ 13 Plaintiff did not notify CMCU that she was opting out of the arbitration provision and, otherwise, continued to use her checking account.

¶ 14 These above facts are undisputed.

¶ 15 We conclude that these facts show the existence of a binding arbitration agreement. The arbitration provision was a change to the forum selection procedure contained in the original Agreement. Plaintiff agreed to be notified by email of any such change. Plaintiff, in fact, was notified on three different occasions. And Plaintiff assented to the amendment by her failure to opt-out and her continued use of her checking account. Her failure to read the provisions is no excuse. *See*, *e.g.*, *Davis v. Davis*, 256 N.C. 468, 472, 124 S.E.2d 130, 133 (1962) (holding that a party who assents to the terms of an agreement is not excused by failure to read the terms).

¶ 16 Plaintiff argues, and the trial court held, CMCU's contractual right to change the terms of the Agreement did not authorize CMCU to add provisions addressing an entirely new subject, such as arbitration. The trial court held that such addition was not contemplated and, otherwise, that CMCU was violating the covenant of good faith and fair dealing implied in every contract by adding a provision that was not in "the universe of terms included in its original [A]greement", citing *Sears Roebuck & Co. v. Avery*, 163 N.C. App. 207, 221, 593 S.E.2d 424, 434 (2004). Indeed, we held in *Sears* that no valid arbitration agreement existed based on a unilateral amendment because the original contract "made no reference to arbitration or any other dispute resolution procedures and did not in any manner address the forum in which a customer could have disputes resolved." *Id.* at 208, 593 S.E.2d at 426 (applying Arizona law). Other courts have similarly held. *See Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 79 Cal. Rptr. 2d 273 (1998) (wherein the court denied defendant's motion to compel arbitration because "[n]one of the agreements admitted into evidence contained any provision regarding the method or forum for resolving disputes"); *Maestle v. Best Buy Co.*, 2005-Ohio-4120 (Ct. App.) ("the amendment provision referenced only changes to payments, charges, fees and interest… nowhere in the contract is there a clause addressing forums of dispute.").

¶ 17 However, the Agreement here did contain a "Governing Law" provision, which outlined the appropriate choice of law and forum for settling disputes. Plaintiff was therefore on notice that CMCU could change this provision to allow for disputes to be settled, not in the court where CMCU was located, but rather in another forum, including before an arbitrator. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("[a]n

agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause[.]").

¶ 18 Indeed, other courts have enforced an arbitration provision where a bank customer was provided notice of an amendment containing the provision. *Stiles v. Home Cable Concepts*, 994 F. Supp. 1410 (M.D. Ala. 1998) (arbitration clause added by amendment enforceable because original agreement contained a change-of-terms provision and plaintiff received notice of the amendment, yet failed to opt out); *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819 (S.D. Miss. 2001) (arbitration clause added by amendment enforceable where defendant received proper notice which made clear his option to accept or reject the clause and the amendment was not filled with legalese); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909 (N.D. Tex. 2000) (arbitration clause added by amendment enforceable where cardmember was given reasonable notice of the arbitration amendment and failed to respond); *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1031 (S.D. Miss. 2000) (arbitration clause added by amendment enforceable where plaintiff agreed to a change of terms provision contained in the original deposit agreement).

¶ 19 We note Plaintiff's contention that she did not receive *adequate* notice of the amendment. Plaintiff admits that CMCU notified her of the change three times by email, each entitled "Charlotte Metro CU Online Statement and Changes to Membership and Account Agreements are Available." The notices were sent along with Plaintiff's monthly statements. Information pertaining to the Amendment was contained in hyperlinks which unambiguously pertained to "arbitration" and "class action waiver."

¶ 20 Plaintiff might not have read the email notifications. However, she agreed to be bound to amendments when notified of them by email. And our Court has long held that "the law will not relieve one who can read and write from liability upon a written contract, upon the ground that he did not understand the purpose of the writing, or that he has made an improvident contract, when he could inform himself and has not done so." *Weaver v. St. Joseph*, 187 N.C. App. 198, 213, 652 S.E.2d 701, 712 (2007) (citation omitted) (internal quotation marks omitted). We have enforced an arbitration agreement despite the plaintiff's argument that the agreement was unconscionable because notice was improper. *Westmoreland v. High Point Healthcare*, 218 N.C. App. 76, 721 S.E.2d 712 (2012).

¶ 21 Here, not only did CMCU's email notice include the text of the new amendment, but it also included a link to a thorough explanation in

plain language. Even so, Plaintiff contends that CMCU "buried the arbitration and class action waiver provision under 'Additional Forms and Notices' " in the email. After examining the notice email in its entirety, we do not find this argument persuasive. Both the "Information about Arbitration" and "Arbitration and Class Action Waiver" links are clearly visible in the body of the email. The subject line of the email further put Plaintiff on notice of the change in terms. Plaintiff opted-in to receive electronic notifications. She does not dispute that she received all three notice emails from CMCU. Although Plaintiff may take issue with the method in which notice was provided, we conclude that the notice was sufficient.

¶ 22 We further note that Plaintiff was given the right to opt out of the provisions in the amendment yet failed to do so. Plaintiff claims that an ambiguity in the opt-out provision made it impossible for her to decline arbitration. This provision reads:

> You have the right to opt out of this agreement to arbitrate if you tell us within 30 days of the opening of your account or the mailing of this notice, whichever is sooner.

Plaintiff argues that because she opened her account in 2014 and the notice was not sent until 2021, this provision makes it impossible for her to opt out. We agree that this provision could be construed to suggest that Plaintiff's right to opt out of the amendment expired in 2014, long before the amendment was even contemplated. But such a reading is nonsensical. As such, we construe the provision as to allow Plaintiff 30 days from the date she received notice to opt out. Yet she failed to do so in this case.

IV. Conclusion

¶ 23 We reverse the trial court's order denying CMCU's motion to compel arbitration. We remand this matter, directing the trial court to stay this action pending arbitration.

REVERSED AND REMANDED.

Judge DIETZ concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

¶ 24 I respectfully dissent from the majority's holding that these facts show the existence of a binding arbitration agreement and that the trial court erred in denying CMCU's motion to compel arbitration. Accordingly, I would hold the trial court's order should be affirmed because there is no valid arbitration agreement.

¶ 25 It is well established by this Court that before a dispute can be settled by arbitration, "there must first exist a valid agreement to arbitrate." *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271, 423 S.E.2d 791, 794 (1992) (citations omitted). "The law of contracts governs the issue of whether there exists an agreement to arbitrate." *Id.* (citations omitted). Therefore, "a party cannot be forced to submit to arbitration of any dispute unless he has agreed to do so." *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 478, 583 S.E.2d 325, 330 (2003), *aff'd per curiam*, 358 N.C. 146, 593 S.E.2d 583 (2004) (citation omitted). The responsibility of demonstrating a valid agreement exists is placed upon the party seeking arbitration. *Routh*, 108 N.C. App. at 271-72, 423 S.E.2d at 794.

¶ 26 Additionally, because arbitration agreements are governed by the principles of contracts, they are also subject to the implied covenants of good faith and fair dealing. *See Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation omitted) ("In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement."). This responsibility is even more important when an agreement "confers on one party a discretionary power affecting the rights of the other[.]" *Mezzanotte v. Freeland*, 20 N.C. App. 11, 17, 200 S.E.2d 410, 414 (1973), *cert. denied*, 284 N.C. 616, 201 S.E.2d 689 (1974). However, a promise may be illusory where a promisor reserves "an unlimited right to determine the nature or extent of his performance[.]" *Wellington-Sears & Co. v. Dize Awning & Tent Co.*, 196 N.C. 748, 752, 147 S.E. 13, 15 (1929).

¶ 27 I agree with the trial court that CMCU had no authority to unilaterally alter the Agreement and add entirely new terms. In the present case, the Agreement between the parties, allowed the appellant to "change" certain terms and allowed them to serve those changes by electronic means. Specifically, the Agreement allowed CMCU to "change the terms of *this* Agreement[,]" and stated CMCU would notify customers of "any change in terms," but did not put customers on notice that it would add additional, uncontemplated terms. (Emphasis added.)

¶ 28 Therefore, in my opinion, nothing in the Agreement allowed CMCU to add new provisions to the Agreement and make those new additions apply retroactively to protect their past actions. The majority's opinion improperly interprets the Agreement to allow for this occurrence and sanctions such behavior by allowing a financial institution to protect itself from actions for which it is already being sued for in other litigation.

¶ 29 In addition even if the Agreement allowed CMCU to "add" new terms as opposed to changing current terms, which I do not believe it did, the cunning method in which CMCU attempted to do so (requiring its customers to click thru numerous links and forms to determine that it was attempting to add new terms to the Agreement), in my opinion, blatantly breached the covenants of good faith and fair dealing provisions inherent in every contract. Furthermore, allowing CMCU unlimited authority to alter the terms of an established contract renders the contract illusory.

¶ 30 This view is consistent with the previous holdings of the Court, which the majority is required to follow under the holding set forth in *In re Civil Penalties*. 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted) ("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."). Specifically, the majority's holding violates the principal that allowing one party to an agreement to unilaterally alter the terms of the agreement is antithetical to the contractual principles of mutual assent and this Court's contention that "a party cannot be forced to submit to arbitration of any dispute *unless he has agreed to do so*." *Sloan Fin. Grp., Inc.*, 159 N.C. App. at 478, 583 S.E.2d at 330 (emphasis added).

¶ 31 Other jurisdictions have found similarly. In *Sears Roebuck and Company v. Avery*, this Court, applying Arizona law, found that the plaintiff company could not unilaterally add an arbitration provision. 163 N.C. App. 207, 219, 593 S.E.2d 424, 432 (2004). In *Sears Roebuck*, the plaintiff company's original contract with defendant did not contain an arbitration clause, but they later amended the agreement to change the terms. *Id.* at 212, 593 S.E.2d at 428.

¶ 32 However, this Court reasoned that allowing Sears to "unilaterally insert" a "wholly new term" would "ignore the requirement of good faith implied in all contracts of adhesion[,]" be contrary to "black letter contract law[,]" and "render the contract illusory." *Id.* at 218-19, 593 S.E.2d at 432. Other courts have found similarly. *Id.* at 219, 593 S.E.2d at 432-33 (citing *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 783, 79 Cal. Rptr. 2d

273, 275 (1998); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160, 157 L. Ed. 2d 1204 (2004); *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 316 (6th Cir. 2000), *cert. denied*, 531 U.S. 1072, 148 L. Ed. 2d 664 (2001)).

¶ 33 Because I believe that the majority's view is violative of previous precedent of this Court and of the black letter principals of contract law I dissent. I would find there to be no mutual assent and thus no binding arbitration agreement and I would conclude the trial court was correct in denying CMCU's motion to compel arbitration. For the foregoing reasons, I would affirm the trial court's order and I dissent.

CHRISTOPHER DAVIS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF FELISA O. DAVIS, PLAINTIFF
v.
MARLON FREDERICK WOODS, DEFENDANT

No. COA22-478

Filed 6 December 2022

1. Civil Procedure—Rule 59 motion—new trial limited to damages—amendment of jury award—lack of authority

In an estate dispute in which both plaintiff (decedent's son) and defendant (decedent's former romantic partner) asserted multiple claims including conversion, unjust enrichment, fraud, and breach of fiduciary duty, the trial court did not abuse its discretion when, in granting defendant's motion for a new trial pursuant to Civil Procedure Rule 59, it limited the rehearing to the issue of damages. However, the trial court erred by unilaterally amending the amount of damages determined by the jury, for which it had no authority under Rule 59. Although the parties stipulated to the amount of money defendant received from one of decedent's benefits, the parties did not stipulate to the amount of damages. The court's order amending the jury verdict was vacated and the matter was remanded for a new trial solely on the amount of damages.

2. Civil Procedure—Rule 59 motion—jury instruction denied—cross-examination limited—no abuse of discretion

In an estate dispute between decedent's son (plaintiff) and decedent's former romantic partner (defendant) in which the jury found

for plaintiff, the trial court properly denied defendant's motion for a new trial, made pursuant to Civil Procedure Rule 59, where defendant was not entitled to a jury instruction on the duty to read (regarding a document defendant prepared for plaintiff to sign that gave defendant a portion of decedent's estate), and where defendant did not show prejudice or an abuse of discretion by the trial court's limitation of his cross-examination of plaintiff.

3. Estates—claim for recovery against estate—motion for directed verdict—statute of limitations bar

In an estate dispute between decedent's son (plaintiff) and decedent's former romantic partner (defendant), the trial court properly granted plaintiff's motion for directed verdict on defendant's claim for recovery against the estate for a specified amount of money because the six-month statute of limitations barred defendant's claim.

4. Estates—breach of contract—conversion and fraud—unjust enrichment—summary judgment

In an estate dispute between decedent's son (plaintiff) and decedent's former romantic partner (defendant), the trial court properly granted summary judgment to plaintiff on defendant's claims of breach of contract, conversion, and fraud where there was no genuine issue of material fact that an agreement defendant had prepared for plaintiff to sign, which gave defendant a portion of decedent's estate, was not backed by bargained-for consideration. However, since defendant did demonstrate a genuine issue of material fact with regard to his claim of unjust enrichment—based on payments defendant made towards decedent's residence and vehicle—the trial court improperly granted summary judgment to plaintiff on this issue.

Appeal by defendant from an order filed 10 May 2021 by Judge Stephen R. Futrell, and orders entered 1 June 2021 and 11 January 2022 and judgment entered 28 June 2021 by Judge Lora Cubbage, in Cabarrus County Superior Court. Heard in the Court of Appeals 2 November 2022.

Blanco Tackabery & Matamoros, P.A., by Elliot A. Fus and Chad A. Archer, for plaintiff-appellee.

Savage Law PLLC, by Donna P. Savage, for defendant-appellant.

ARROWOOD, Judge.

¶ 1 Marlon Frederick Woods ("defendant") appeals from multiple orders and judgment entered by the trial court in favor of plaintiff. Defendant contends that the trial court erred in: (1) granting plaintiff's post-verdict motion for a new trial and altering the jury award; (2) denying defendant's motion for a new trial; (3) dismissing defendant's first cause of action for recovery; and (4) granting plaintiff's motion for partial summary judgment, dismissing defendant's second through sixth causes of action in his complaint. For the following reasons, we affirm in part and vacate and remand in part.

I. Background

¶ 2 On 4 October 2017, Felisa O. Davis ("Ms. Davis") died intestate. Under North Carolina intestacy law, her estate passed to her son, Christopher Davis ("plaintiff"). Although she hired an attorney to prepare a trust, she had not executed estate planning documents at the time of her death. In addition, Ms. Davis had life insurance and was employed with Associate Member Benefits Advisors ("AMBA"), which afforded her designated beneficiary benefits. One such benefit was residual commissions ("commissions"), which awards insurance seller's beneficiaries a percentage of insurance premiums from returning customers. In her signed "Agent Beneficiary Contingent Commissions Designation[,]" Ms. Davis indicated her designated beneficiary was plaintiff.

¶ 3 After her death, Ms. Davis's family and friends, including plaintiff and defendant, located her unexecuted trust document and met regarding how to proceed. Thereafter, defendant, a resident of Illinois who had at one time been in an intimate relationship with Ms. Davis but never had any legal relationship with her and had no legal right to any portion of her estate, engaged an attorney to draft an "Agreement of Distribution of the Felisa O. Davis Estate" ('the agreement"). Defendant provided the attorney with all the information the document should include. In pertinent part, the agreement stated:

> [Plaintiff] certifies to be in agreement for the following distributions:
>
> 1. [Plaintiff] certifies to be in agreement he shall re-- ceive insurance proceeds set forth by [Ms. Davis].
>
> 2. The real property and all furniture located at 2849 Bivins Street, Davidson, NC 28036, the 2014 Lincoln MKT, all the remaining assets of the estate, the UNUM $50,000 life insurance policy thru [sic] AMBA (as beneficiary of this policy),

> and the residuals under AMBA (renewals paid monthly for the next six years) to [defendant].

On 21 October 2017, plaintiff, while in Chicago, was presented the agreement by defendant and signed the document. Defendant then sent the document to AMBA and began receiving the commission payments directly.

¶ 4 Following Ms. Davis's death, plaintiff continued to live in her North Carolina residence and have a relationship with defendant. Plaintiff even had defendant act as "trust protector" for his trust. However, their relationship deteriorated in August of 2018. Plaintiff became the administrator of Ms. Davis's estate on 8 February 2019 and thereafter contacted AMBA about the commissions and got a copy of the agreement. Plaintiff requested the commissions be sent to him, informing AMBA that he contested the agreement. By that time, defendant had received $89,975.33 in commission payments. It was also after he became administrator when plaintiff learned there were over $10,000.00 worth of charges to Ms. Davis's account after her death.

¶ 5 On 24 February 2020, plaintiff filed a complaint against defendant alleging seven claims for relief on behalf of himself individually and as the administrator of Ms. Davis's estate. In his complaint, plaintiff alleged defendant and Ms. Davis were no longer together at the time of her death and the agreement was thrust upon him while he was in Chicago for his mother's memorial service, and he had no opportunity to read the agreement or consult an attorney prior to signing it. Plaintiff also alleged defendant told him to sign the document so that "[d]efendant [could] help take care of business, financial and/or legal matters relating to [Ms. Davis's] affairs."

¶ 6 In plaintiff's complaint, his first, fifth, sixth, and seventh claims for relief, individually and as administrator, alleged conversion and unjust enrichment. Specifically, plaintiff claimed that defendant converted the commissions that were supposed to be paid to plaintiff and was unjustly enriched by accepting those payments. Plaintiff's second claim for relief was for actual fraud, based on the misrepresentation of the contents of the agreement. Plaintiff's third and fourth claims for relief were based on constructive fraud and breach of fiduciary duty.

¶ 7 Defendant filed his own complaint on 7 May 2020, alleging plaintiff had breached their "contract." Furthermore, defendant made claims of fraud, conversion, breach of fiduciary duty, and unjust enrichment against plaintiff and the estate since he "detrimenta[lly] reli[ed]" on the "contract" when he made payments on Ms. Davis's residence and vehicle.

¶ 8 Both parties filed motions to dismiss. Plaintiff's motion for partial summary judgment sought dismissal of most of defendant's causes of action, and an order in his favor on the issue of whether he was entitled to compensatory damages for the commissions paid to defendant, and the amount of those commissions.

¶ 9 The matter came on for a hearing on plaintiff's Motion for Partial Summary Judgment the week of 26 April 2021 in Cabarrus County Superior Court, Judge Futrell presiding. On 10 May 2021, Judge Futrell entered an order granting in part and denying in part plaintiff's motion. The order dismissed all but one of defendant's claims, denied defendant's request for summary judgment, and denied plaintiff's motions regarding the commissions. The remaining matters came on for trial on 17 May 2021, Judge Cubbage presiding. At trial, both plaintiff and defendant testified.

¶ 10 Plaintiff testified that when Ms. Davis died, he was twenty-one-years-old, with no experience in legal or financial matters and he did not know how to administer an estate or pay household expenses. After her death, plaintiff, defendant, and other family members gathered and decided that "[defendant] would take care of the mortgage, . . . utilities, [and ensure] . . . [Ms. Davis]'s debit card and credit cards were [closed]." Plaintiff testified that although there was an "expectation that [defendant]would come and live with [plaintiff] to take care of the household as well as look after [plaintiff][,]" he never did.

¶ 11 Plaintiff further testified that he did not know about the commissions until after he contacted AMBA and reiterated that he did not read the agreement before signing it and did not understand what some of the document meant. Still, he stated that he signed the document because defendant told him the agreement would allow them "to carry out what [Ms. Davis] had wanted."

¶ 12 Plaintiff also called Ms. Davis's friend and colleague, Patricia Erin Hall ("Ms. Hall") to testify. Ms. Hall testified that Ms. Davis told her before her death that she and defendant were "not together[,]" and that "she wanted everything to go to [plaintiff]." At the close of plaintiff's case, defense counsel made a motion for directed verdict arguing that as to the fraud claim, they did not believe that plaintiff had established there was a fiduciary relationship between the parties. Defendant's motion was denied, and he then took the stand to testify.

¶ 13 Defendant testified that he and Ms. Davis were together at the time of her death and presented a different version of how the agreement came to be signed. Defendant testified that at the family meeting following Ms.

Davis's death, the family reviewed her unexecuted trust document and agreed that if those were her "final wishes," then they "should honor her by doing what her last wishes were." However, defendant acknowledged that the unexecuted trust document did not mention the commissions. Defendant further stated that before plaintiff signed the agreement, he made sure plaintiff was "okay with [it][,]" "went over it" with plaintiff, had plaintiff read it, and "asked [plaintiff] a number of times" if he understood what the agreement meant.

¶ 14 Defendant made mortgage payments on the house plaintiff inherited and was residing at and car payments on Ms. Davis's vehicle until January 2019, but then stopped making the payments at the advice of his attorney. Defendant claimed that he personally paid $27,515.04 related to Ms. Davis's vehicle and property after her death. However, defendant acknowledged that money used to pay for some of these expenses "came out of the checking account listed under Advancetech[,]" defendant's company. Other expenses came out of defendant's UNUM account, which is listed in his name and was funded by money he received from Ms. Davis's life insurance policy as a beneficiary.

¶ 15 Furthermore, defendant testified that he was making a claim for some personal property located inside Ms. Davis's residence because he thought they "jointly" owned the property, even though the property was purchased out of Ms. Davis's account, and he could not provide documentation that he paid for most of the items. However, defendant did provide "guesstimat[ions]" of the cost and value of some of the property he was claiming.

¶ 16 Defendant also acknowledged that his attorney was told that some of the property he was claiming was boxed up and needed "to be retrieved" from Ms. Davis's residence, and responded that some items were not retrieved because they were no longer of interest to defendant. Defendant testified that he was willing to waive any claims to specific property. Defendant also conceded that any purchases made to Ms. Davis's accounts after her death would have been him, although he did not know her account was subject to the estate process, and he was not supposed to be spending Ms. Davis's money. Furthermore, defendant acknowledged he had "some role" in plaintiff's trust but that he did not know "what that entailed."

¶ 17 At the close of defendant's case, plaintiff's counsel made a motion for directed verdict for judgment as a matter of law with respect to defendant's claim for relief for $27,515.04. Plaintiff's counsel argued that defendant's claim should be dismissed because: (1) it was against the

estate and not plaintiff individually; (2) the house was not an asset of the estate and there could "be no claim against the estate with respect to the house"; (3) the funds were from defendant's business account and defendant could not make a claim for the LLC; (4) the statute of limitations had run on the claims against the estate under N.C. Gen. Stat. § 28A-19-3(b)(2); (5) defendant was not entitled to personal property, or the value of such property, because he waived the right to some property during trial and because he could not prove that he paid for the items or provide any valuation of the items based on anything other than mere guesswork; and (6) defendant admitted that he "illegally" charged Ms. Davis's account after her death.

¶ 18 The trial judge granted plaintiff's motion in open court and filed an order pertaining to the motion on 1 June 2021. Specifically, the trial court found that defendant's only surviving claim should be dismissed because the statute of limitations had run and, based on defendant's testimony, he "expressly waived" the claim "to the [personal property located in Ms. Davis's residence][.]" The court also granted a "directed verdict as a matter of law in favor of the [p]laintiff in that [defendant] did convert and was unjustly enriched by the monies in the account of [Ms.] Davis after she was deceased." Therefore, the only issues for the jury to decide were the plaintiff's claims related to the conversion of the commissions, unjust enrichment, breach of fiduciary duty, and fraud.

¶ 19 During the charge conference, defense counsel "stipulated that the amount of money [defendant] received from the . . . commissions . . . was $89,975.33." Additionally, defense counsel requested an instruction on the duty to read. The trial court declined to provide the instruction, finding that such an instruction was generally used in commercial cases and "because there [wa]s a fraud question . . . if [the jury] f[ound] there was no fraud they must be saying [plaintiff] had a duty to read." Thereafter, when given an opportunity, defense counsel did not object to the instruction.

¶ 20 After the jury retired, they sent questions asking: "[I]s [the agreement] a legally binding document?" and "Does [the agreement] cancel out the beneficiary consent [form] . . . ?" After some discussion, plaintiff's and defendant's counsel agreed with the court, that an appropriate response would be:

> The Court has already determined that as a matter of law [the agreement] is not a legally binding contract. Accordingly, it does not cancel [out the beneficiary form]. But the issue of whether [the agreement] is a

> binding contract does not dispose of the questions given to you. You should answer these questions based on the instructions provided.

¶ 21 On 20 May 2021, the jury returned a verdict in favor of plaintiff, finding defendant did convert the commissions from plaintiff and plaintiff was entitled to recover $62,460.29 in damages. Furthermore, the jury found in favor of plaintiff on most remaining claims and awarded $1.00 in damages for the constructive fraud, breach of fiduciary duty, and unjust enrichment claims. After the jury was dismissed, plaintiff's counsel expressed confusion with the amount of damages, but stated that he would speak with plaintiff and submit a motion if necessary.

¶ 22 On 8 July 2021, plaintiff filed a post-trial motion addressing the jury award, asking the court to either:

> (1) [s]et aside the verdict and the [final] [j]udgment only with respect to the amounts of damages awarded and enter judgment in the principal amount of $89,975.33 plus interest, in accordance with [N.C. Gen. Stat. § 1A-1,] Rule 50; or (2) [i]n the alternative, amend the [final] [j]udgment to enter judgment in the principal amount of $89,975.33 plus interest; or (3) [i]n the alternative, grant a new trial on the issue of damages only [under N.C. Gen. Stat. § 1A-1, Rule 59 ("Rule 59")].

Defendant responded, requesting the court deny plaintiff's motion under Rule 50 and Rule 59. Specifically, defendant argued that the "stipulation" regarding the amount of commissions received was not a stipulation as "to the amount of damages."

¶ 23 Defendant also requested a new trial "based on prejudicial errors of law committed during the trial." In particular, defendant stated that the court's response to the jury question was "prejudicial, confusing[,] and not relevant to the issues submitted to the jury and constituted an error of law[,]" that the trial court erred in limiting defendant's cross-examination of plaintiff, and that the trial court erred in not providing the jury instruction on the duty to read. Based on these issues, defendant argued he was entitled to a new trial under Rule 59.

¶ 24 The matter came on for a hearing on parties' post-trial motions on 13 December 2021, Judge Cubbage presiding. On 11 January 2022, Judge Cubbage filed an order denying defendant's motion for a new trial and granting plaintiff's motion for a new trial under Rule 59 solely on the

issue of damages. Judge Cubbage found that "[i]n light of the parties' stipulation that [d]efendant received $89,975.33 in residual commissions . . . that [p]laintiff's damages were $89,975.33 for all four claims on which the jury found liability . . . ." Therefore, Judge Cubbage set aside the previous judgment and entered judgment in favor of plaintiff for that amount. On 9 February 2022, defendant filed notice of appeal.

II. Discussion

¶ 25 On appeal, defendant argues that the trial court erred in: (1) granting plaintiff's post-verdict motion for a new trial solely on damages and altering the jury award; (2) denying defendant's motion for a new trial; (3) dismissing defendant's first cause of action for recovery against the estate for $27,515.04; and (4) granting plaintiff's motion for partial summary judgment as to defendant's remaining causes of action. Although defendant stated other claims, they failed to submit arguments for these contentions, and they are therefore abandoned and will not be considered on appeal. N.C. R. App. P. 28(a) (2022) ("Issues not presented *and* discussed in a party's brief are deemed abandoned.") (emphasis added); *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, *writ denied*, *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005) ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein.").

A. Plaintiff's Post-Trial Motion

¶ 26 **[1]** Defendant's first claim on appeal that the trial court abused its discretion in granting plaintiff's post-trial motion for a new trial pursuant to Rule 59 based only on damages and amending the judgment to reflect that of the stipulated amount. We find that although the trial court did not abuse its discretion in granting plaintiff's motion for a new trial, the trial court lacked the authority to unilaterally amend the amount of damages.

¶ 27 Motions for a new trial are governed by Rule 59 of the North Carolina Rules of Appellate Procedure and are generally reviewed by the appellate courts for an abuse of discretion. *See Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "Abuse of discretion results where the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted). "Consequently, an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605.

¶ 28 However, this Court has also recognized that the trial court's authority is not limitless. "A trial judge has the authority and discretion to set aside a jury verdict and grant a new trial—in whole or in part—under Rule 59; however, that rule does not allow a trial judge presiding over a jury trial to substitute its opinion for the verdict and *change the amount of damages to be recovered*." *Justus v. Rosner*, 254 N.C. App. 55, 71, 802 S.E.2d 142, 152 (2017), *aff'd*, 371 N.C. 818, 821 S.E.2d 765 (2018) (emphasis added).

¶ 29 In *Justus*, this Court found "[e]ven if the trial court had grounds to set aside the jury verdict, the trial court nevertheless erred in entering the [a]mended [j]udgment striking the jury's answer . . . and imposing a new verdict." *Id.* at 71, 802 S.E.2d at 152 (citation and internal quotation marks omitted). Therefore, the matter was "remand[ed] . . . for a new trial on the issue of damages only." *Id.* at 72, 802 S.E.2d at 153.

¶ 30 Here, the trial court granted plaintiff's motion for a new trial under Rule 59 *solely on the issue of damages*. Despite defendant's contention that this was an abuse of discretion, they themselves acknowledge in their brief that Rule 59 provides the trial court "the authority and discretion to set aside a jury verdict and grant a new trial—in whole *or in part*[.]" *Id.* at 71, 802 S.E.2d at 152 (emphasis added). Therefore, we find that the trial court did not abuse its discretion in granting plaintiff's motion for a new trial solely on the issue of damages. However, we find that the trial court lacked the authority to amend the amount of damages without defendant's consent.

¶ 31 Plaintiff claims that this case is distinguishable from *Justus* because it involves a stipulated amount. We disagree. "A stipulation is an agreement between the parties establishing a particular fact in controversy. The effect of a stipulation is to eliminate the necessity of submitting *that issue of fact to the jury*." *Smith v. Beasley*, 298 N.C. 798, 800, 259 S.E.2d 907, 909 (1979) (citations omitted and emphasis added). However, as defendant points out, the parties stipulated to "the *amount of money [defendant] received* from the . . . commissions[,]" not the amount of damages. Had the stipulation been to damages, there would have been no need to ask the jury to determine damages on the verdict form. Accordingly, we find that the stipulated amount was not a stipulation of what the damages should be if the jury found in plaintiff's favor on any of the counts, and therefore could not be the basis for the trial court to amend the judgment.

¶ 32 "It is a cardinal rule that the judgment must follow the verdict, and if the jury h[as] given a specified sum as damages, the *court cannot*

increase or diminish the amount, except to add interest, where it is allowed by law and has not been included in the findings of the jury." *Indus. Cirs. Co. v. Terminal Commc'ns, Inc.*, 26 N.C. App. 536, 540, 216 S.E.2d 919, 922 (1975) (citing *Bethea v. Town of Kenly*, 261 N.C. 730, 732, 136 S.E.2d 38, 40 (1964) (per curiam)) (internal quotation marks omitted). We find the reasoning of *Industrial Circuits Company* instructive. In that case, this Court found the trial court lacked the authority to reduce the verdict, "without the consent of the interested party[,]" as an alternative to granting a new trial. *Id.* at 540, 216 S.E.2d at 922. We held that the trial court did not abuse its discretion in granting the Rule 59 motion, but still found that the trial court did not act "properly or with authority" when it changed the jury award amount. *See id.* Therefore, the case was remanded for a new trial on the issue of damages only. *Id.* at 548, 216 S.E.2d at 927.

¶ 33 Adopting this reasoning, we affirm the trial court's order granting plaintiff's motion for a new trial but vacate the order amending the jury verdict and remand the case for a new trial as to the amount of damages only.

B. Defendant's Motion for a New Trial

¶ 34 **[2]** Defendant next contends the trial court erred in not granting his motion for a new trial because the trial court committed "errors of law" by providing a "prejudicial, confusing[,]"and irrelevant answer to the jury question, limiting defense counsel's cross-examination of plaintiff, and refusing to instruct the jury on the duty to read. We disagree.

¶ 35 As previously stated, the proper standard of review for a party's motion for a new trial under Rule 59 is abuse of discretion. *See Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). Therefore, this Court will not disturb a trial court's order on a Rule 59 motion unless "the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision" and the trial court's "ruling probably amounted to a substantial miscarriage of justice." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988); *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605. Here, we find no abuse of discretion.

1. Motion for a New Trial Based on Jury Instructions and Jury Question

¶ 36 Defendant first contends they were entitled to a new trial based on the trial court's refusal to provide the duty to read instruction and the trial court's response to the jury's question. Specifically, defendant cites

Rules 59(a)(8) ("[e]rror in law occurring at the trial and objected to by the party making the motion"), and (a)(5) ("[m]anifest disregard by the jury of the instructions of the court") to support this argument.

¶ 37 "In order to obtain relief under Rule 59(a)(8), a defendant must show a proper objection at trial to the alleged error of law giving rise to the Rule 59(a)(8) motion." *Davis v. Davis*, 360 N.C. 518, 522, 631 S.E.2d 114, 118 (2006). Here, although defendant's counsel did not object when the trial judge stated they would not be giving the instruction, nor at the close of the instruction, they did request the duty to read instruction during the charge conference. Our Supreme Court's recent decision in *State v. Hooper* has held that such a request is sufficient to preserve a challenge to a trial court's refusal to provide jury instructions for purposes of appellate review. *State v. Hooper*, 2022-NCSC-114, ¶ 26. However, we find that defendant's requested instruction, while preserved for appellate review, was properly rejected.

¶ 38 "[T]he duty to read an instrument or to have it read before signing it is a positive one, and the failure to do so, *in the absence of any mistake, fraud, or oppression*, is a circumstance against which no relief may be had[.]" *Mills v. Lynch*, 259 N.C. 359, 362, 130 S.E.2d 541, 543-44 (1963) (alterations in original) (emphasis added) (citations omitted). Here, fraud was at issue because one of plaintiff's claims was for actual fraud based on defendant's misrepresentation of the contents of the agreement. Accordingly, the duty to read instruction was improper, and the trial court did not abuse its discretion by refusing to provide it. *See id.*

¶ 39 Additionally, we find no error in the trial court's response to the jury's question. When the trial court decided how it would respond to the jury's question, defense counsel failed to object. Therefore, "defendant failed to preserve his right to pursue a Rule 59(a)(8) motion." *Davis*, at 523, 631 S.E.2d at 118.

¶ 40 Defendant's argument is likewise without merit under Rule 59(a)(5). Other than the contention that the jury "clearly disregarded the trial court's instructions," defendant provides no case law or legal authority to support his contention. Accordingly, we affirm the trial court's decision to deny defendant's Rule 59 motion on these grounds.

2. Motion for a New Trial Based on Limitation of Cross-Examination

¶ 41 Defendant next contends that he was entitled to a new trial based on the trial court's limitations to his cross-examination of plaintiff. This issue was not preserved since defendant did not make an offer of proof as to what the cross-examination would have shown. *State v. Jacobs*,

363 N.C. 815, 818, 689 S.E.2d 859, 861 (2010) (citations omitted) (holding that the "substance of the witness' testimony must be shown before [the reviewing court] can ascertain whether prejudicial error occurred[,]" otherwise the [reviewing] court can "only speculate as to what a witness's testimony might have been").

¶ 42 However, defendant also cites Rule 59(a)(1) ("[a]ny irregularity by which any party was prevented from having a fair trial") in support of his argument. "Although the language of Rule 59(a)(1) is broad, [n]ew trials are not awarded because of technical errors. The error must be prejudicial. Moreover, [t]he party asserting the error must demonstrate that he has been prejudiced thereby." *Jonna v. Yaramada*, 273 N.C. App. 93, 105, 848 S.E.2d 33, 44 (2020) (internal quotation marks omitted) (citing *Sisk v. Sisk*, 221 N.C. App. 631, 635, 729 S.E.2d 68, 71 (2012), *disc. review denied*, 366 N.C. 571, 738 S.E.2d 368 (2013)).

¶ 43 However, defendant did not argue he was prejudiced. Nor do we see any abuse of discretion on the part of the trial court. For an alleged error to amount to abuse of discretion, it must be "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

¶ 44 Here, we need not speculate as to whether the trial court made a reasoned decision because the trial judge stated, on the record, she did not think defense counsel's line of questioning was appropriate because it appeared defense counsel was trying to "embarrass" plaintiff by asking him to read the agreement line by line. Additionally, the trial judge indicated that having plaintiff read the document was unnecessary because he had "already answered [defense counsel's] question that he kn[ew] how to read" and what plaintiff understood about the document in court was not relevant since the agreement was signed five years prior.

¶ 45 We are unable to conclude that the trial court abused its discretion in ruling on defendant's Rule 59 motion. Accordingly, we affirm the trial court's order.

C. Defendant's Action for Recovery

¶ 46 **[3]** Defendant next argues that the trial court erred in granting plaintiff's motion for partial summary judgment, dismissing defendant's first cause of action for recovery against the estate in the amount $27,515.04. We disagree.

¶ 47 "[T]he questions concerning the sufficiency of the evidence to withstand a . . . motion for directed verdict or judgment notwithstanding

the verdict present an issue of law[.]" *In re Will of Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999). Thus, on appeal, this Court reviews an order ruling on a motion for directed verdict or judgment notwithstanding the verdict *de novo*. *See Denson v. Richmond County*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003). The standard of review of a ruling entered upon a motion for directed verdict is "whether upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury." *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 249-50, 565 S.E.2d 248, 252 (2002) (citations omitted). "A motion for . . . [directed verdict and] judgment notwithstanding the verdict should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim." *Denson*, 159 N.C. App. at 412, 583 S.E.2d at 320 (quotation marks and citations omitted).

¶ 48 Here, plaintiff made a motion for directed verdict as to defendant's claim against the estate arguing, in pertinent part, that the statute of limitations had run, and defendant waived any right to property he was claiming through his testimony. At trial, defendant's counsel conceded the statute of limitations would have run within six months and declined to "make any particular argument on that." However, defense counsel did claim that defendant was entitled to some of the property he believed to be "jointly owned," and the values he assigned to said property "were not speculative."

¶ 49 As to claims against an estate, our statute states:

> [a]ll claims against a decedent's estate which arise at or after the death of the decedent . . . are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent unless presented to the personal representative or collector . . . within *six months after the date on which the claim arises*.

N.C. Gen. Stat. § 28A-19-3(b), (b)(2) (2021) (emphasis added).

¶ 50 In this case, Ms. Davis died in October 2017. Defendant testified he made payments towards Ms. Davis's property until January 2019. Although defendant filed a claim against the estate on 30 July 2019 for $15,280.05, which was denied, he did not file the claim for $27,515.04 until May 2020. Because the latter claim is the only one defendant appealed, we need not consider the initial $15,280.05 claim. Therefore, because more than six months had passed between when the defendant's

claim arose and the action for $27,515.04 against the estate, defendant's claim was barred by the statute of limitations. *See id*. Accordingly, the trial court did not err by granting plaintiff's motion for directed verdict.

D. Plaintiff's Motion for Partial Summary Judgment

¶ 51 **[4]** Defendant's final argument on appeal is that the trial court erred in granting plaintiff's motion for partial summary judgment, which dismissed defendant's second through sixth causes of action. Specifically, defendant contends the order dismissing his claims for breach of contract, conversion, fraud, and unjust enrichment was in error because he presented "genuine issues of fact with regard" to these claims and, therefore, plaintiff was not entitled to judgment as a matter of law.

¶ 52 The standard of review on appeal from summary judgment "is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted). Summary judgment "shall be rendered forthwith 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). "We review an order allowing summary judgment *de novo*. If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Wilkins v. Safran*, 185 N.C. App. 668, 672, 649 S.E.2d 658, 661 (2007) (citations and quotation marks omitted). Evidence presented by the parties "must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co.*, 130 N.C. App. at 733, 504 S.E.2d at 577.

1. Breach of Contract

¶ 53 Defendant's second cause of action alleged the agreement was a "contract" that plaintiff breached "by stopping or causing the stoppage of the [commissions] from being paid out to [defendant][.]" Specifically, defendant argued there was a "[g]enuine issue of material fact . . . regarding the consideration under the agreement." We disagree.

¶ 54 "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract. The elements of a valid contract are offer, acceptance, consideration, and mutuality of assent to the contract's essential terms." *Soc'y for Hist. Pres. of Twentysixth N.C. Troops, Inc. v. City of Asheville*, 282 N.C. App. 700, 2022-NCCOA-218, ¶ 30 (citations and quotation marks omitted). "It is well established that in an action for breach of contract, a party's promise must be supported by consideration for it to be enforceable." *Elliott*

v. Enka-Candler Fire & Rescue Dep't, Inc., 213 N.C. App. 160, 163, 713 S.E.2d 132, 135 (2011) (citation and brackets omitted).

¶ 55 "Consideration sufficient to support a contract consists of any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee." *Id.* (quotation marks and citations omitted). "To constitute consideration, a performance or a return promise must be bargained for." *Chem. Realty Corp. v. Home Fed. Sav. & Loan Ass'n of Hollywood*, 84 N.C. App. 27, 30, 351 S.E.2d 786, 789 (1987) (citations omitted).

¶ 56 "Bargained for" means "the consideration and the promise bear a reciprocal relation of motive or inducement" and "the consideration induces the making of the promise and the promise induces the furnishing of the consideration." *Id.* at 31, 351 S.E.2d at 789 (citation omitted). Therefore,

> consideration analysis focuses on the dynamic of the parties' transaction. Where it is claimed that a contract exists between A and B, the question is whether A's promise induced B to make a counter-promise or to begin performance of some act or to forbear from taking some action. The flip side to this question is whether A was induced to make his promise in exchange for B's promise or performance. Without this reciprocity of inducements-characterized as a 'bargained-for exchange'-no consideration exists to support the contract.

Cline v. Dahle, 149 N.C. App. 975, *4 563 S.E.2d 307 (2002) (unpublished) (citing J. Hutson and S. Miskimon, *North Carolina Contract Law § 3-6* (2001)).

¶ 57 For example, in *Chemical Realty Corporation v. Home Federal Savings and Loan Association of Hollywood*, this Court found that the promise of the defendant company to purchase the plaintiff company was not supported by bargained for consideration. *Chem. Realty Corp.*, 84 N.C. App. at 32, 351 S.E.2d at 789. Specifically, this Court found that the letter itself made "no recital of any consideration for defendant's promise[,]" and although the plaintiff acted in reliance on the letter, "even assuming defendant's promise was the inducement for plaintiff's performance, plaintiff . . . [did] not show[] expressly that its performance was the inducement for defendant's promise." *Id.* at 32, 351 S.E.2d at 789-90.

¶ 58 Here, the agreement is likewise without consideration because there was no bargained-for exchange. The agreement specifically granted defendant Ms. Davis's residence, her car, and the commissions, but provides nothing to plaintiff other than the life insurance policy to which he was already entitled. Therefore, there could be no bargained for exchange on the part of plaintiff because there was no reciprocity of inducements. *Id.* at 32, 351 S.E.2d at 789. Accordingly, we affirm the trial court's granting of plaintiff's motion for summary judgment, which dismissed defendant's breach of contract claim, because there was no genuine issue of fact as to consideration.

2. Conversion and Fraud

¶ 59 As defendant acknowledges, his claims for conversion and fraud flow from his claim for breach of contract. Accordingly, we also affirm the order granting plaintiff's motion for directed verdict on these causes of action.

3. Unjust Enrichment

¶ 60 Finally, defendant argues that the trial court erred in granting plaintiff's directed verdict dismissing defendant's cause of action for unjust enrichment. Specifically, defendant claims there was a genuine issue of fact as to whether plaintiff was unjustly enriched by defendant's payments towards Ms. Davis's residence and her vehicle. We agree.

¶ 61 To establish a *prima facie* claim for unjust enrichment a party must show: (1) "one party must confer a benefit upon the other party"; (2) "the benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances"; (3) "the benefit must not be gratuitous"; (4) "the benefit must be measurable"; and (5) "the defendant must have consciously accepted the benefit." *Butler v. Butler*, 239 N.C. App. 1, 7, 768 S.E.2d 332, 336 (2015) (citation omitted).

¶ 62 "A claim of this type is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law. A quasi contract or a contract implied in law is not a contract. The claim is not based on a promise but is imposed by law to prevent an unjust enrichment." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). However, "[t]he recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for their value." *Butler*, 239 N.C. App. at 7, 768 S.E.2d at 337 (citing *Wright v. Wright*, 305 N.C. 345, 350, 289 S.E.2d 347, 351 (1982)).

¶ 63 Although we agree that any claim against the estate has been barred by the statute of limitations, as discussed above, we do find there is a genuine issue of material fact as to whether plaintiff individually was unjustly enriched by some payments defendant made towards Ms. Davis's residence and vehicle. Defendant specifically stated in his complaint that these payments were "not gratuitously" made. Furthermore, these payments conferred a benefit to plaintiff, who was the owner of, and resided in, the house which he inherited from his mother at the time of her death while defendant made these payments, and these payments are readily measurable.

¶ 64 However, we note there is also evidence in the form of an admission by defendant that he used assets from an account of a non-party to make certain of these payments, and he would therefore not be entitled to recover those payments in a claim for unjust enrichment. Accordingly, to the extent that defendant can show that he made payments from his individual assets for the benefit of plaintiff's property, summary judgment was improper with respect to defendant's unjust enrichment claim and is hereby vacated.

III. Conclusion

¶ 65 For the foregoing reasons, we hold that while the trial court properly awarded a new trial on the issue of damages, it did not have the authority to amend the jury award and increase the amount awarded to plaintiff. Accordingly, with respect to that portion of the trial court's order, we vacate and remand for a new trial on damages only. Furthermore, we vacate the order granting summary judgment on defendant's unjust enrichment claim to the extent that defendant used his own personal assets to pay expenses on plaintiff's property but affirm the orders and judgments in all other respects.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

Judges ZACHARY and GRIFFIN concur.

FRAZIER v. FRAZIER

[286 N.C. App. 565, 2022-NCCOA-781]

AALIYAH D. FRAZIER, Plaintiff
v.
GARY KENNETH FRAZIER, JR., Defendant

No. COA22-438

Filed 6 December 2022

1. Appeal and Error—record on appeal—sealed sua sponte—child's medical records—confidential records of child abuse investigation

In a mother's appeal from a child custody order, the Court of Appeals sua sponte sealed the record on appeal where the record included the child's confidential medical records and records of a child abuse investigation by the department of social services (DSS) and by child protective services (CPS), which was conducted after the mother claimed that the child had been abused. Because the investigation showed that the mother's claims were unsubstantiated and because neither DSS nor CPS filed a juvenile petition under Chapter 7B of the General Statutes, the mother was not technically obligated to file the child's confidential records under seal pursuant to Appellate Rule 42. Nevertheless, there was no good reason to make personal, sensitive information about the child available to the public.

2. Child Custody and Support—best interests of the child—sole custody to father—sufficiency of findings

The trial court in a child custody case did not abuse its discretion in determining that it was in the child's best interests to grant sole custody to her father and visitation to her mother. The court made sufficient findings of fact—none of which were challenged on appeal—to support its determination, including that the parties were unable to co-parent their child; the child's therapist had no concerns about the father's ability to care for the child; and that the mother reported that the father's wife had allowed the child to be sexually abused, but social services found no evidence of abuse and the child later stated that her mother had told her to lie about being abused.

Appeal by Aaliyah D. Frazier[1] from order entered 7 December 2021 by Judge Wayne S. Boyette in District Court, Nash County. Heard in the Court of Appeals 1 November 2022.

1. Aaliyah D. Frazier is noted as the plaintiff on the custody order on appeal and as the defendant on her notice of appeal. We refer to her as the plaintiff, per the order.

Dobson Law Firm, PLLC, by John W. Moss, for plaintiff-appellant.

Etheridge, Hamlett & Murray, LLP, by J. Richard Hamlett, II, for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Plaintiff-mother appeals a custody order granting defendant-father sole legal and physical custody of their child and granting Mother visitation. Mother did not challenge any of the trial court's findings of fact but challenges only the trial court's determination it is in the child's best interest for Father to have sole legal and physical custody. Because the trial court made sufficient findings of fact to support its conclusions of law and did not abuse its discretion by granting sole legal and physical custody to Father, we affirm the trial court order.

I. Deficiencies in the Record on Appeal

¶ 2 **[1]** Mother timely filed a notice of appeal from a December 2021 child custody order granting Father sole legal and physical custody of their child, with Mother having visitation. We first note what the record does not include, and then what it does include.

¶ 3 Our record does not contain a complaint, a required document on appeal: "The printed record in civil actions . . . shall contain . . . copies of the pleadings[.]" N.C. R. App. P. 9(a)(1)(d). Further, our record does not contain some of the motions addressed in the custody order on appeal. Nor does the record include the prior custody order which was being modified. "Plaintiff, as the appellant, bore the burden of ensuring that the record on appeal was complete, properly settled, in correct form, and filed." *Fox v. Fox*, 238 N.C. App. 336, 2022-NCCOA-334, ¶ 49 (citation, quotation marks, ellipses, and brackets omitted).

¶ 4 Unfortunately, Mother *did* include in the record confidential medical records of the child, confidential records of a child abuse investigation by Wake County Child Protective Services ("CPS") and the Nash County Department of Social Services ("DSS"), and records including voluminous personal identifying information of the child and the parties.[2] This Court has *sua sponte* sealed the record to protect the personal identifying information and confidential medical information of the child to the extent we can.

2. The parties did not use the minor child's name in their briefs.

¶ 5 Under Rule 42 of the North Carolina Rules of Appellate Procedure, documents in certain types of cases are sealed by operation of law to protect the identity and personal information of minor children. *See* N.C. R. App. P. 42. Rule 42 specifically applies to "appeals filed under" certain statutes:

> (b) *Items sealed by operation of rule.* By virtue of this subsection, items filed with the appellate courts are under seal in the following matters:
>
> (1) Appeals filed under N.C.G.S. § 7B-1001;
>
> (2) Appeals filed under N.C.G.S. § 7B-2602;
>
> (3) Appeals filed under N.C.G.S. § 7A-27 that involve a sexual offense committed against a minor; and
>
> (4) Cases in which the right to appeal under one of these statutes has been lost.
>
> In briefs, motions, and petitions filed in these matters, counsel must use initials or a pseudonym instead of the minor's name. Counsel for each party must agree on the initials or pseudonym and must include a stipulation that evidences this agreement in the record on appeal.
>
> (c) *Items sealed by appellate courts.* If an item was not sealed in the trial tribunal or by operation of rule, then counsel may move the appellate court to seal that item. Items subject to a motion to seal will be held under seal pending the appellate court's disposition of the motion.

Id.

¶ 6 N.C. Gen. Stat. § 7B-1001 addresses appeals filed in abuse, neglect, or dependency proceedings under Chapter 7B, Subchapter I. N.C. Gen. Stat. § 7B-2602 addresses appeals filed in cases dealing with undisciplined and delinquent juveniles under Chapter 7B, Subchapter II. N.C. Gen. Stat. § 7A-27 governs appeals of right from the courts of the trial divisions in other types of cases, but Rule 42(b)(3), limits its application to appeals "involv[ing] a sexual offense committed against a minor." *Id.*

¶ 7 If the CPS and DSS investigations of alleged abuse of the minor child here had resulted in the filing of a petition and an appeal from an order ruling on the petition, the medical records and CPS and DSS

records filed by Mother in this record on appeal would have been sealed by operation of law under Rule 42(b)(1), as the appeal would have been "filed under" N.C. Gen. Stat. § 7B-1001(a). *See id.* But neither CPS nor DSS substantiated Mother's claims of sexual abuse of the child; and no petition alleging abuse, neglect, or dependency was filed. The trial court's order on appeal specifically rejects the claim of sexual abuse. The trial court found that "the child stated to Nash DSS that she had previously lied when she said she was sexually assaulted and that she had lied because her mother had told her to lie." But the fact that the child was *not* sexually abused does not change anything about the need to protect the child's confidential medical information or her personal identifying information.

¶ 8 Rule 42 unfortunately does not cover cases like this one, where there has been an investigation of alleged sexual abuse, *but* the investigation does not find any grounds to substantiate the claim or take further action. *See generally id.* Here, the parties simply used the minor child's medical records and records from the CPS and DSS investigations – which would have been protected if the claims of sexual abuse were substantiated – in the Chapter 50 custody case and then in the record on appeal. Thus, Mother was not *technically* required by Rule 42 to file the child's confidential medical and investigatory records under seal in this appeal, an appeal under N.C. Gen. Stat. § 7A-27, as this appeal does *not* involve "a sexual offense committed against a minor[.]" *Id.* Instead, it involves an *unfounded allegation* of a sexual offense against a minor. But the public dissemination of sensitive information in the investigatory and medical records of the minor child may be no less harmful to the child where the allegations of sexual abuse were unfounded than if they were grounded in fact.

¶ 9 Despite this loophole in Rule 42, we encourage parents, trial courts, and counsel involved in child custody proceedings to be keenly aware of the need to protect the confidentiality of minor children who are the innocent and unfortunate victims of disputes between their parents or caregivers. Unless the record, or portions of the record, is sealed, all the information in records filed with the Court of Appeals is available online and disclosure of this sort of personal information of a minor child can result in direct harm to the minor child. There is simply no good reason to have a minor child's confidential medical records and personal identifying information placed on the permanent public record, available online to the entire world.

II. Best Interests of the Child

¶ 10 **[2]** Despite the deficiencies in the record on appeal, we can review Mother's argument because she contends only that the trial court abused its discretion in granting sole custody to Father. The custody order on appeal contains 40 findings of fact, and Mother did not challenge any of these findings on appeal. Mother even notes she "does not argue that the trial court order lacks findings of fact to support a change in circumstances[,]" so she does not challenge the trial court's modification of the prior custody order based upon a substantial change in circumstances affecting the best interests of the minor child.

¶ 11 "A trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 409 (2012) (citation, quotation marks, and brackets omitted). The only challenge on appeal is the trial court's determination that it was in the child's best interests for Father to have sole legal and physical custody of the child, with Mother having visitation.

> As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion. Under an abuse of discretion standard, we must determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.

Stephens v. Stephens, 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011) (citations and quotation marks omitted).

¶ 12 Mother contends the trial court should have made additional findings of fact regarding various factors, such as "the quality of education at Wake County Public Schools versus Nash County Public Schools" and "the suitability of each parent to provide for the child's needs, the child's preferences, or the emotional or physical health of the child." But the trial court has the discretion to weigh the evidence and to determine which factors are most important in each case, and the trial court need not make detailed evidentiary findings as to every aspect of the child's life. *See generally id.* The question for this Court is simply whether the findings of fact are sufficient to show the trial court made a reasoned decision as to the child's best interests, and thus did not abuse its discretion. *See generally id.*

¶ 13 The binding findings of fact establish Mother reported Father's wife had allowed the child to be sexually abused, but DSS found "no evidence of abuse[;]" the child's therapist testified "she had no concerns" regarding the child being cared for while in Father's custody; and Mother repeatedly interfered when a social worker from CPS attempted to interview the child. Ultimately, the child stated, "she had lied because her mother had told her to lie." Further, the trial court found the parents were not able to jointly co-parent the child. Based upon the unchallenged findings of fact, we cannot determine the trial court's decision to grant Father sole legal and physical custody was "manifestly unsupported by reason[.]" *Id.*

¶ 14 We therefore affirm the custody order.

AFFIRMED.

Judges HAMPSON and JACKSON concur.

CHAD FRAZIER, Petitioner-Appellee
v.
TOWN OF BLOWING ROCK and MORGAN HORNER, Respondent-Appellants

No. COA21-388

Filed 6 December 2022

Zoning—ordinance violation—short-term rentals—effective date of prohibition—grandfathered and nonconforming use

The trial court correctly applied the appropriate standard of review in reversing a town board of adjustment's decision determining that petitioner violated a local ordinance prohibiting short-term rentals, where the town had not clearly prohibited short-term rentals until a 2019 amendment to its ordinances given that its pre-amendment ordinances were vague and ambiguous regarding the regulation of that category of rentals. Because petitioner acquired and began using his property for short-term rentals prior to the 2019 ordinance amendment, he established a prima facie case of a grandfathered and valid nonconforming use.

Appeal by Respondent from Order entered 15 March 2021 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 23 February 2022.

Deal, Moseley & Smith, LLP, by Bryan P. Martin, for Respondent-Appellant.

Nexsen Pruet, PLLC, by David S. Pokela, for Petitioner-Appellee.

CARPENTER, Judge.

¶ 1 The Town of Blowing Rock ("Town") seeks review of the superior court's 15 March 2021 Amended Order reversing the Town of Blowing Rock Board of Adjustment's ("BOA") decision denying Petitioner's appeal of a Final Notice of Violation ("NOV") for operating a short-term rental property in violation of a local zoning ordinance. After careful review, we affirm the Amended Order of the superior court.

I. Factual and Procedural Background

¶ 2 On 29 June 2016, Chad Frazier ("Petitioner") acquired a three-unit property at 163 Wilmot Circle ("Property") in the Town from the prior owners, who had owned the Property since 1981. Petitioner owns and maintains the Property for short-term rentals.

¶ 3 The phrase "tourist homes and other temporary residences renting by the day or week" existed in the Town's Ordinances since 1984. In 2000, the Town's Ordinances were amended ("2000 Amendment") to define "short-term rentals" as the "rental, lease, or use of an attached or detached residential dwelling unit that is less than 28 consecutive days," and to establish a short-term rental overlay district in multi-family residential districts. The Town, however, did not contemporaneously add "short-term rentals" to its Table of Permissible Uses.[1] On 13 August 2019, another amendment was enacted ("2019 Amendment") to add "short-term rental of a residential dwelling unit" to the Table of Permissible Uses, replacing "tourist homes and other temporary residences renting by the day or week[.]"

¶ 4 On 13 September 2019, Petitioner was cited by the Town's Planning Director with a NOV for purportedly violating a local ordinance prohibiting short-term rentals in R-15 zoning districts. The NOV explained, "[a] short-term rental is a home or dwelling unit that is rented for a period less than 28 days." The parties do not dispute the Property is located in a R-15 zoning district, the Property has at all relevant times been zoned

1. The Table of Permissible Uses is contained within Article X of the Town's Land Use Ordinances. Through December 1985, it was located at Section 16-146. As of the date of the 2019 Amendment, it was found at Section 16-10.1.

residential by the Town, and the Property is not within the short-term rental overlay district created by the 2000 Amendment.

¶ 5 Petitioner timely appealed the NOV to the BOA, contending his use of the Property amounted to a grandfathered, nonconforming use as a short-term rental. Petitioner maintained he used and intended to use the Property for short-term rentals before, as of, and after the effective date of the new short-term rental ordinance, and during his ownership, there were no periods of 180 days or more in which he did not use the Property for short-term rentals. Over two hearing dates in January and February of 2020, the BOA considered Petitioner's appeal of the NOV. On 2 March 2020, the BOA issued its decision, concluding Petitioner's use of the Property as a short-term rental was an illegal, non-conforming use.

¶ 6 Petitioner sought review of the BOA's decision by filing a petition for writ of certiorari with the Watauga County Superior Court. The writ was granted, a hearing was held before the superior court, and the Amended Order was entered on 15 March 2021. In the Amended Order, the superior court reversed the BOA's decision, concluding Petitioner's use of the Property as a short-term rental was "a grandfathered and valid non-conforming use . . . which may be continued." The superior court concluded as a matter of law that the language of the Town's 1984 Land Use Act prohibiting "temporary residences renting by the day or week" in residentially zoned areas was vague and ambiguous, and therefore the Town had no enforceable restriction against "short-term rentals of less than 28 days" until the enactment of the 2019 Amendment.[2] The Town filed notice of appeal from the Amended Order on 15 April 2021.

II. Jurisdiction

¶ 7 This Court has jurisdiction to address the Town's appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2021) and N.C. Gen. Stat. § 1-277 (2021).

III. Issues

¶ 8 The issues raised on appeal are whether: (1) the superior court erred as a matter of law in reversing the BOA's decision, and (2) omissions of the superior court deprived Petitioner of alternative bases in law for supporting the Amended Order.

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2. We are not called upon to determine or otherwise address the constitutionality of the 2019 Amendment within the scope of this appeal.

IV. Standard of Review

¶ 9 A local zoning board, such as a board of adjustment, acts as "a quasi-judicial body." *Refining Co. v. Bd. of Aldermen*, 284 N.C. 458, 469, 202 S.E.2d 129, 136–37 (1974). At the time of the BOA hearings and decision, 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[.]" 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 as N.C. Gen. Stat. § 160D-406(k) (2021)).

¶ 10 Decisions issued by quasi-judicial bodies are "subject to review by the superior court by proceedings in the nature of certiorari," wherein the superior court sits as an appellate court, and not as a trier of facts. *Tate Terrace Realty Invs., Inc. v. Currituck Cnty.*, 127 N.C. App. 212, 217, 488 S.E.2d 845, 848 (1997) (quoting *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 135–36, 431 S.E.2d 183, 186 (1993)). If the board's decision is challenged as resting on an error of law, the proper standard of review for the superior court is *de novo*. *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 189, 689 S.E.2d 576, 586 (2010).

¶ 11 "However, if the petitioner contends the Board's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the 'whole record' test." *NCJS, LLC v. City of Charlotte*, 255 N.C. App. 72, 76, 803 S.E.2d 684, 688 (2017) (quoting *Four Seasons Mgmt. Servs. Inc. v. Town of Wrightsville Beach*, 205 N.C. App. 65, 75, 695 S.E.2d 456, 462 (2010)). "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[,]" which is evidence that "a reasonable mind would consider sufficient to support a particular conclusion . . . ." *Thompson v. Union Cnty.*, 2022-NCCOA-382, ¶ 12 (citation and internal quotations 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 . . . [t]he question is whether the evidence before the BOA was supportive of the BOA's decision." *Id.* at ¶ 13 (citing *Dellinger v. Lincoln Cnty.*, 248 N.C. App. 317, 323, 789 S.E.2d 21, 26 (2016)).

¶ 12 The Court of Appeals, on a writ of certiorari considering the decision of a quasi-judicial body, has the authority to review a superior court judgment as it is "derivative of the power of the superior court to

review the action." *Tate Terrace Realty Invs., Inc.*, 127 N.C. App. at 219, 488 S.E.2d at 849 (citing *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 649, 334 S.E.2d 103, 105 (1985)). "An appellate court's review of the trial court's zoning board determination is limited to determining whether the superior court applied the correct standard of review, and . . . whether the superior court correctly applied that standard." *Bailey & Assocs., Inc.*, 202 N.C. App. at 190, 689 S.E.2d at 586.

V. Analysis

A. 15 March 2021 Amended Order

¶ 13 The Town contends the superior court erred in concluding as a matter of law that the Town's Land Use Code did not prohibit or regulate short-term rentals until the enactment of the 2019 Amendment. By applying the effective date of the 2019 Amendment, 13 August 2019, as the date by which the Petitioner's "grandfathered" status should be measured, the Town further asserts the superior court erred by concluding that Petitioner established a *prima facie* case for the Property to be "grandfathered" as a non-conforming use. Petitioner, on the other hand, claims the superior court was correct in concluding that no clear ordinance purporting to regulate short-term rentals existed in the Town prior to the 2019 Amendment. Therefore, Petitioner asserts the superior court correctly determined that he had established a *prima facie* case of a grandfathered and valid non-conforming use based upon the facts found by the BOA.

¶ 14 We initially note the Town raises only issues of law on appeal, and neither party disputes the superior court applied the appropriate standard of review, *de novo*, in its appellate role. *See id.* at 189, 689 S.E.2d at 586. Our analysis is therefore limited to whether the superior court "correctly applied" its *de novo* review to the BOA's conclusions of law. *See id.* at 190, 689 S.E.2d at 586.

(1) The Town Did Not Properly Prohibit or Regulate "Short-Term Rentals of Less Than 28 Days" Until 13 August 2019

¶ 15 The free use of property is favored in our State. *Harry v. Crescent Res., Inc.*, 136 N.C. App. 71, 80, 523 S.E.2d 118, 124 (1999).[3] "Zoning

3. During the pendency of this appeal, this Court rendered an opinion with broad implications on local government authority to proscribe or otherwise restrict landowners' rights to freely use their property for rental purposes in the face of contrary state law. *See Schroeder v. City of Wilmington*, 282 N.C. App. 558, 2022-NCCOA-210 (holding non-severable provisions of local ordinance requiring local government permits, permission, or registration to lease or rent real property was preempted by state statute). This

ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they must be liberally construed in favor of such owner." *Hampton v. Cumberland Cnty.*, 256 N.C. App. 656, 665, 808 S.E.2d 763, 770 (2017) (citation omitted). Because "[z]oning regulations are in derogation of common law rights . . . they cannot be construed to include or exclude by implication that which is not clearly . . . their express terms." *Byrd v. Franklin Cnty.*, 237 N.C. App. 192, 201, 765 S.E.2d 805, 810–11 (2014) (citation omitted) (Hunter, J. concurring in part and dissenting in part), *adopted per curiam*, 368 N.C. 409, 778 S.E.2d 268 (2015). "[W]hen there is ambiguity in a zoning regulation, there is a special rule of construction requiring the ambiguous language to be 'construed in favor of the free use of real property.' " *Visible Properties, LLC v. Vill. of Clemmons*, 2022-NCCOA-529, ¶ 11 (quoting *Morris Commc'ns Corp. v. City of Bessemer*, 365 N.C. 152, 157, 712 S.E.2d 868, 871 (2011)); *see also Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) ("[W]ell-founded doubts as to the meaning of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property.").

¶ 16 The Town would have us infer, based upon the evolution of its local Land Use Ordinances, that it has been prohibiting or regulating short-term rentals since 1984, or alternatively, 2000. In support of its argument, the Town directs us to Section 1.620 of its 1984 Land Use Ordinance, which established the use category "[t]ourist homes and other temporary residences renting by the day or week" in the Town's Table of Permissible Uses and restricted its use to non-residential zoning districts. The Town amended its Ordinances again in 2000, establishing a short-term rental overlay district in multi-family residential districts and defining "short-term rental of a dwelling unit" as the "rental, lease, or use of an attached or detached residential dwelling unit that is less than 28 consecutive days," without adding this newly defined use or eliminating the use "temporary residences renting by the day or week" from the Town's Table of Permissible Uses.

¶ 17 While the Town asserts the 2000 Amendment "provided further clarity" regarding "in which zoning districts . . . short-term rentals [were] allowed[,]" the expressed purpose of the 2019 Amendment indicates the opposite is true. The 2019 Amendment was the result of a "Short-term Rental Task Force of the Planning Board . . . formed to evaluate the

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binding precedent is not dispositive on the issues before us, as the landowners there filed for declaratory relief; therefore, our analysis here is limited to arguments asserted below and advanced on appeal.

current Land Use Code Regulations and establish goals for a new ordinance to regulate short-term rentals[.]" These "goals" included:

> 1. To *clearly* define short-term rental *so everyone understands* what is and is not allowed;
> 2. To *clearly* identify where short-term rentals are permitted;
>
> . . .
>
> 10. To communicate *transparently* with 3rd party rental listing companies.

(emphasis added).

¶ 18 It is apparent from the plain language of the 2019 Amendment that a lack of clarity and transparency existed and was known to exist with respect to the Town's regulation of short-term rentals between the 2000 Amendment and the 2019 Amendment. Ambiguity logically follows where two comparable, yet apparently distinct land use definitions simultaneously exist in the Town's Ordinances, but only one is clearly prohibited by the Town's Table of Permissible Uses. We will not construe "short-term rentals" as defined by the 2000 Amendment, to be impliedly prohibited by cross-reference to a less definite, albeit related, land use category. *See Byrd*, 237 N.C. App. at 201, 765 S.E.2d at 810–11. Our jurisprudence is clear that in the event of doubts or ambiguity, zoning regulations are to be construed in favor of the free use of property. *See Visible Properties, LLC*, 2022-NCCOA-529, ¶ 11; *see also Hullett v. Grayson*, 265 N.C. 453, 454, 144 S.E.2d 206, 207 (1965).

¶ 19 The Town's arguments pursuant to Section 16-149 of its 1984 Land Use Ordinance are not considered on appeal for two reasons. First, these arguments were not raised before the BOA. Contentions not raised and argued below may not be raised and argued for the first time in the appellate court, because "the law does not permit parties to swap horses between courts in order to get a better mount[.]" *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Second, neither the BOA nor the superior court relied upon these theories in reaching their decisions. *See Godfrey v. Zoning Bd. of Adjustment of Union Cnty.*, 317 N.C. 51, 64, 344 S.E.2d 272, 279–80 (1986) (Courts examining the propriety of quasi-judicial determinations must conduct review "solely on the grounds invoked by the agency.").

¶ 20 As the superior court correctly noted, "until August 19, 2019[,] the regulation of 'short term rentals of less than 28 days' as well as [t]ourist

homes and other temporary residences renting by the day or week, [was] vague and ambiguous and left the rights of landowners to the unguided discretion of the [BOA]." The ambiguity present here flows from the Town's ineffective attempt to simultaneously prohibit two distinct land uses, where only one use was lawfully prohibited by the Town's Table of Permissible Uses—not from either land use category being independently and sufficiently ambiguous on its face. The superior court properly recognized that this ambiguity left the Town's purported regulation of short-term rentals between 2000 and 2019 in a state of uncertainty, which in turn, "left the rights of landowners to the unguided discretion of the [BOA]."

¶ 21 When the 2019 Amendment took effect on 13 August 2019, replacing "temporary residences renting by the day or week" with the previously defined "short-term rental of a dwelling unit" in the Town's Table of Permissible Uses, the Town achieved the goals of the 2019 Amendment by properly regulating "short-term rentals of less than 28 days" for the first time. Accordingly, the superior court did not err by concluding the Town's Ordinances existing prior to 13 August 2019 did not properly regulate short-term rentals of less than 28 days.

(2) The BOA Erred by Concluding Petitioner's Short-Term Rental Use Was Not "Otherwise Lawful"

¶ 22 The Town next contends the superior court erred in determining the BOA erred in concluding Petitioner's nonconforming short-term rental use was not "otherwise lawful" pursuant to Section 16-8.1 of the Town's 1984 Land Use Ordinance. We disagree.

¶ 23 Section 16-8.1 provides in relevant part, "nonconforming situations that were otherwise lawful on the effective date of this chapter may be continued[.]" The authority of a local board of adjustment to render decisions as a quasi-judicial body is provided by statute, and each decision shall "determine contested facts . . . and their application to applicable standards." N.C. Gen. Stat. § 160A-388(e2)(1) (2019) (repealed by S.L. 2019-111, § 2.3 as amended by S.L. 2020-25, § 51(b), eff. June 19, 2020) (recodified as N.C. Gen. Stat. § 160D-406(j) (2021)).[4] Appellate review of the BOA's decision is strictly limited to the grounds invoked by the BOA. *See Godfrey*, 317 N.C. at 64, 344 S.E.2d at 279–80.

¶ 24 Here, the effective date, within the meaning of Section 16-8.1, is the date of the 2019 Amendment, 13 August 2019, as properly determined by

4. For a detailed discussion of the General Assembly's recent reorganization of our land use statutes, *see Schroeder v. City of Wilmington*, 282 N.C. App. 558, 2022-NCCOA-210.

the BOA. Petitioner was twice cited by the Town for violating the Town's purported ban on short-term rentals, once before and once after the 2019 Amendment. The record is clear that the alleged violation in each instance was specific to the Town's proscription against "short-term rentals of less than 28 days." In neither instance did the Town cite Petitioner for violating the Town's regulation of "temporary residences renting by the day or week." Accordingly, the question of whether Petitioner's property use violated the Town's regulation of "temporary residences renting by the day or week" was neither a contested fact between the parties nor the standard applicable to this case. *See* N.C. Gen. Stat. § 160A-388(e2)(1) (2019) (repealed by S.L. 2019-111, § 2.3 as amended by S.L. 2020-25, § 51(b), eff. June 19, 2020) (recodified as N.C. Gen. Stat. § 160D-406(j) (2021)).

¶ 25 Thus, the BOA erred and exceeded its quasi-judicial authority to determine contested facts upon applicable standards by mischaracterizing the nature of Petitioner's property use, implicating a land use category he was not cited for violating, to attain a particular outcome. By denying Petitioner's claim pursuant to the "otherwise lawful" provision of Section 16-8.1 of the Town's 1984 Land Use Ordinances—a standard not implicated by the NOV—the BOA erred and exceeded its quasi-judicial authority conferred by statute. *See* N.C. Gen. Stat. § 160A-388(e2)(1) (2019) (repealed by S.L. 2019-111, § 2.3 as amended by S.L. 2020-25, § 51(b), eff. June 19, 2020) (recodified as N.C. Gen. Stat. § 160D-406(j) (2021)).

¶ 26 Therefore, the superior court properly concluded the BOA had erred by concluding Petitioner's short-term rental use was not "otherwise lawful" under the local ordinance through its improper reference to an inapplicable standard.

(3) The Superior Court Did Not Err in Concluding Petitioner's Property Use Became a Nonconforming Use Effective 13 August 2019

¶ 27 For the reasons expressed in Section A(1) *supra*, including the ambiguity or obscurity caused by simultaneous regulation of two substantially similar land use categories between 2000 and 2019, the superior court did not err in concluding that short-term rentals, as defined in the 2000 Amendment, were not regulated by the Town until the 2019 Amendment took effect. Since Petitioner obtained the Property on 29 June 2016, during the ineffective period of the Town's attempts to regulate short-term rentals, it follows that Petitioner's use first acquired a nonconforming character on the effective date of the 2019 Amendment.

(4) The BOA Erred and Exceeded its Authority by Failing to Conclude Petitioner Established a *Prima Facie* Case of Nonconforming Use and Denying His Claim

¶ 28 "[T]he burden of proving the existence of an operation in violation of the local zoning ordinance is on [the Town]." *Shearl v. Town of Highlands*, 236 N.C. App. 113, 116–17, 762 S.E.2d 877, 881 (2014) (quoting *City of Winston-Salem v. Hoots Concrete Co., Inc.*, 47 N.C. App. 405, 414, 267 S.E.2d 569, 575 (1980)).

> 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. . . . 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.

Id. at 118, 762 S.E.2d at 882 (cleaned up).

¶ 29 Section 16-2.2 of the Town's Land Use Ordinances defines a "Nonconforming Use" as, "[a] nonconforming situation that occurs when the property is used for a purpose or in a manner made unlawful by the use regulations applicable to the district in which the property is located." "[N]onconforming situations that were otherwise lawful on the effective date of this chapter may be continued[,]" provided the grandfathered nonconforming use is not "discontinued for a consecutive period of 180 days" or "discontinued for any period of time without a present intention to reinstate the nonconforming use[.]" Sections 16-8.1, 16-8.6.

¶ 30 Here, the BOA found, based upon the evidence established at the hearing, that "[s]ince [Petitioner] bought the Property there has been no 180 day period that he did not rent a unit for less than 28 days." This unchallenged fact found by the BOA is binding on appeal. *See Massey v. City of Charlotte*, 145 N.C. App. 345, 348, 550 S.E.2d 838, 841 (2001). Having previously concluded the superior court properly identified the date Petitioner's use transformed into a nonconforming use as 13 August 2019, that court similarly did not err by concluding the BOA erred in failing to recognize that Petitioner made out a *prima facie* case of nonconforming use under the Town's ordinances.

¶ 31 Furthermore, the BOA exceeded its authority by mischaracterizing Petitioner's nonconforming use of a short-term rental as a "temporary residence renting by the day or week[,]" which was not a contested fact between the parties or the legally applicable standard, given the nature of the violation alleged in the NOV.

(5) The BOA Decision Was Not Supported by Competent, Material, and Substantial Evidence

¶ 32 The Town further contends the superior court's conclusion that "the BOA's decision was not based upon competent, material, and substantial evidence appearing in the record[,]" without further explanation, constitutes error as a matter of law. After careful review, we agree with the Town that this conclusion is derived from the superior court's prior conclusions of law. *See Thompson*, 2022-NCCOA-382, ¶ 13 (quoting *Dellinger*, 248 N.C. App. at 324–25, 789 S.E.2d at 27) ("[W]hether competent, material and substantial evidence is present in the record is a conclusion of law.").

¶ 33 Absent the BOA's erroneous invocation of "tourist homes and other temporary residences renting by the day or week[,]" unchallenged findings of fact by the BOA and unrebutted testimony by Petitioner would have established a valid situation of grandfathered, nonconforming short-term rental use. Since unrebutted testimony supported Petitioner's claim of grandfathered, nonconforming use, the superior court did not err in exercising whole record review and concluding the BOA's decision to deny Petitioner's claim of nonconforming use was not supported by competent evidence. *See Thompson*, 2022-NCCOA-382, ¶ 13. In short, we discern no error in the superior court's conclusion that the evidence before the BOA was not supportive of the BOA's decision, absent the BOA's invocation of an inapplicable standard. *See id.*

B. Alternative Bases to Support the 15 March 2021 Amended Order

¶ 34 Petitioner asserts that the Amended Order failed to review several issues and arguments he advanced before the BOA in support of the superior court's reversal of the BOA decision, thus depriving Petitioner of alternative bases in law to support the Amended Order. *See* N.C. R. App. P. 10(c), 28(c). Having affirmed the superior court's Amended Order, we do not reach Petitioner's alternative theories of relief.

VI. Conclusion

¶ 35 Based on the forgoing, we conclude the superior court correctly applied the appropriate standard of review in reversing the BOA's denial of Petitioner's claim of grandfathered, nonconforming use. *See Bailey*

& Assocs., Inc., 202 N.C. App. at 190, 689 S.E.2d at 586. Therefore, we affirm the Amended Order.

AFFIRMED.

Judges TYSON and JACKSON concur.

NUNG HA AND NHIEM TRAN, PLAINTIFFS
v.
NATIONWIDE GENERAL INSURANCE COMPANY, DEFENDANT

No. COA21-793

Filed 6 December 2022

Insurance—homeowner's—notice of cancellation—proof of mailing sufficient

A judgment finding that an insurance company properly cancelled plaintiffs' homeowner's insurance policy prior to their home burning down in a house fire was affirmed where, under the plain language of N.C.G.S. § 58-44-16 (governing cancellation of standard fire insurance policies), "giving" notice of cancellation included mailing the notice to the insured parties. The insurance company supplied proof that they mailed a cancellation notice to plaintiffs, and they were not legally required to prove receipt of that notice. Further, N.C.G.S. § 58-41-15(c)—which does require proof that insured parties received a cancellation notice—did not apply to plaintiffs' insurance policy because the policy was covered by Article 36 of the insurance statute, and section 58-41-15 does not apply to policies for residential risks written under that article.

Judge ARROWOOD dissenting.

Appeal by Plaintiffs from judgment entered 30 July 2021 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 24 August 2022.

John M. Kirby for Plaintiffs-Appellants.

Robinson, Bradshaw & Hinson, P.A., by Stephen D. Feldman, Travis S. Hinman, and Garrett A. Steadman, for Defendant-Appellee.

Young Moore and Henderson, P.A., by Walter E. Brock, Jr., and Angela Farag Craddock, for amicus curiae North Carolina Rate Bureau.

GRIFFIN, Judge.

¶ 1 Plaintiffs Nung Ha and Nhiem Tran appeal from a judgment finding that Defendant Nationwide General Insurance Company validly cancelled Plaintiffs' homeowner's insurance policy. After review, we affirm the trial court's judgment.

I. Factual and Procedural Background

¶ 2 On 24 July 2015, a house fire destroyed Plaintiffs' home in Wake Forest, North Carolina. At issue is whether a homeowner's insurance policy issued by Nationwide was properly cancelled prior to the fire, in which case Plaintiffs are not entitled to coverage under the policy. Specifically, the issue is whether Nationwide properly cancelled the policy by mailing notice of cancellation to Plaintiffs, or whether further proof that notice was actually received by Plaintiffs is required in order to cancel the policy.

¶ 3 A divided panel of this Court previously considered this matter in June 2019, and the majority issued an opinion holding that the word "furnishing" in N.C. Gen. Stat. § 58-41-15(c) "requires actual delivery to and/or receipt of [a notice of cancellation] by the insured" in order for the homeowner's policy to be validly cancelled: "Because the facts before us demonstrate nothing more than that Nationwide provided 'proof of mailing,' and the trial court expressly found [P]laintiffs did not receive notice, Nationwide failed to afford [P]laintiffs sufficient notice of the policy's cancellation." *Ha v. Nationwide Gen. Ins. Co.*, 266 N.C. App. 10, 17, 829 S.E.2d 919, 924 (2019). Our Supreme Court subsequently vacated this Court's judgment and remanded the matter "to determine whether Article 41, Article 36 or other statutes govern in this matter." *Ha v. Nationwide Gen. Ins. Co.*, 375 N.C. 87, 845 S.E.2d 436 (2020). A majority of this Court over further dissent remanded the case to the trial court for further proceedings consistent with the Supreme Court's instruction.

¶ 4 Following remand, the trial court issued a new judgment finding that N.C. Gen. Stat. § 58-41-15 did *not* apply to the policy but that section 58-44-16 was applicable. The trial court then found that Nationwide complied with the latter provision by providing proof that the cancellation notice was mailed to Plaintiffs. Plaintiffs timely appeal.

II. Analysis

¶ 5 We are now asked to interpret whether N.C. Gen. Stat. § 58-44-16 requires proof that the cancellation notice was actually received by Plaintiffs, or whether proof of mailing is sufficient to cancel the policy. We hold that Nationwide properly cancelled the policy under section 58-44-16 by proving that the cancellation notice was mailed to Plaintiffs. Plaintiffs alternatively argue that the trial court erroneously determined that section 58-41-15 did not apply to the policy. We disagree.

A. N.C. Gen. Stat. § 58-44-16

¶ 6 "A question of statutory interpretation is ultimately a question of law for the courts." *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998). "This Court reviews questions of law de novo, meaning that we consider the matter anew and freely substitute our judgment for the judgment of the lower court." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014).

¶ 7 N.C. Gen. Stat. § 58-44-16(f)(10) governs cancellation of standard fire insurance policies, providing that such policies "may be cancelled at any time by th[e] insurer by *giving to the insured* a five days' written notice of cancellation[.]" N.C. Gen. Stat. § 58-44-16(4)(10) (2021) (emphasis added). Article 44 does not define what the word "giving" requires, so we look to the plain meaning of the term in order to ascertain the intent of the legislature. *Lunsford*, 367 N.C. at 623, 766 S.E.2d at 301 ("The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature. If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." (citations and internal quotation marks omitted)).

¶ 8 "Undefined words are accorded their plain meaning so long as it is reasonable to do so. In determining the plain meaning of undefined terms, this Court has used standard, nonlegal dictionaries as a guide." *Midrex Tech., Inc. v. N.C. Dept. of Rev.*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (citations and internal quotation marks omitted). According to *Webster's New Twentieth Century Dictionary*, to "give" means "to surrender into the power of another; to convey to another; to bestow." *Webster's New Twentieth Century Dictionary of the English Language* 739 (Harold Whitehall ed., 1956). "Giving," the present participle form of "give" used in the statute, means "*the act of* conferring." *Id.* at 740 (emphasis added). We conclude that the plain meaning of the word "give," particularly in its present participle form, includes the act of mailing

notice of cancellation to the insured. Indeed, it is hardly reasonable to argue that "giving" does not include the act of mailing an item to another.

¶ 9 We note that the General Assembly requires that cancellation notice be sent via certified mail or actually received with respect to several different types of insurance policies but chose not to include those requirements here. *See, e.g.*, N.C. Gen. Stat. § 58-41-15(a) (2021) (requiring "prior written consent of the insured" in order to cancel certain types of property, liability, title, and indemnity insurance policies); N.C. Gen. Stat. § 58-36-105(b) (2021) (governing worker's compensation insurance policies and providing that notice of cancellation must be in writing and sent via certified/registered mail and that "no cancellation by the insurer shall be effective unless and until such method is employed and completed"). Absent language in the statute requiring more, we conclude that the legislature intended mailing to constitute "giving" notice of cancellation.

B. N.C. Gen. Stat. § 58-41-15

¶ 10 Plaintiffs also argue that the trial court erroneously determined that N.C. Gen. Stat. § 58-41-15 did not apply to the policy. This argument is without merit.

¶ 11 N.C. Gen. Stat. § 58-41-10 outlines the scope of insurance policies governed under Article 41 and to which the cancellation provisions in section 58-41-15 apply, stating "[t]his Article does not apply to insurance written under Articles 21, 26, 36, 37, 45 or 46 of this Chapter[or to] *insurance written for residential risks in conjunction with insurance written under Article 36 of this Chapter*[.]" N.C. Gen. Stat. § 58-41-10(a) (2021) (emphasis added). Our Administrative Code provides that "[f]or the purposes of G.S. 58-41-10(a), a 'residential risk' is a risk covered under any of the following North Carolina Rate Bureau residential programs," including the "Homeowners Program[and the] Dwelling Fire and Extended Coverage Program[.]" 11 N.C. Admin. Code 10.0313(a) (2022).

¶ 12 Moreover, N.C. Gen. Stat. § 58-36-1 provides that the North Carolina Rate "Bureau shall promulgate and propose rates for insurance against loss to residential real property with not more than four housing units located in this State[.]" N.C. Gen. Stat. § 58-36-1(3) (2021). Pursuant to section 58-36-55, "[n]o policy form applying to insurance on risks or operations covered by this Article may be delivered or issued for delivery unless it has been filed with the Commissioner by the Bureau and either he has approved it, or 90 days have elapsed and he has not disapproved it." N.C. Gen. Stat. § 58-36-55 (2021). The record reveals that Plaintiffs' insurance policy was written on a standard HO3 form, and the Rate

Bureau Commissioner has approved the form under the Homeowner's Program, which is authorized by Article 36. These statutory provisions along with the record clearly establish that Plaintiffs' policy was covered by Article 36, meaning the cancellation provisions in N.C. Gen. Stat. § 58-41-15 do not apply to the policy.

¶ 13 Lastly, "[i]t is a general rule of statutory construction that where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Oxendine v. TWL, Inc.*, 184 N.C. App. 162, 165–66, 645 S.E.2d 864, 866 (2007) (quoting *Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 532–33 (1993)). Article 36 specifically applies to "insurance against loss to residential real property with not more than four housing units located in this State[.]" N.C. Gen. Stat. § 58-36-1(3) (2021). Article 41 applies generally to a wide variety of policies, including property, liability, title, and indemnity insurance policies. N.C. Gen. Stat. § 58-41-10(a). Accordingly, it is apparent that the legislature intended for Article 36 to apply to standard homeowner's insurance policies. Plaintiffs' argument is therefore without merit.

III. Conclusion

¶ 14 For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.

Judge TYSON concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

¶ 15 I respectfully dissent from the majority's holding that proof of mailing is sufficient to cancel an insurance policy under N.C. Gen. Stat. § 58-44-16. Accordingly, I would hold that for an insurance company to effectively cancel a policy under this statute, they would need to show proof the notice of cancellation was actually received.

¶ 16 Our statute states that a "standard fire insurance policy . . . may be cancelled at any time by th[e] insurer *by giving to the insured* a five days' *written notice of cancellation* with or without tender of the excess of paid premium." N.C. Gen. Stat. § 58-44-16(f)(10) (2021) (emphasis added). "When construing a statute, the court looks first to its plain meaning, reading words that are not defined by the statute according

to their plain meaning *as long as it is reasonable to do so*. The court must give effect to the plain meaning as long as the statute is clear and unambiguous." *State ex rel. Utilities Comm'n v. Env't Def. Fund*, 214 N.C. App. 364, 366, 716 S.E.2d 370, 372 (2011) (emphasis added) (citing *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010); *Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991); *State v. Jackson*, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001)). However, when a statute is unclear, "courts must resort to statutory construction to determine legislative will and the evil the legislature intended the statute to suppress." *Jackson*, 353 N.C. at 501, 546 S.E.2d at 574 (citations omitted).

¶ 17 Generally, our courts have sought to protect the insured from the contracts of adhesion and the general predatory practices of insurance companies by interpreting insurance policy provisions liberally to afford coverage whenever reasonable. *See N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 702, 412 S.E.2d 318, 321 (1992); *State Cap. Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986) ("[P]rovisions of insurance policies and compulsory insurance statutes which extend coverage must be construed liberally so as to provide coverage, whenever possible by reasonable construction.") (citations omitted). This is true whether the statute or insurance provision seeks to extend or exclude coverage. *State Cap. Ins. Co.*, 318 N.C. at 538, 350 S.E.2d at 68 (explaining that policy provisions which extend coverage should be construed to provide coverage and exclusion provisions should be construed against the insurer in favor of the insured).

¶ 18 Furthermore, other jurisdictions interpreting similar statutes have found that more than proof of mailing is required to effectively cancel an insurance policy. For example, in *Nunley v. Florida Farm Bureau Mutual Insurance Company*, the court, interpreting an insurance policy, found receipt of the cancellation notice was required to be effective. *Nunley v. Fla. Farm Bureau Mut. Ins. Co.*, 494 So. 2d 306, 307 (Fla. Dist. Ct. App. 1986). In *Nunley*, the provision used language identical to the statute here, stating: "[t]his policy may be cancelled at any time by this company *by giving to the insured a ten-days written notice of cancellation* with or without tender of the excess of said premium above the pro rata premium for the expired time[.]" *Id.* The *Nunley* court found the language was ambiguous and should therefore be "most reasonably construed as requiring the actual receipt of the notice by the insured." *Id.* Specifically, that court found that when the insurance provision states "the policy may be cancelled by giving notice to the insured in a specific number of days . . . actual receipt by the insured of such notice is a condition precedent to cancellation of the policy by the insured[.]" *Id.* Therefore, any "notice of cancellation mailed by the

insurer but not received by the insured [wa]s consequently ineffective as a cancellation." *Id.*

¶ 19 Because the term "giving" is ambiguous in this context, I would conclude the statute must be interpreted in favor of the insured and therefore require proof of delivery for a cancellation notice to be effective. For the foregoing reasons, I would reverse the trial court's order and I respectfully dissent.

IN THE MATTER OF G.W.

No. COA22-137

Filed 6 December 2022

Child Abuse, Dependency, and Neglect—neglect—substantial risk of future neglect—newborn—neglect of older siblings

The trial court's order adjudicating respondent-mother's newborn baby as neglected was affirmed where there was a history of the parents' home being filthy and having holes in the floor, of both parents having significant mental health issues, and of both parents abusing drugs; and where the parents failed to substantially comply with the terms of their case plan for their two older children in addressing those problems. Sufficient evidence supported the trial court's findings of fact (including certain events occurring after the filing of the petition, relating to ongoing circumstances relevant to conditions alleged in the petition), which in turn supported the trial court's conclusion that there was a substantial risk of future neglect of the child.

Appeal by Respondent from an order entered 16 November 2021 by Judge Thomas B. Langan in Stokes County District Court. Heard in the Court of Appeals 21 September 2022.

Sean P. Vitrano, for the Respondent-Appellant.

Leslie Rawls, for Stokes County Department of Social Services, the Petitioner-Appellee.

GAL Appellate Attorney James N. Freeman, Jr., for the Guardian ad Litem.

WOOD, Judge.

¶ 1 Respondent-Mother ("Mother") appeals from an order filed on 16 November 2021 adjudicating her child "Grace"[1] as neglected. Because we hold there is sufficient evidence to support the trial court's findings of fact, which in turn support the trial court's conclusion of there being a substantial risk of future neglect for Grace, we affirm the adjudication order of the trial court.

I. Factual and Procedural Background

¶ 2 Mother and Father[2] are the parents of three daughters: "Anita," "Hayley,"[3] and Grace. On 18 December 2018, Surry County Department of Social Services ("Surry County DSS") opened an investigation into allegations of neglect due to improper care. The parents were alleged to have given Hayley improper foods, to have dipped the baby's pacifier in Benadryl, refused to take parenting classes, and to be improperly feeding the baby, who was not gaining weight properly.

¶ 3 On 3 July 2020, DSS opened an investigation after receiving a report that Mother and Father had accidentally spilled bleach in Anita's eyes while cleaning near her crib. Their home was found to be cockroach-infested, having holes in the floors, and bags full of trash sitting in the home. On 6 July 2020, Mother and Father were charged with felony child abuse and agreed to have their children reside with a maternal great aunt.

¶ 4 Mother and Father moved to Stokes County and were contacted by a social worker from Stokes County DSS on 14 July 2020. On 11 August 2020, Surry County DSS learned of pending charges against the parents, including the charges of felony child abuse, misdemeanor possession of marijuana, and misdemeanor possession of marijuana paraphernalia. On 21 August 2020, a social worker reviewing records from Surry County learned that Father had been diagnosed with PTSD and paranoid schizophrenia that was untreated, that he was reported to have stabbed someone because "the guy was going to try and kill him," and that "he used to be in the Arian [sic] Brotherhood gang."

¶ 5 The social worker also learned that Mother has a history of intellectual disability, bipolar disorder, intermittent explosive disorder, and

1. We use pseudonyms to protect the child's identity and for ease of reading.

2. Father is not a party to this appeal.

3. We use pseudonyms to protect the children's identities and for ease of reading.

borderline personality disorder. She was referred for a psychological assessment, and it was recommended a guardian be assigned to her. On this same day, Stokes County DSS filed petitions alleging that Grace's sisters, Anita and Hayley, were abused and neglected, and the children were placed in the nonsecure custody of the Stokes County DSS. Anita was two years old; Hayley was five months old; and Grace had not yet been born at this time. On 23 September 2020, the parents entered into a family services case plan in relation to Anita and Hayley.

¶ 6 Grace was born on 21 January 2021, and, although Grace's urine screen was negative, Mother tested positive for marijuana and oxycodone at her birth. Because the hospital is located in Forsyth County, Forsyth County DSS came to the hospital to investigate the report. When the social worker initiated contact, Mother immediately stated she would be leaving the hospital. Father "became irate" with hospital staff and the social worker such that security had to be called. The hospital refused to allow Grace to be discharged when Mother and Father attempted to leave with her. Stokes County DSS filed a petition alleging Grace was a neglected juvenile due to living in an environment injurious to her welfare. On this same day, Grace was removed from Mother and Father's custody pursuant to a nonsecure custody order and placed in the custody of Stokes County DSS.

¶ 7 According to the petition, Stokes County DSS received a CPS report on the day Grace was born alleging that Mother and Father had not followed recommendations from their out of home family services case plan concerning their "parenting psychological[,] . . . ha[d] not completed parenting classes and [were] not involved in mental health services." The petition also alleged that the parents changed their stories several times about what happened to their other children and that hospital staff reported the parents were "acting sketchy and paranoid, and [were] not wanting anyone in their room." The petition further stated that the parents had a positive drug screen on 19 November 2020, for marijuana and that Mother had a positive screen for marijuana and opiates in December 2020.

¶ 8 On 9 February 2021, the trial court ordered that (1) Grace shall remain in the nonsecure custody of DSS; (2) the parents shall meet with Stokes County DSS worker, Ms. Wanda Pearman, to explore services for themselves; (3) Stokes County DSS shall conduct a home study of the relative identified by the parents for home and kinship suitability; and (4) "Parents shall address the tasks of the case plans in 20 JA 98 and 99" for their other two children. The parents were allotted two hours per week of supervised visitation with Grace to take place with her sisters

who were also in the custody of DSS. On this same day, the trial court appointed a Guardian *ad litem* on behalf of Mother "based on the previous order and the [8 October 2020] report from Dr. Bennett" of Carolina Piedmont Psychological Associates. According to Dr. Bennett, Mother has "limitations to her cognitive capacity and that she would benefit from someone who could help her understand the legal proceedings" because she "does not understand the consequences of her decisions but she is easily influenced[.]"

¶ 9 On 25 February 2021, the trial court granted Stokes County DSS' motion to amend their juvenile petition for Grace. The amended petition added the following allegation: on 26 January 2021, Grace's umbilical cord tested positive for THC, oxycodone, noroxycodone, oxymorphone, and noroxymorphone. On this same day, Anita and Hayley were adjudicated neglected with the consent of Mother and Father. On 26 March 2021, Mother's attorney filed a motion to strike, motion to dismiss, motion to set aside, and answer to the juvenile petition. The adjudication hearing set in April was continued until June and then August due to Father being homebound by a physician's orders after a serious moped accident resulted in the amputation of his leg and left him wheelchair bound.

¶ 10 On 26 August 2021, the trial court conducted an adjudication and disposition hearing. The trial court adjudicated Grace to be a neglected juvenile due to living in an "injurious environment, condition of home, — filthy, holes in floor." Additionally, the trial court found there was a substantial risk of future neglect and that her parents had failed to address the conditions which resulted in the removal of their two older children. The court determined that legal custody and physical custody of Grace should remain with Stokes County DSS.

¶ 11 In its disposition, the trial court ordered that (1) both Father and Mother obtain substance abuse assessments and comply with the recommended treatments; (2) Mother obtain a mental health assessment and comply with recommended treatment; (3) both parents attend individual counseling and Father specifically attend anger management courses; (4) parents comply with the provisions of their family services case plan entered on 23 September 2020 in relation to their two older children; (5) parents maintain a suitable residence, including making necessary repairs; (6) parents utilize YVEDDI transportation services; and (7) the parents comply with recommendations made by Dr. Bennett in their psychological assessments. The trial court further ordered that parents would continue to have visitations with their children on a weekly basis for a two-hour duration at DSS, until such time as "holes in floor [of home were] repaired."

¶ 12 The formal adjudication judgment and dispositional order was filed on 16 November 2021. Mother gave notice of appeal on 8 December 2021.

II. Analysis

¶ 13 Mother contends the trial court's conclusion that Grace faced a substantial risk of future neglect was unsupported by clear and convincing evidence, and therefore, it was error to adjudicate her a neglected juvenile. She also contests several findings of fact and conclusions of law in the adjudication order. However, Mother does not challenge the disposition order.

¶ 14 The purpose of an adjudication hearing is to adjudicate "the existence or nonexistence of any of the conditions alleged in a petition." N.C. Gen. Stat. § 7B-802 (2021). Thus, post-petition evidence is admissible for consideration of the child's best interest in the dispositional hearing, but generally not for an adjudication of neglect. *In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 15 (2006). In reviewing a non-jury adjudication of neglect, "the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re K.D.*, 178 N.C. App. 322, 327, 631 S.E.2d 150, 154 (2006) (citation omitted). Additionally, uncontested 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). This Court reviews the trial court's conclusions of law to determine whether they are supported by the findings of fact. *In re W.C.T.*, 280 N.C. App. 17, 2021-NCCOA-559, ¶ 27. The determination of whether a child is neglected is a legal conclusion that is reviewed *de novo*. *In re K.L.*, 272 N.C. App. 30, 36, 845 S.E.2d 182, 189 (2020). "An appeal *de novo* is one 'in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings.' " *In re K.S.*, 380 N.C. 60, 2022-NCSC-7, ¶ 8 (quoting *Appeal De Novo*, Black's Law Dictionary (11th ed. 2019)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.* (cleaned up).

¶ 15 A "neglected juvenile" is defined by statute as:

> [a]ny juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker . . . [c]reates or allows to be created a living environment that is injurious to the juvenile's welfare . . . . In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another

> juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2021). "[I]n order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm." *In re K.J.B.*, 248 N.C. App. 352, 354, 797 S.E.2d 516, 518 (2016) (citation omitted).

¶ 16 When "neglect cases involv[e] newborns, 'the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.' " *In re J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693, 698-99 (2019) (quoting *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999)). Otherwise,

> [t]o hold that a newborn child must be physically placed in the home where another child was abused or neglected would subject the newborn to substantial risk, contrary to the purposes of the statute. Thus, a newborn still physically in residence in the hospital may properly be determined to "live" in the home of his or her parents for the purposes of considering under N.C. Gen. Stat. § 7B-101(15) whether a substantial risk of impairment exists to that child.

In re A.B., 179 N.C. App. at 611, 635 S.E.2d at 16.

A. Challenged Findings of Fact.

1. Finding of Fact 5

¶ 17 Mother contends that several findings were unsupported by clear and convincing evidence. She objects to portions of finding of fact 5 which suggest that she and Father "were not complying with their case plans or Dr. Bennett's recommendations" when the neglect petition was filed on 22 January 2021. Mother specifically contests the portion of finding of fact 5 which states: "Regarding their case plans for the older two children, the parents have not followed the terms of their parenting psychological[ ] [evaluations], they have not completed parenting classes, and they are not involved in mental health services."

¶ 18 Mother argues this finding is unsupported because she and Father "were complying with several aspects of their case plans, and the record does not establish that parenting classes were offered to them before the petition was filed." We disagree.

¶ 19 According to the record before us, the trial court did not require either parent to enter into a new case plan for Grace, but rather it required only that the parents continue working on the case plans entered on 23 September 2020 for their two older children. While Mother and Father have complied with some aspects of their case plans, "compliance with a portion of [their] case plan does not preclude a finding of neglect." *In re N.B.*, 377 N.C. 349, 2021-NCSC-53, ¶ 20 (internal citation omitted).

¶ 20 Clear and convincing evidence supports the trial court's findings that neither Mother nor Father had complied with the recommendations of the evaluating psychologist, Dr. Bennett. In regard to Mother, Dr. Bennett recommended she have: (1) a psychiatric consultation to review her diagnosis and treatment, which was scheduled for 6 October 2020, then rescheduled to 17 November 2020, with Mother ultimately not attending the appointment; (2) counseling to treat her depression and explore parenting behaviors that would allow her to safely care for her children, in which Mother attended one therapy session in September 2020, but did not schedule a follow up appointment; (3) random drug testing, which of four tests taken prior to the petition, Mother tested positive for cannabinoid and THC once on 19 November 2020; and (4) Mother demonstrate stability in her life including having stable housing to support caring for her children, which the testimony of social workers revealed that holes were present in the home's floors as early as 3 July 2020 and as recently as early August 2021.

¶ 21 In regard to Father, Dr. Bennett recommended: (1) a psychiatric evaluation to review and confirm his diagnoses and to evaluate for treatment options, which according to Father, he completed a week and a half before the August 2021 adjudication hearing; (2) random drug testing which of the four drug screens taken prior to the petition, Father had tested positive for THC and cannabinoid at each; and, (3) counseling to offer Father an opportunity to explore alternative behaviors both in parenting and in dealing with others. Ample clear and convincing evidence demonstrates that neither parent substantially complied with Dr. Bennett's recommendations or the mental health services requirements of their case plans. While record evidence supports Mother's contention that she and Father completed parenting classes prior to the July 2021 adjudication hearing, the classes were completed after the filing of the petition.

¶ 22 Post-petition evidence is admissible for consideration of Grace's best interest in the dispositional hearing, but not in the adjudication of neglect. *In re A.B.*, 179 N.C. App. at 609, 635 S.E.2d at 15. Notwithstanding Mother's contentions otherwise, the record shows that "[a] referral for the Nurturing Parenting Program . . . was completed and sent to the

Children's Center of Northwest NC on September 23, 2020." Therefore, we conclude clear and convincing evidence in the record supports the trial court's finding of fact 5.

2. Findings of Fact 29, 30, 32, 35, 36, 37, 38

¶ 23 Next, Mother objects to findings of fact 29, 30, 32, 35, 36, 37, and 38 because these findings describe events that occurred after the filing of the juvenile petition for neglect. Mother cites to this Court's previous holding in *In re V.B.* that held "post-petition evidence generally is not admissible during an adjudicatory hearing for abuse, neglect or dependency." 239 N.C. App. 340, 344, 768 S.E.2d 867, 869 (2015) (cleaned up). While Mother is correct that the purpose of an adjudicatory hearing is to determine only "the existence or nonexistence of any of the conditions alleged in a petition," the general rule that post-petition evidence is not admissible during the adjudication hearing is "not absolute." *Id.* at 344, 768 S.E.2d at 869-70. This court has previously determined that some post-petition evidence, like that which pertains to mental illness and paternity, does not constitute a "discrete event or one-time occurrence." *Id.* at 344, 768 S.E.2d at 870. Instead, conditions such as these have been determined by this Court to be "fixed and ongoing circumstance[s]" so that post-petition evidence about them is allowed to be considered in a neglect adjudication. *In re Q.M.*, 275 N.C. App. 34, 41, 852 S.E.2d 687, 693 (2020) (quoting *In re V.B.*, 239 N.C. App. at 344, 768 S.E.2d at 870). Likewise, the findings Mother challenges here relate in whole or in part to "ongoing circumstances" relevant to "the existence or nonexistence of conditions alleged in the adjudication petition." *In re V.B.*, 239 N.C. App. at 344, 768 S.E.2d at 869-70; N.C. Gen. Stat. § 7B-802.

¶ 24 In finding 29, the trial court found, "the parents struggle to care for their three children during visitation, and social workers have intervened to prevent child injury." The implications of this finding are based upon post-petition evidence. Here, this finding relates to Mother and Father's continuous difficulties in properly caring for their children — difficulties that existed even prior to Grace's birth. Competent record evidence demonstrates that concerns regarding Mother and Father's parenting abilities had been ongoing since December 2018 when Surry County DSS initiated an investigation alleging neglect of Grace's older sisters. Indeed, the petition filed by DSS contained allegations regarding the parents' inability to care for Grace and this contested finding is relevant to the existence or nonexistence of conditions alleged in the petition.

¶ 25 Additionally, Mother contests finding of fact 30 which states, "Holes in the floor of the parents' home are safety concerns for the children,

including [Grace]." Mother also challenges a similar portion of finding of fact 32: "In addition, the injurious environment of the parents' home, specifically holes in the floor, creates a safety hazard." Again, these findings also present an ongoing circumstance of home safety and the ongoing risk to Grace's safety. Clear and convincing evidence in the record demonstrates that there had been holes in the floor prior to Grace's birth. According to the initial neglect petition for Grace, on 3 July 2020, a social worker "observed books scattered on the floor in various spots," and asked Mother why the books were on the floor. In response, Mother lifted one of the books for the social worker "to see the holes at least a foot in length and 3-4 inches in width." At that time, the social worker "observed 2-3 holes in the bedroom and bathroom [and] [Mother] stated [Grace's older sibling] is walking some now and they try to keep her safe." At the adjudication hearing, a social worker testified about the need for repairs to the parents' home, citing that there were "holes in the floor as recently as last week. [Mother] . . . reported that she fell through the floor in the kitchen. So that is a concern." Therefore, these findings of fact relating to the continuing risk to the child's safety is admissible post-petition evidence.

¶ 26 Next, Mother challenges several findings of fact addressing her and Father's progress on their case plans as post-petition evidence which, she argues, is generally not admissible during an adjudicatory hearing. The trial court addressed Mother's and Father's progress related to their mental health and parenting classes in findings of fact 35 and 36. Finding of fact 35 states, "Regarding [Father's] case plan for his older two children he reports he will begin therapy with Monarch soon. He completed parenting classes 7/14/2021." Regarding Mother's case plan for her older children, finding of fact 36 states, "she has not completed a psychiatric evaluation, nor has she engaged in counseling. She completed parenting classes 7/14/2021."

¶ 27 "[D]ue to the fact that mental illness is generally not a discrete event or one-time occurrence," we find that Mother's and Father's failure to address their case plan goals concerning their mental health is relevant to the parents' ability to care for Grace. *In re V.B.*, 239 N.C. App. at 344, 768 S.E.2d at 870 (quoting *In re A.S.R.*, 216 N.C. App. 182, 716 S.E.2d 440, 2011 N.C. App. LEXIS 2166, at *11 (N.C. Ct. App. 2011) (unpublished)). Thus, the post-petition evidence of both Father and Mother not yet having begun therapy or taken measures to address their mental health concerns at the time of the adjudication hearing was relevant to the existence or nonexistence of conditions alleged in the petition. Therefore, we conclude these portions of the findings of fact are supported by competent evidence and may be considered at the adjudicatory stage.

¶ 28 Although Father and Mother finished parenting classes in July 2021, the courses were not completed before the adjudication petition was filed, so these portions of the findings constitute post-petition evidence. Parenting classes qualify as a discrete occurrence that occurs over a designated period of time; therefore, this evidence is not admissible at adjudication. Consequently, we disregard these portions of findings 35 and 36.

¶ 29 Mother further contests findings of fact relating to her and Father's substance abuse and drug screenings. Finding of fact 37 states, "[Father] tested positive for THC 9/23/2020, 10/12/2020, 11/19/2020, 11/28/2021 [sic], and 3/16/2021. He has not been tested since his accident [on] March 23, 2021. He asserts positive screens are due to his CBD use." Finding of fact 38 states:

> [Mother] tested negative 9/23/2020, 10/12/2020, 1/28/2021, and 3/16/2021 on drug screens requested by DSS. She was positive 11/19/2020 for THC, a DSS screen. Her screen at [Grace's] birth on 1/21/2021 was positive for marijuana and opiates. She attributes the positive for THC to CBD use and the positive for opiates to prescribed medications.

Concerning Father's positive drug screens, we note that four of his positive drug tests were conducted prior to the filing of the adjudication petition, and evidence thereof may be considered at the adjudicatory stage. Likewise, Mother's drug screens conducted prior to the petition, including Mother's positive test for THC at Grace's birth may also be considered at the adjudicatory stage of the neglect petition. As to Father's and Mother's post-petition drug screens, we liken these to the admissibility of a parent's blood alcohol test at the adjudication stage. *Powers v. Powers*, 130 N.C. App. 37, 46, 502 S.E.2d 398, 403-04 (1998). Like a blood alcohol test, a drug test is a discrete, one-time event as opposed to an ongoing condition. Therefore, the evidence of Mother's and Father's post-petition drug tests is admissible at disposition, but not at adjudication. *Id.*

3. Findings of Fact 32 and 33

¶ 30 Finally, Mother challenges the trial court's findings of fact 32 and 33 that Grace was at substantial risk of neglect. Mother argues that these contested findings of fact should be classified as conclusions of law because the determination that Grace was at risk of neglect requires the exercise of judgment. *In re A.B.*, 179 N.C. App. at 612, 635 S.E.2d at 16 (citing *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997)). Finding of fact 32 states, "Considering the vulnerability of the

young child, the cognitive limitations of the parents, and their history of rejecting medical and social services' advice, there is a substantial risk of future neglect. In addition, the injurious environment of the parents' home, specifically holes in the floor, creates a safety hazard." Finding of fact 33 states, "The parents' failure to address the terms of their case plans for their older two children, ages one and two, specifically mental health, creates a substantial risk of future neglect to [Grace]."

¶ 31 We agree with Mother that the above findings contain conclusions of law, but we hold that they should more properly be characterized as ultimate findings of fact since they are determinations of "mixed question[s] of law or fact." *In re C.A.H.*, 375 N.C. 750, 757, 850 S.E.2d 921, 926 (2020) (citation omitted). Further, we hold that the supported findings of fact and evidence establish that Grace was at a substantial risk of future harm.

¶ 32 Here, clear and convincing evidence supports the finding that Mother and Father failed to comply with medical and social services' advice and failed to comply with the terms of the case plans for their older two children such that a substantial risk of future neglect exists for Grace. Several unchallenged findings of facts support the trial court's conclusion of neglect and risk of future neglect. For instance, finding of fact 9 states that on 22 January 2021, Mother "left the hospital against medical advice . . . . The child remained in the hospital without the parents."

¶ 33 An unchallenged finding of fact states that Father

> believes he is being targeted for his Nazi beliefs. In his personality assessment, [Father] presented significant levels of suspiciousness and paranoia. He has limited insight and ignores medical guidance and experts. He does not notice symptoms and hazards regarding children, which should be noticed by a parent. He has put his children at risk as a result, including placing a pot grinder in his child's crib to hide it from law enforcement, placing a bleach bottle on his baby's crib rail and spilling its contents into her eyes, and being unaware of his twenty-two[-]month old's severe tooth decay, despite warnings from medical professionals.

Similarly, uncontested findings state, "[Mother's] judgment is not sound, and she does not have the ability to protect her children. She fails to understand how her actions impact the health and safety of her children. She ignores medical guidance and does not notice the developmental delays of her older two children."

¶ 34 With respect to the risk of future neglect, the trial court also made multiple uncontested findings regarding the parents' inability to substantially comply with their case plans. For example, the court recognized Grace's vulnerability relating to her parents' drug use: "[M]other tested positive for marijuana and opiates at the child's birth, 1/21/2021. She was prescribed opiates . . . . [Grace's] umbilical cord was positive for marijuana, oxycodone, noroxycodone, oxymorphone, and noroxymorphone." The uncontested finding also states Mother

> does not understand her actions led to the loss of custody of her older two children. She supports [Father]'s perceptions that she and her husband are being treated unfairly because they hold Nazi views, rather than examining her own behaviors and actions, which caused her children to be placed in DSS custody.

Whether another juvenile has been subjected to neglect by an adult who resides in the home is a relevant factor, and here, uncontested findings demonstrate that the "parents' older two children, ages one and two, are presently in the custody of the Stokes County Department of Social Services." Further, the court's uncontested findings demonstrate Grace faced a substantial risk of neglect if placed back into the custody of her parents at the time of the adjudication. Therefore, the clear and convincing evidence and the unchallenged findings of fact support the conclusion of law that Grace is a neglected juvenile at risk of future neglect.

III. Conclusion

¶ 35 Based on the reasoning above, we hold that the clear and convincing evidence in the record supports the trial court's adjudicatory findings of fact and that the uncontested findings of fact and evidence support the trial court's conclusion that Grace is a neglected juvenile at risk of future neglect. Therefore, we affirm the trial court's order adjudicating Grace as a neglected juvenile.

AFFIRMED.

Judges TYSON and CARPENTER concur.

IN RE J.N.J.

[286 N.C. App. 599, 2022-NCCOA-785]

IN THE MATTER OF J.N.J.

No. COA21-455

Filed 6 December 2022

1. **Child Abuse, Dependency, and Neglect—adjudication—findings of fact—recitation of allegations in petition—sufficiency of evidence**

In a child neglect and dependency case, the trial court's findings of fact, despite mirroring the allegations in the petition filed by the department of social services, were supported by clear and convincing evidence—including social workers' testimony—and reflected the trial court's processes of logical reasoning, as demonstrated by the court's detailed orally rendered judgment. The findings, minus a few minor unsupported details, which the appellate court disregarded, were sufficient to support the trial court's adjudication of a minor child as neglected and dependent.

2. **Child Abuse, Dependency, and Neglect—neglect—infant with severe respiratory issues—parents smoked and lacked training**

The trial court properly adjudicated a minor child—who was born premature with underdeveloped lungs; who required two trained, full-time caregivers; and who could not be in contact with any smoke, residue, or particulate—as neglected based on factual findings, which were supported by clear and convincing evidence, that the child's parents were unable to provide proper care and supervision because they had not completed the necessary medical training; that both parents admitted to smoking and their homes smelled of smoke and contained smoking paraphernalia; and that respondent mother had a history of engaging in relationships with domestic violence, had a troubled relationship with respondent father and allowed him to convince her to lie to social services about the child's parentage, and had two other children in nonsecure custody. Based on these findings, there was a substantial risk of the child's physical impairment if he were allowed to live with either parent.

3. **Child Abuse, Dependency, and Neglect—dependency—infant with severe respiratory issues—parents smoked and lacked training—no alternative care arrangement**

The trial court properly adjudicated a minor child—who was born premature with underdeveloped lungs; who required two trained, full-time caregivers; and who could not be in contact with any smoke, residue, or particulate—as dependent based on factual findings, which were supported by clear and convincing evidence, that the child's parents were unable to provide proper care and supervision because they had not completed the necessary medical training, that both parents admitted to smoking and their homes smelled of smoke and contained smoking paraphernalia, and that there was no appropriate alternative child care arrangement.

4. Appeal and Error—preservation of issues—constitutional issue—child neglect and dependency proceeding

In a neglect and dependency proceeding, respondent mother failed to preserve her constitutional argument that the trial court erred by awarding custody of her son to the department of social services without first making a finding that respondent was unfit or had acted inconsistently with her constitutionally protected right as a parent, because respondent failed to raise the issue at either the adjudicatory or dispositional hearings.

Judge MURPHY dissenting.

Appeal by Respondent-Mother from orders entered 22 July 2020, 29 July 2020, and 18 May 2021 by Judge Marcus A. Shields in Guilford County District Court. Heard in the Court of Appeals 9 February 2022.

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

Kimberly Connor Benton for Respondent-Appellant Mother.

Parker Poe Adams & Bernstein LLP, by Collier R. Marsh, for the Guardian ad Litem.

JACKSON, Judge.

¶ 1 Respondent-Mother argues that (1) the trial court's findings are insufficient because they merely restate allegations from the Petition and are unsupported by clear and convincing evidence; (2) the remaining supported findings do not support an adjudication of neglect and dependency; and (3) the trial court failed to make necessary constitutional

findings in order to properly apply the best interest of the child standard. First, we hold that while some minor portions of the findings are unsupported and must be disregarded, the remaining portions are supported by clear and convincing evidence. Moreover, despite mirroring language from the Petition, we are confident that the trial court used a process of logical reasoning when making its ultimate findings. Second, we hold that these findings support the conclusion that Jason[1] was neglected and dependent, and therefore affirm the trial court's order on adjudication. Lastly, because we hold that Respondent-Mother's constitutional argument was not properly preserved for our review, we do not address its merits.

I. Background

¶ 2 On 28 July 2019, Respondent-Mother gave birth to Jason. The following day, a report was filed with the Guilford County Department of Health and Human Services ("DHHS") originating this case because Respondent-Mother had other children in DHHS custody at the time. Due to his premature birth at 25 weeks, Jason remained hospitalized for treatment of various medical conditions. Jason was on a breathing tube and was consequently prohibited from being in contact with smoke, smoke particulate, and residue due to his respiratory condition. Jason's home and any car he traveled in also had to be free of smoke residue. His doctors also required Jason to be supervised 24 hours a day, necessitating two full-time caretakers. Because Jason needed a tracheal tube and ventilator, both caretakers needed to be medically trained to care for him and use the necessary equipment.

¶ 3 On 30 July 2019, Social Worker R. Turner visited Jason and Respondent-Mother at the hospital. During the visit, Respondent-Mother admitted that she had other children in DHHS custody and did not have visitation with them. Respondent-Mother also told Social Worker Turner that she did not know who Jason's father was and that she believed he was conceived at a party in Atlanta where she had sex with multiple people while intoxicated. DHHS was concerned about Jason's medical issues, Respondent-Mother's other children in custody, and the circumstances of Jason's conception. Based on Respondent-Mother's history with DHHS, Social Worker Turner was concerned about Respondent-Mother's poor decision-making and lack of improvement after taking mandated parenting classes.

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1. The parties stipulate to the use of this pseudonym for ease of reading and to protect the child's privacy.

¶ 4 Eventually, Respondent-Mother identified Jason's father and provided his contact information to Social Worker Turner. Respondent-Father[2] alleged that he had instructed Respondent-Mother to lie about Jason's parentage, specifically instructing her to tell the story that she had engaged in unprotected sex with multiple people at a party. Respondent-Mother admitted to following Respondent-Father's instruction and lying to DHHS.

¶ 5 In October 2019, Social Worker Young visited Respondent-Mother's home to determine if it would be an appropriate home for Jason when he was released from the hospital. At this visit, she discovered that Respondent-Mother was living with an unknown roommate and observed that the home smelled like incense had been burning, both of which concerned DHHS. Separately, a nurse who visited Respondent-Mother's home also detected a "smoky smell." A home visit was also conducted by Social Worker Turner for Respondent-Father's home sometime in October. At this visit, Social Worker Turner observed multiple ashtrays, a glass bong, a tobacco smoke odor, and the odor of what could have been marijuana. Although Respondent-Father denied the bong belonged to him, he admitted to smoking cigarettes and marijuana.

¶ 6 A background check was conducted on Respondent-Father, and DHHS discovered multiple criminal convictions, including assault on a female, communicating threats, assault with intent to inflict serious injury, misdemeanor child abuse, contributing to the delinquency of a minor, resisting a public officer, assault with a deadly weapon on a government official, as well as various drug, larceny, and robbery convictions. Additionally, during the home visit, Social Worker asked Respondent-Father about a 911 call for a domestic disturbance, and he advised that an altercation occurred when the mother of another child of his discovered his involvement with Respondent-Mother. This altercation between Respondent-Father and the mother resulted in the 911 call, and the mother and her child moved out of the home.

¶ 7 On 6 December 2019, Social Worker Turner and hospital staff met with Respondent-Mother and Respondent-Father to discuss Jason's discharge from the hospital. Jason's parents advised DHHS that they were not living together or in a relationship but would be co-parenting. DHHS was concerned with this arrangement, because Jason needed two caretakers living in the home with him to provide 24-hour medical care. Respondent-Father informed DHHS that he had not yet spoken

2. Respondent-Father is not a party to this appeal.

with his employer about Jason's needs or his work schedule and that he "sleeps really hard and has a difficult time with hearing alarms." Social Worker Turner asked Respondent-Mother who Jason's two caretakers would be if placed in her care, and Respondent-Father instructed Respondent-Mother not to answer the question. Respondent-Mother did not directly answer the question or identify anyone by name but vaguely indicated that she had "supports."

¶ 8 After the December meeting, Respondent-Father recommended his brother and sister-in-law as a potential placement option. However, the couple expressed that they were no longer interested in being caretakers for Jason due to their concerns with Respondent-Mother's behavior and the possibility that they were moving to a new home. Social Worker Turner also contacted Respondent-Father's mother, who advised that she could not be a placement option and did not have any other family members that could be considered for placement. At a later meeting between Respondent-Mother and Social Worker Turner, Respondent-Mother again failed to provide other placement options.

¶ 9 Meanwhile, while Jason was hospitalized, the case for his sisters was still pending. A permanency planning hearing for Jason's sisters was held on 20 November 2019. The permanency planning order,[3] entered on 9 December 2019, changed the primary permanent plan from reunification to adoption, with a secondary plan of reunification. The sisters remained in DHHS custody. The trial court found that the barriers to reunification were, *inter alia*: (1) the juveniles were afraid to return home; (2) Respondent-Mother's inability to demonstrate what she learned in domestic violence classes; (3) Respondent-Mother's inability to verbalize why her children came into DHHS custody or her role in that outcome; (4) Respondent-Mother's minimization of the effects of domestic violence on her children; (5) Respondent-Mother's admission that she had intercourse with an unidentified man at a party while intoxicated; (6) Respondent-Mother's honesty; and (7) Respondent-Mother's violation of a court order and failure to comply with her case plan.

¶ 10 The Petition and non-secure custody order for Jason were filed six months after his birth, on 30 January 2020, while he was still in the hospital. The Petition alleged that Jason did not receive proper care, supervision, or discipline, lived in an environment injurious to his welfare, and Jason's parents were unable to provide for his care or supervision and

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3. At Jason's hearing on adjudication, Judge Shields took judicial notice of the permanency planning order in Jason's sisters' pending case, in which he was also the presiding judge.

lacked an appropriate childcare arrangement. At the time the Petition was filed, Respondent-Father had not completed any of the necessary training to care for Jason, and Respondent-Mother had completed some but not all of the training. Neither parent had an appropriate, smoke-free home, and the parents also had not provided an alternative, suitable two-caretaker home to meet Jason's medical needs.

¶ 11 At the first non-secure custody hearing in February 2020, both Respondent-Mother and Respondent-Father were prohibited from visiting with Jason because they admitted to smoking. At the second non-secure custody hearing in April 2020, Respondent-Mother was granted supervised visits with Jason at the hospital, provided she was smoke, particulate, residue, and odor free. She was not permitted to drive her car to the visit unless she provided DHHS with a receipt showing that it had been professionally cleaned and was smoke-free. Jason remained hospitalized until 28 April 2020, when he was placed in a foster home.

¶ 12 The hearing on adjudication was held over two days, on 5 June 2020 and 1 July 2020. Two social workers, R. Turner and K. Young, testified on behalf of DHHS. On 22 July 2020, the trial court adjudicated Jason a neglected and dependent juvenile. An amended adjudication order was filed on 29 July 2020 to correct the file number. The trial court conducted a hearing on disposition on 12 February and 12 March 2021. On 18 May 2021, the disposition order was entered. Respondent-Mother timely filed a Notice of Appeal from the adjudication and disposition orders and an Amended Notice of Appeal to include the amended adjudication order.

II. Discussion

¶ 13 Respondent-Mother argues that (1) the trial court's findings are insufficient because they merely restate allegations from the Petition and are unsupported by clear and convincing evidence; (2) the remaining supported findings do not support an adjudication of neglect and dependency; and (3) the trial court failed to make necessary constitutional findings in order to properly apply the best interest of the child standard. We address each argument in turn.

A. Standard of Review

¶ 14 For adjudications in abuse, neglect, or dependency cases, the standard of review is whether the findings of fact are supported by clear and convincing evidence. *In re J.A.M.*, 372 N.C. 1, 8, 822 S.E.2d 693, 698

(2019). *See* N.C. Gen. Stat. § 7B-805 (2021). However, we do not review challenged findings that are unnecessary to support a trial court's determination. *See In re S.R.F.*, 376 N.C. 647, 654, 656, 2021-NCSC-5, ¶ 16, 19. *See also In re C.J.*, 373 N.C. 260, 262, 837 S.E.2d 859, 860 (2020) (declining to review challenged findings unnecessary to support the grounds for adjudication). Unsupported findings or portions of findings are disregarded, and we review only the proper findings when determining whether the findings of fact support the conclusions of law. *See S.R.F.*, 376 N.C. at 654, 656, 2021-NCSC-5 ¶ 16, 19. Findings of fact supported by clear and convincing evidence are "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). Conclusions of law are reviewed *de novo*. *In re M.H.*, 272 N.C. App. 283, 286, 845 S.E.2d 908, 911 (2020) (citation omitted).

B. Findings of Fact

¶ 15 **[1]** Respondent-Mother argues that the trial court's findings are insufficient because they merely restate allegations from the petition and are unsupported by clear and convincing evidence. While we agree that portions of the trial court's findings are unsupported, we hold that the remaining supported findings are sufficient to support the trial court's adjudication of Jason as neglected and dependent.

¶ 16 The Juvenile Code provides that adjudication orders "shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-807(b) (2021). These factual findings "must be the specific ultimate facts[,] sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *In re H.P.*, 278 N.C. App. 195, 202, 2021-NCCOA-299, ¶ 23 (internal marks and citation omitted).

¶ 17 Acknowledging the reality that trial courts in our State have "little or no support staff to assist with order preparation," we have repeatedly held that

> it is not per se reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party. Instead, this Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we are confident the trial court did

> so, it is irrelevant whether those findings are taken verbatim from an earlier pleading.

In re J.W., 241 N.C. App. 44, 48-49, 772 S.E.2d 249, 253 (2015).

¶ 18 Here, the following relevant findings were not challenged by Respondent-Mother, are supported by clear and convincing evidence from the Record, and are therefore binding on appeal:

> 8. [Respondent-Mother] has two (2) other minor children who are not the subject of this proceeding . . . . The juveniles are currently in the custody of the Guilford County Department of Health and Human Services, pursuant to a Petition and non-secure custody order filed April 20, 2019, alleging neglect and dependency. The current plan for the juveniles was changed to adoption pursuant to a Permanency Planning Hearing on November 20, 2019 with the Order for that hearing entered by the Court on December 11, 2019. Pursuant to that Order, the plan was changed to adoption based on [Respondent-Mother's] lack of compliance with the majority of her case plan for those juveniles, which include the mother's failure to successfully demonstrate improvement in her decision-making regarding parenting and relationships; the mother's understanding of domestic violence; and the mother's ability to properly vet partners. The Court took judicial notice of the Permanency Planning Hearing Order entered on December 11, 2019 pursuant to the hearing held on November 20, 2019 in the companion sibling case.
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> . . .
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> 11. No appropriate relative placements have been identified.

¶ 19 Respondent Mother, however, challenges Findings of Fact 14 through 27 of the trial court's order on adjudication. Specifically, she argues that "Findings of Fact #14-27 are nothing more than mere reiterations of statements to [DHHS] and are not supported by the evidence, and there is no evidence the trial court used any logical reasoning to make its ultimate findings of fact." While Respondent-Mother "does not deny [DHHS] presented some evidence" at the hearing, she takes issue with the fact that "[t]he court verbatim adopted its findings of fact from Exhibit A"

and, in her view, "failed to use logical reasoning to make findings of the ultimate facts."

¶ 20 Omitting minor unsupported details, we hold that the following challenged findings are supported by clear and convincing evidence:

> 14. The Guilford County Department of Health and Human Services received a report on July 29, 2019. Reporter stated that [Respondent-Mother] gave birth to a newborn baby on July, 28 2019. Reporter stated that the infant was born at 25 weeks and will remain in the NICCU [sic] for a while. Reporter advised [Respondent-Mother] has other kids in the custody of GCDHHS. At that time, [Respondent-Mother] refused to give the name of the biological father.
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> 15. On July 30, 2019 Social Worker Turner went to the Greensboro Women's Hospital and spoke with [Respondent-Mother] . . . . Social Worker Turner addressed the allegations and inquired about [Respondent-Mother's] plan. [Respondent-Mother] advised that she currently has a foster care case with her two daughters . . . . [Respondent-Mother] shared that visitation was stopped by the Department . . . . Social Worker Turner asked for the name of [Jason's] father, and [Respondent-Mother] stated that she honestly did not know because it could be one of several men with whom she had intercourse at a party in a different state during the holiday season of 2018. Social Worker Turner requested any names or any information she could recall, and [Respondent-Mother] stated that she had no information.
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> 16. On August 16, 2019, the Department held a Child and Family Team Meeting (CFT) . . . . During this meeting the issues discussed were as follows: (1) CPS report received on July 29, 2019; (2) newborn child was born with medical issues; (3) [Respondent-Mother's] other children currently in DSS custody[;] and (4) safety concerns for this child. [Respondent-Mother] stated that she has worked her case plan, and her situation is not the same as when her other children came into custody. The Department was also concerned as to who the father is of this

child. [Respondent-Mother] stated that she did not know who the father was . . . . [Respondent-Mother] gave [] names, one of which . . . she advised was the homeowner of where the party was where she became heavily intoxicated and engaged in sexual relations. [Respondent-Mother] stated that it was an emotional time for her as her children were taken into custody, so she went out on the town in Atlanta. [Respondent-Mother] appeared to know nothing about the men she slept with. [Respondent-Mother] stated that she just signed a lease to her new house. [Respondent-Mother] presented a copy of the lease. [DHHS] explained that the Department continues to be concerned about the choices that she is making and concerned about her not demonstrating parenting skills that she has learned in her parenting classes. . . . [Respondent-Mother] is currently in therapy with Ms. [M.] Seeley and there have been concerns by the Department as to whether she is providing appropriate treatment to [Respondent-Mother]. [Respondent-Mother] was asked about the current status of her newborn and she advised that he is in the NICU born at 25 weeks, currently 28 weeks gestational. Not ready for discharge for 6 more weeks. [Respondent-Mother] was breast feeding. . . . [Jason was] on a breathing machine until he can breathe on his own. . . .

17. [I]n August . . . 2019, [Social Worker] Turner received an email from [Respondent-Mother] advising that she found the father of [Jason] and provided his contact information.

18. [I]n August . . . 2019, [Social Worker] Turner . . . met with [Respondent-Father] and collected a DNA sample to determine paternity. [Social Worker] Turner inquired about his plan for the child and any other placement options for him. [Respondent-Father] advised that he would be taking care of [Jason] and maybe [Respondent-Father's] mother, but he was not certain if she could. . . . [Respondent-Father's] criminal record . . . reflects various larceny and robbery charges as well as assault with a deadly weapon

on a government official, resisting public officer, . . . contributing to the delinquency of a minor, . . . assault on a female, communicating threats, assault with intent to inflict serious injury, and misdemeanor child abuse.

. . .

21. . . . Social Worker Turner conducted a home visit with [Respondent-Father] and noted that the home had an odor of lingering smoke residue [and] that of cigarettes and what appeared to be marijuana. Social Worker Turner noticed various ashtrays . . . and a glass bong in a back room/den area of the home. [Social Worker] Turner addressed the smoke odors and smoking paraphernalia. [Respondent-Father] denied owning the glass bong pipe but stated that he does engage in marijuana and cigarette use. Social Worker Turner inquired about the status of his relationship with [Respondent-Mother]. He advised that they were in [a]. . . relationship . . . . [Respondent-Father] advised that he knew [Respondent-Mother] was pregnant from the beginning of her pregnancy and he has always known that the child was his. . . .

22. On November 20, 2019, Social Worker Turner was informed that the plan for [Respondent-Mother's] daughters had been changed to adoption due to [Respondent-Mother] being out of compliance with the majority of her case plan, including not being able to successfully demonstrate a change in improving her decision-making regarding parenting and relationships, understanding of domestic violence and properly vetting partners.

23. On December 6, 2019, a Child and Family Team meeting (CFT) was held at Wake Forest Baptist Hospital NICU. The attendees included: [Respondent-Father], [Respondent-Mother], . . . [R.] Miller- MD-Neonatology, [J.] Kerth-Nurse Practitioner-Pediatric Pulmonology, [S.] Crabtree-Pediatric Pulmonology Attending . . . . The medical team advised of the child's medical needs including a tracheal tube, a ventilator and ongoing developmental needs due to underdeveloped airways

and his premature status. Medical Staff advised that there would need to be 2 fully trained 24-hour caregivers prior to discharge. Restrictions included no smoking in the home, vehicles or smoke residue on the hands or clothes of anyone providing care for or being with [Jason]. [Respondent-Father] advised that he needed to take some time and consider the information and speak with his employer. He shared that he is a very hard sleeper and doesn't hear alarms while sleeping . . . . During the CFT, [Respondent-Father] stated that he encouraged [Respondent-Mother] to be dishonest with the Department about her initial story about [Jason's] conception and naming the father. [Respondent-Mother] advised that this was true. Social Worker Turner inquired about the current status of their relationship and their plan for his care. [Respondent-Mother] advised that they were only co-parenting. Social Worker Turner asked what that meant and what that looked like . . . . Social Worker Turner asked who the trained caretakers would be for [Jason] as [Respondent-Father] expressed his plan to care for him. Social Worker Turner asked whose home would be the primary residence and whether the other parent would join them at that home. [Respondent-Father] instructed [Respondent-Mother] not to answer Social Worker Turner. After the CFT was concluded, Nurse Merrill advised that when she visited [Respondent-Mother's] home, there was a "smokey [sic] smell" that she would be working with [Respondent-Mother] on the smell.

24. [I]n December . . . 2019, a meeting was held with [Respondent-Mother] per her request . . . . The Department's concerns were re-explained to [Respondent-Mother] as well as other placement options including transfer of custody to caretakers identified by [Respondent-Father] and she was asked if she had any other placement options for the child and she advised she did not have any additional placement options.

25. . . . Social Worker Turner spoke with . . . [Respondent-Father's] sister in-law and identified

> caretaker. [Respondent-Father's sister in-law] advised that . . . she and her husband felt that there were too many concerns regarding [Respondent-Mother], and they would no longer [be] interested in being the caretakers for [Jason].
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> 26. . . . Social Worker Turner called and spoke with . . . [Respondent-Father's] brother and desired potential caretaker. [Respondent-Father's brother] advised that he and his wife have decided to no longer be the caretakers for [Jason]. . . . [Social Worker] Turner asked if their mother would be an option and [Respondent-Father's brother] stated that they had not discussed it since she was caring for another grandchild and they did not want to add additional burdens to her[.]
>
> 27. . . . Social Worker Turner phoned . . . paternal grandmother of [Jason] and inquired about her interest and ability to be a possible caretaker and placement option for [Jason]. [She] advised that she would not be able to care for or be a placement option for [Jason].

¶ 21 Respondent-Mother relies primarily on *In re H.P.*, 278 N.C. App. 195, 2021-NCCOA-299, to support her argument that these findings, which closely track the language of Exhibit A to the Petition, are mere recitations that do not demonstrate that the trial court exercised logical reasoning. However, in *In re H.P.*, this Court held that the trial court did not "through the process of logical reasoning, find the ultimate facts necessary to dispose the case" where "*no* evidence to support the allegations in Exhibit A was presented at the adjudication and disposition hearing, and several of the allegations in Exhibit A could not be substantiated[.]" 278 N.C. App. at 204, 2021-NCCOA-299 at ¶ 26 (internal marks and citation omitted) (emphasis added). In addition to many of the findings being "mere recitations" from the petition's exhibit, this Court held that (1) "[f]our of the trial court's findings expressly state that 'there was not evidence' to support other allegations the trial court found as fact in the adjudication order"; (2) "three other findings of fact by the trial court recognize that there was insufficient evidence to support the allegations accepted as fact in other findings"; (3) many of the statements included in the findings "were not corroborated by any of the testimony given at the adjudication hearing"; and (4) "[t]he contents of Exhibit A[,]" where the language was lifted for the findings of fact, "are

contradictory on its face and, therefore, not competent evidence." *Id.* at 203-04, 2021-NCCOA-299 at ¶ 24-28.

¶ 22 Here, unlike in *In re H.P.*, many of the allegations in Exhibit A to the Petition were supported by evidence presented at the hearing. At the hearing on adjudication, which spanned two days, DHHS presented the testimony of two social workers, one of whom corroborated many of the allegations in the Petition. Although some minor details from the Petition were not supported by testimony at the hearing, including, *inter alia*, specific dates, names of persons, and a handful of statements, these unsupported details, which were omitted from our recitation above, were not necessary to adjudicate Jason as neglected or dependent, as demonstrated further below. Moreover, unlike *In re H.P.*, here, the findings of fact were not self-contradictory and did not depend on allegations that lacked sufficient evidence.

¶ 23 We therefore hold that all of the above findings are supported by the social workers' testimony at the adjudicatory hearing. Based on this evidence and the trial court's detailed orally rendered judgment, "the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case." *In re J.W.*, 241 N.C. App. at 48-49, 772 S.E.2d at 253. Because we are confident that the trial court used logical reasoning to reach its findings, "it is irrelevant whether those findings are taken verbatim from an earlier pleading." *Id.* Further, because we do "not review challenged findings that are unnecessary to support the trial court's determination[,]" and unsupported findings or portions of findings are similarly disregarded, *In re S.R.F.*, 376 N.C. at 654, 656, 2021-NCSC-5 ¶ 16, 19, we will review only the above findings when determining whether the findings of fact supported the trial court's determination that Jason was neglected and dependent.

C. Neglect

¶ 24 **[2]** A "neglected juvenile" is defined by statute as "[a]ny juvenile . . . whose parent, guardian, custodian, or caretaker does . . . not provide proper care, supervision, or discipline[,]" or "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15)(a), (e) (2021). "In neglect cases involving newborns," or in Jason's case as a medically fragile infant, "the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect based on the historical facts of the case." *In re J.A.M.*, 372 N.C. 1, 9-10, 822 S.E.2d 693, 699 (2019) (internal quotation marks and citation omitted).

¶ 25 "To adjudicate a juvenile neglected, some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline is required." *In re R.B.*, 280 N.C. App. 424, 432, 2021-NCCOA-654, ¶ 18 (internal quotation and citation omitted). *See also In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003) ("Where there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding."). "Similarly, in order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm." *In re K.J.B.*, 248 N.C. App. 352, 354, 797 S.E.2d 516, 518 (2016) (citation omitted). A court "need not wait for actual harm to occur to the child if there is a substantial risk of harm." *In re D.B.J.*, 197 N.C. App. 752, 755, 678 S.E.2d 778, 780 (2009) (quotation and citation omitted).

¶ 26 The prior adjudication of a sibling as neglected may not, standing alone, support an adjudication of neglect. *In re J.A.M.*, 372 N.C. at 9-10, 822 S.E.2d at 699 (2019). Instead, additional factors must be present " 'to suggest that the neglect . . . will be repeated.' " *Id.* (citing *In re J.C.B.*, 233 N.C. App. 641, 644, 757 S.E.2d 213 (2014). A parent's failure to correct the conditions that lead to the prior adjudication of neglect, including the failure to address domestic violence, may support the likelihood of the repetition of neglect. *See In re D.L.W.*, 368 N.C. 835, 843-44, 788 S.E.2d 162, 167-68 (2016) (holding that the trial court's findings regarding ongoing domestic violence in the home after the prior adjudication of neglect "support[ed] the conclusion that there would be a repetition of neglect based upon the juveniles' living in an environment injurious to their welfare") (cleaned up).

¶ 27 Here, the trial court adjudicated Jason neglected, as defined by N.C. Gen. Stat. § 7B-101(15).

¶ 28 We are "required to consider the totality of the evidence to determine whether the trial court's findings sufficiently support its ultimate conclusion that" Jason is a neglected juvenile. *In re F.S.*, 268 N.C. App. 34, 43, 835 S.E.2d 465, 471 (2019). As described above, because of his premature birth, Jason was a medically fragile juvenile. Even when the Petition was filed six months after his birth, Jason remained hospitalized for his safety. Jason had difficulty breathing on his own, and hospital staff advised that in order for him to be released from the NICU, Jason needed two full-time caretakers medically trained to use and monitor his breathing equipment. Jason was not permitted to be near smoke

odor, residue, or particulate in his home or transportation, which would interfere with his health and ability to breathe. Therefore, his caretakers had to be clean of smoke odor, residue, and particulate as well.

¶ 29 First, the trial court properly concluded that Respondents were unable to provide proper care and supervision for Jason. The trial court found that neither Respondent-Mother nor Respondent-Father had completed the necessary medical training to care for Jason at the time the Petition was filed. Although Respondent-Mother points out that she completed "some" of the training for Jason's care during his six months in the NICU, this incomplete training was not sufficient for Jason to be discharged to her care. Moreover, even if Respondent-Mother had completed the necessary training, she would still not be capable of providing proper care on her own, as she did not have a second caretaker with the necessary medical training living in the home where she planned to raise Jason. Although Respondent-Mother indicated that she planned to "co-parent" with Respondent-Father, she refused to tell Social Worker Turner which home would be Jason's primary residence or whether both parents would reside with Jason in the home. The trial court repeatedly found that no additional caretakers were presented by Respondent-Mother.

¶ 30 Second, the trial court properly concluded that Jason was neglected due to an injurious environment. Based on the trial court's findings, Respondent-Mother's home had a "smoky smell" when one of Jason's nurses conducted a home visit, and Respondent-Father's home also had a smoke odor and contained various smoking paraphernalia, including ashtrays and a bong. Both parents also admitted to smoking, which is why they were not permitted to visit with Jason. Therefore, had Jason been allowed to return home to live with Respondent-Mother or Respondent-Father, due to the presence of smoke odor and his respiratory condition, his home environment would result in a substantial risk of his physical impairment.

¶ 31 In addition to the presence of smoke odor in Jason's environment, Respondent-Mother repeatedly engaged in relationships with domestic violence and failed to learn from her parenting and domestic violence courses. As demonstrated by the adjudication of Jason's siblings as neglected, Respondent-Mother's history of poor decision-making and domestic violence contributed to Jason's sisters being removed from her custody and recommended for adoption. Additionally, in Jason's case, Respondent-Mother's relationship with Respondent-Father was a concern to DHHS and the trial court. The trial court expressed concern that "based upon her previous history of domestic violence, and

having taken classes for domestic violence and was in therapy, . . . that [Respondent-Mother] was able to conceive a child with someone she did not know all of the background, who had a violent history or tendencies related to violence, specifically had [an] assault on a female conviction[,]" in addition to a misdemeanor child abuse conviction.

¶ 32 Although according to Respondent-Mother, Respondents were not in a relationship, the findings reflect that Respondent-Father instructed Respondent-Mother to lie to DHHS about Jason's paternity, inventing the story about having intercourse with strangers at a party in Atlanta, and then further instructed Respondent-Mother not to answer Social Worker Turner's questions regarding their co-parenting plan. The trial court again expressed concern that Respondent-Mother "was able to be controlled by [Respondent-Father]" when "a component of the therapy is the Crossroads program in her other case, which identifies domestic violence skills, especially for battered women[,]" and Respondent-Father's control over her "resulted in her telling the [D]epartment false information . . . , and [] it took her almost a month to tell the truth" about Respondent-Father's paternity. The court further stated that Respondent-Mother "was unable to use the skills that she developed in her therapy and services provided to give truthful information or to assess intimate partners that she might come in contact with." Given that Jason's sisters were also removed from Respondent-Mother's care over domestic violence concerns contributing to their injurious environment, these findings regarding Respondent-Mother's involvement with Respondent-Father amply support a failure to address these concerns and a repetition of that neglect.

¶ 33 We therefore hold, in light of the trial court's supported findings, Jason was properly adjudicated a neglected juvenile.

D. Dependency

¶ 34 **[3]** A "dependent juvenile" is defined by statute as a "juvenile in need of assistance or placement because . . . the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2021). Therefore, a child is not dependent so long as there is one parent who can either care for the child or make appropriate alternative childcare arrangements for the child. *In re Q.M.*, 275 N.C. App. 34, 42, 852 S.E.2d 687, 693 (2020). "Adjudicatory hearings for dependency are limited to determining only the existence or nonexistence of any of the conditions alleged in the petition." *Id.* at 39, 852 S.E.2d at 691 (internal marks and quotation omitted). We have previously held that "the

trial court must consider 'the conditions as they exist at the time of the adjudication as well as the risk of harm to the child from return to a parent.' " *In re F.S.*, 268 N.C. App. at 46, 835 S.E.2d at 473 (citation omitted).

¶ 35 Here, the trial court found that Jason should be adjudicated "dependent, as the parents lack an appropriate child care arrangement," and thereby concluded that Jason was dependent as defined by N.C. Gen. Stat. § 7B-101(9). Because the trial court's findings also addressed whether Respondents were "unable to provide proper care and supervision[,]" they supported the trial court's adjudication of dependency.

¶ 36 As described above, the trial court properly found that Respondents were unable to provide the proper care and supervision Jason needed in his medically fragile state, due to the dangers posed by the smoke odor in their homes, their inability to complete the necessary medical training, and their inability to articulate how, in their plan to "co-parent," that Jason would be supervised full-time in the home by two trained caretakers as medically required for his release.

¶ 37 Likewise, the trial court properly found that the parents lacked an appropriate child care arrangement. Respondent-Father proposed his brother and sister-in-law, who later told Social Worker Turner that they were not willing to be Jason's caretakers. Respondent-Father's mother also indicated she did not want to be considered as a caretaker and that she had no other family interested. Respondent-Father proposed no other possible caretakers. While Respondent-Mother vaguely indicated that she had "supports," when asked for specific names by Social Worker Turner, she repeatedly failed to name any potential caretakers for Jason. Although Respondent-Mother argues on appeal that she suggested either her friend or sister to DHHS, social worker testimony demonstrated that neither Respondent-Mother's friend or sister were approved by DHHS in the case involving Respondent-Mother's other children, and therefore they were not considered in Jason's case. Moreover, and more importantly, none of Respondent-Mother's proposed arrangements accounted for the two full-time, live-in caretakers that were medically required for Jason's care, and this is adequately reflected in the trial court's findings.

¶ 38 Therefore, in light of the trial court's supported findings, neither parent could care for Jason or make appropriate childcare arrangements for him, and Jason was properly adjudicated a dependent juvenile.

E. Constitutionally Required Findings

¶ 39 **[4]** After adjudicating Jason neglected and dependent, the trial court found that it was "contrary to [his] health and safety to be returned to

the custody of a parent" at that time, and that it was "in the best[] interest of the juvenile to remain in the legal and physical custody of" DHHS. Respondent-Mother argues that the trial court incorrectly applied the best interest of the child standard in "awarding custody of Jason" to DHHS without first making a finding that Respondent-Mother was "unfit" or "acted inconsistently with her constitutionally protected rights" as a parent. Respondent-Mother contends that her constitutional argument is automatically preserved under N.C. R. App. P. 10(a)(1). We disagree.

¶ 40 Parents have several constitutional protections arising from the Due Process and Equal Protection clauses of the Fourteenth Amendment, as well as the Ninth Amendment to the United States Constitution, as recognized by our Supreme Court in *Petersen v. Rogers*, 337 N.C. 397, 401, 445 S.E.2d 901, 903 (1994). However,

> [n]othing in *Petersen* serves to negate our rules on the preservation of constitutional issues. Thus, a parent's argument concerning his or her paramount interest to the custody of his or her child, although afforded constitutional protection, may be waived on review if the issue is not first raised in the trial court.

In re J.N., 381 N.C. 131, 133, 2022-NCSC-52, ¶ 8.

¶ 41 In *In re J.N.*, our Supreme Court rejected an argument nearly identical to Respondent-Mother's. In that case, the respondent likewise argued that "the trial court erred by granting guardianship without first concluding that respondent was an unfit parent or had acted inconsistently with his constitutional right to parent[,]" and that this argument was "automatically preserved under N.C. R. App. P. 10(a)(1)[.]" *Id.* at 132-33, 2022-NCSC-52 at ¶ 5-6. Our Supreme Court was not persuaded, and instead affirmed a unanimous decision from this Court, *In re J.N.*, 276 N.C. App. 275, 2021-NCCOA-76, ¶ 8 (unpublished), ultimately holding that, because the respondent "failed to assert his constitutional argument in the trial court[,]" despite the respondent's opportunity to do so, he had not properly preserved his constitutional argument for appeal. *In re J.N.*, 381 N.C. at 133-34, 2022-NCSC-52 at ¶ 9-10.

¶ 42 Here, like the respondent in *In re J.N.*, despite the trial court affording all parties an opportunity to present closing arguments at the conclusion of each hearing, Respondent-Mother did not raise a constitutional argument at either the adjudicatory or dispositional hearings. DHHS acknowledged that while reunification was still the goal of Jason's permanent plan, DHHS recommended that he remain in DHHS custody for his health and safety. Although Respondent-Mother argued, *inter alia*,

that she was capable of providing a safe, permanent home for Jason and wanted face-to-face visitation with him, she did not at any point argue that leaving Jason in DHHS custody was a violation of her constitutional rights. Therefore, because Respondent-Mother was afforded an opportunity to raise her constitutional argument at trial and did not do so, we conclude that she has waived this argument for our review.

III. Conclusion

¶ 43 Because the trial court used logical reasoning to make adequate factual findings, supported by clear and convincing evidence, that supported an adjudication of Jason as neglected and dependent, the trial court's order on adjudication is

AFFIRMED.

Judge DIETZ concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

¶ 44 Though not addressed at length in the preceding opinion, I would first like to underscore the unprecedented nature of the Majority's decision to base its determination, in any part, on findings of fact in an "orally rendered judgment" that does not appear in the trial court's order. *See supra* ¶ 23. This is a remarkable departure from our ordinary review process which, having now been written into our precedent, will present an unworkable burden to future litigants challenging a trial court's findings of fact—now, appellants must not only challenge findings committed to writing by the trial court, but also those the trial court *declined* to include in its order. While *In re J.W.* does allow for a degree of pragmatic leniency in our review, nowhere does it authorize us to upend the procedural norms of our abuse, neglect, and dependency jurisprudence by basing our review on findings outside the trial court's written order.[1] *See In re J.W.*, 241 N.C. App. 44, 48-49, *disc. rev. denied*, 368 N.C. 290 (2015).

1. This is especially troubling given the stringency with which we typically limit the scope of our review on the basis that "unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *In re R.D.B.*, 274 N.C. App. 374, 379-80 (2020). While I do not dispute the practical necessity of that procedural rule, it strikes me as profoundly unprincipled that we would underscore the formal importance of the trial court's written findings of fact when individual appellants might benefit from

¶ 45 Furthermore, while a trial court may quote a juvenile petition verbatim in its findings of fact without committing reversible error, it cannot do so at the expense of having found the ultimate facts necessary to dispose of the case through a process of logical reasoning based on the evidentiary facts before it. When, on the other hand, a trial court's findings of fact deviate from the evidence before it so significantly that whether its findings were based on logical reasoning becomes unclear, it reversibly errs. Here, in quoting the juvenile petition verbatim, the trial court based its reasoning in the adjudication order so heavily on information that was not presented to the trial court as evidence that the central logic of its position became compromised. This was reversible error, and I would remand for adequate factfinding.

BACKGROUND

¶ 46 As discussed by the Majority, Jason was born prematurely in July 2019 at 25 weeks and was placed in the newborn intensive care unit ("NICU") to address his health needs related to his underdeveloped respiratory system. The following day, the Guilford County Department of Health and Human Services ("DHHS") received a child protective services report indicating that Jason was born prematurely and placed into the NICU, that he would remain there for some time, and Respondent-Mother had other children in the custody of DHHS.

¶ 47 One day later, at the hospital where Respondent-Mother had given birth, a DSS employee spoke with Respondent-Mother regarding the allegations in the report. Over the following six months, DHHS had several meetings with Respondent-Mother and Respondent-Father, including two Child and Family Team ("CFT") meetings. Over the course of the meetings, DHHS determined that Jason was a neglected and dependent juvenile and, on 30 January 2020, filed a juvenile petition.

¶ 48 The trial court entered a non-secure Custody Order on 30 January 2020. After an evidentiary hearing, the trial court entered its Adjudication Order on 22 July 2020, finding Jason to be neglected and dependent pursuant to N.C.G.S. § 7B-807. *See* N.C.G.S. § 7B-807 (2021); *see also* N.C.G.S. § 7B-101 (2021). On 29 July 2020, the trial court entered its Amended Adjudication Order, with the only amendment being a change to the file number in the order. On 18 May 2021, the trial court entered its Disposition Order that ordered legal and physical custody of Jason remain with DHHS and kept him in his foster placement. Respondent-Mother timely appeals.

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flexibility and leniency, only to treat the same findings with flexibility and leniency when appellants might benefit from formality.

ANALYSIS

¶ 49 Respondent-Mother argues (A) the trial court erred in adjudicating Jason neglected because "it failed to make findings of fact based upon clear and convincing evidence"; (B) the trial court committed reversible error in adjudicating Jason neglected and dependent because it "failed to make necessary findings of fact, there was insufficient evidence to support the findings of fact, and the findings which are supported by the evidence are insufficient to support its conclusions of law"; and (C) the trial court "incorrectly applied the best interest of the child standard in awarding custody of [Jason] to [DHHS] without first finding [Respondent-Mother] was unfit or had acted inconsistently with her constitutionally protected rights as a parent." I would remand on the basis of Respondent-Mother's first argument and, as a result, would not reach her remaining arguments on appeal.

¶ 50 "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 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480 (2000)), *aff'd as modified*, 362 N.C. 446 (2008). "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.*

¶ 51 However, as we discussed in *In re H.P.*, the trial court's findings of fact must display a "process[] of logical reasoning[] based on the evidentiary facts before it" that results in a finding of "the ultimate facts necessary to dispose of the case":

> The Juvenile Code provides that adjudication orders "shall contain appropriate findings of fact and conclusions of law." [N.C.G.S.] § 7B-807(b) [(2021)]. Rule 52 of our rules of civil procedure mandates the trial court make findings of "facts specially and state separately its conclusions of law thereon . . . ." [N.C.G.S.] § 1A-1, Rule 52 [(2021)]. "[T]he trial court's factual findings must be more than a recitation of allegations. They must be the specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *In re Anderson*, 151 N.C. App. 94, 97[] . . . (2002) (citing *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57[] . . . (1977)). It is "not *per se* reversible error

> for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party . . . . this Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case." *In re J.W.*, 241 N.C. App. 44, 48-49, . . . *disc. review denied*, 368 N.C. 290[] . . . (2015). "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *In re Anderson*, 151 N.C. App. at 97[;] . . . *see also In re H.J.A.*, 223 N.C. App. 413, 418[] . . . (2012).

In re H.P., 278 N.C. App. 195, 2021-NCCOA-299, ¶ 23, *appeal dismissed*, 379 N.C. 155 (2021).

¶ 52 In that case, "the trial court made forty-seven findings of fact in the adjudication order"; however, "many of the findings of fact in the adjudication order [were] mere recitations of the allegations in Exhibit A that was attached to the juvenile petition." *Id.* at ¶ 24. "Several of the trial court's findings [were] verbatim recitations of the allegations in the juvenile petition. Four of the trial court's findings expressly state[d] that 'there was not evidence' to support other allegations the trial court found as fact in the adjudication order." *Id.* "Although not explicitly stated, three other findings of fact by the trial court recognize[d] that there was insufficient evidence to support the allegations accepted as fact in other findings." Under the circumstances, we held that the findings of fact were mere recitations of allegations because there was no evidence presented to support the allegations otherwise. *Id.* at ¶ 26. We also held "the trial court did not, through the process of logical reasoning, find ultimate facts necessary to dispose of the case." *Id.* (marks omitted).

¶ 53 The Majority correctly points out that, when reviewing the trial court's factfinding, pragmatism requires that we do not review challenged findings that are unnecessary to support a trial court's determination and that we review only the proper findings when determining whether the findings of fact support the conclusions of law. *See supra* ¶¶ 14, 17. However, I do not believe—as it is clear we did not believe in *In re H.P.*—that the limitation of our review to the dispositive features of the findings of fact frees the trial court from its duty to issue its orders above a minimum standard of clarity and coherence. The limitation of our analysis to the facts necessary to support the trial court's determination is, as I understand it, an exercise in resolving factual

disagreement; it operates similarly to surplusage in a criminal indictment, freeing the judicial system from the need to undo and redo procedures simply because a document was more specific than necessary. *See State v. Bollinger*, 192 N.C. App. 241, 246 (2008) ("Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage."), *aff'd*, 363 N.C. 251 (2009); *see also Surplusage*, Black's Law Dictionary (9th ed. 2009) ("1. Redundant words in a statute or legal instrument; language that does not add meaning . . . 2. Extraneous matter in a pleading . . . .").

¶ 54 Conversely, the trial court's responsibility to "find ultimate facts necessary to dispose of the case" through a "process of logical reasoning" necessarily reflects a concern not only for whether the facts found were actually supported, but also whether the trial court evaluated the case with adequate care and consideration. *In re H.P.*, 2021-NCCOA-299 at ¶ 26. If it were truly the case that the trial court's findings of fact could be upheld as liberally as the Majority claims, then this requirement would have virtually no meaning; any amount of disarray or patent absence of logic in a trial court's factfinding would be tolerable as long as some subset of propositions cherry-picked from the document—no matter how small—could amount to a justification of the result. Whatever description may apply to such a scenario, it would not be a "process[] of logical reasoning . . . ." *Id.*

¶ 55 Bearing the above in mind, I turn to Respondent-Mother's specific argument on appeal. She contends that Findings of Fact 14 through 27 are "mere recitations of statements made to [DHHS] and are not supported by the evidence." Here, the challenged findings of fact state:

> 14. The Guilford County Department of Health and Human Services received a report on [29 July 2019]. Reporter stated that [Respondent-Mother] gave birth to a newborn baby on [28 July 2019]. Reporter stated that the infant was born at 25 weeks and will remain in the NICCU [sic] for a while. Reporter advised [Respondent-Mother] has other kids in the custody of GCDHHS. At that time, [Respondent-Mother] refused to give the name of the biological father.
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> 15. On [30 July 2019] [DSS employee] Turner went to the Greensboro Women's Hospital and spoke with [Respondent-Mother] and observed the infant in the incubator in the NICU with [Respondent-Mother]. [DSS employee] Turner addressed the allegations

and inquired about [Respondent-Mother's] plan. [Respondent-Mother] advised that she currently has a foster care case with her two daughters due to them being present during a domestic violence incident with her boyfriend at that time. [DSS employee] Turner inquired about [Respondent-Mother's] case plan with her daughters, and [Respondent-Mother] stated that she has done everything that was required of her by the Department including domestic violence classes, drug reassessment classes, therapy and parenting classes. [Respondent-Mother] stated that she has not had contact with her abuser, she moved, changed her phone number and blocked him on all social media. [Respondent-Mother] shared that visitation was stopped by the Department because she asked her daughter how her father was doing and told her to tell him she said hello. [Respondent-Mother] received an email afterwards stating that she would no longer have visitation due to her mentioning the child's father. [Respondent-Mother] explained her interpretation of the rules was that she was not supposed to ask about his visitation and did not know she could not ask anything or mention him at all; and because it was unclear, her visits were taken. [DSS employee] Turner explained that a Child and Family Team Meeting ("CFT") would have to be scheduled to address the plan for the child. [Respondent-Mother] advised that she does not want [Jason] in foster care and would prefer for him to go to a family member and listed her sister . . . . [DSS employee] Turner asked for the name of [Jason's] father, and [Respondent-Mother] stated that she honestly did not know because it could be one of several men with whom she had intercourse at a party in a different state during the holiday season of 2018. [DSS employee] Turner requested any names or any information she could recall, and [Respondent-Mother] stated that she had no information.

16. On [16 August 2019], the Department held a Child and Family Team Meeting (CFT) facilitated by Supervisor Rhonda Oboh, present were: [DSS employee] Turner, Supervisor Sherline McLean,

[DSS employee] Kimberly Young, Supervisor Rose Cromartie, [Respondent-Mother], Godmother [], maternal aunt . . . , friend . . . , friend . . . and friend . . . . During this meeting the issues discussed were as follows: (1) CPS report received on [29 July 2019]; (2) newborn child was born with medical issues; (3) [Respondent-Mother's] other children currently in DSS custody[;] and (4) safety concerns for this child. [Respondent-Mother] stated that she has worked her case plan, and her situation is not the same as when her other children came into custody. The Department was also concerned as to who the father is of this child. [Respondent-Mother] stated that she did not know who the father was, there were the potential of 2 fathers. [Respondent-Mother] gave two names, one of which . . . she advised was the homeowner of where the party was where she became heavily intoxicated and engaged in sexual relations. [Respondent-Mother] stated that it was an emotional time for her as her children were taken into custody, so she went out on the town in Atlanta. [Respondent-Mother] appeared to know nothing about the men she slept with. [Respondent-Mother] stated that she just signed a lease to her new house. [Respondent-Mother] presented a copy of the lease. Ms. McLean explained that the Department continues to be concerned about the choices that she is making and concerned about her not demonstrating parenting skills that she has learned in her parenting classes. It was stated that at that time [Respondent-Mother] could not have unsupervised visits with her children in custody based on the last court hearing. The next court date was [23 October 2019]. The children had been in custody for 16 months, and [Respondent-Mother] had two violations since the children came into custody. [Respondent-Mother] was concerned that someone told her children that she had a new baby and she instructed the [DSS employee] and supervisor not to tell her children about the baby. Ms. McLean explained that [neither] she nor [DSS employee] Young told the children about the baby. Ms. McLean asked [Respondent-Mother] if she told the

therapist, Lisa Partin. [Respondent-Mother] stated no. [Respondent-Mother] is currently in therapy with Ms. Michelle Seeley and there have been concerns by the Department as to whether she is providing appropriate treatment to [Respondent-Mother]. [Respondent-Mother] was asked about the current status of her newborn and she advised that he is in the NICU born at 25 weeks, currently 28 weeks gestational. Not ready for discharge for 6 more weeks. [Respondent-Mother] was breast feeding. He weighed 1 lb. at birth and at the time of this CFT, he weighed 2 lbs. 5 oz. with no special needs except for him being on a breathing machine until he can breathe on his own. [DSS employee] Turner sent a diligent efforts search for [the man identified as the potential father].

17. On [19 August 2019], [DSS employee] Turner received an email from [Respondent-Mother] advising that she found the father of [Jason] and provided his contact information.

18. On [27 August 2019], [DSS employee] Turner and Social Worker Supervisor Cromartie met with [Respondent-Father] and collected a DNA sample to determine paternity. [DSS employee] Turner inquired about his plan for the child and any other placement options for him. [Respondent-Father] advised that he would be taking care of [Jason] and maybe [Respondent-Father's] mother, but he was not certain if she could. [DSS employee] Turner asked about the status of the relationship with [Respondent-Mother] and he advised that they are in a relationship and had been for approximately 1 year. [DSS employee] Turner inquired about his criminal background and he advised that he has had several charges and convictions including assault on a female and was just released from prison not long ago. [Respondent-Father's] criminal record dates back to 2003 and reflects various larceny and robbery charges as well as assault with a deadly weapon on a government official, resisting public officer, felony and misdemeanor probation violations, contributing to the delinquency of a minor, traffic violations, flee

and eluding arrest, possession with intent to distribute marijuana, cocaine, and possession of marijuana charges, possession of firearm by felon, assault on a female, communicating threats, assault with intent to inflict serious injury, and misdemeanor child abuse.

19. On [17 September 2019], [DSS employee] Turner received the DNA test results which confirmed by 99.99% probability of paternity that [Respondent-Father] is the biological father of [Jason].

20. On [30 October 2019], [DSS employee] Turner called [Respondent-Father] after reviewing missed calls from the number provided for him, although the phone number ID reflected [Respondent-Mother's] name. [DSS employee] Turner spoke with him and requested to visit his home. [DSS employee] Turner requested to visit his home on [1 November 2019] at 1pm and [Respondent-Father] agreed. On [1 November 2019], [DSS employee] Turner and GCDHHS Nurse Brown went to the home for the appointment and discovered that no one was home.

21. On [7 November 2019], [DSS employee] Turner conducted a home visit with [Respondent-Father] and noted that the home had an odor of lingering smoke residue that of cigarettes and what appeared to be marijuana. [DSS employee] Turner noticed various ashtrays full of cigarette butts and a glass bong in a back room/den area of the home. [DSS employee] Turner addressed the smoke odors and smoking paraphernalia. [Respondent-Father] denied owning the glass bong pipe but stated that he does engage in marijuana and cigarette use. [DSS employee] Turner inquired about the status of his relationship with [Respondent-Mother]. He advised that they were in an on and off relationship over the last year. However, he advised that he "can't deal with her and all that drama and attitude" and he is no longer in a relationship with her. [DSS employee] Turner asked when he became aware that [Respondent-Mother] was pregnant and when he became aware that the infant might be his biological child. [Respondent-Father] advised that he knew [Respondent-Mother] was

pregnant from the beginning of her pregnancy and he has always known that the child was his. He stated that [Respondent-Mother] called him one day stressing that the Department was repeatedly requesting the name of the father. He advised that he instructed [Respondent-Mother] to tell the Department that he is the father since it was the truth and they both knew he is the father.

22. On [20 November 2019], [DSS employee] Turner was informed that the plan for [Respondent-Mother's] daughters had been changed to adoption due to [Respondent-Mother] being out of compliance with the majority of her case plan, including not being able to successfully demonstrate a change in improving her decision-making regarding parenting and relationships, understanding of domestic violence and properly vetting partners.

23. On [6 December 2019], a Child and Family Team meeting (CFT) was held at Wake Forest Baptist Hospital NICU. The attendees included: [Respondent-Father], [Respondent-Mother], Lee Daniels -Hospital [Social Worker], Rachel Miller- MD-Neonatology, Julie Kerth-Nurse Practitioner-Pediatric Pulmonology, Shana Crabtree-Pediatric Pulmonology Attending, Theresa Merrill- RN CC4C Case Nurse Manager, Rykiell Turner-CPS [DSS employee], Susie Edwards-CPS Social Worker Supervisor[,] [and several family friends or relatives]. The medical team advised of the child's medical needs including a tracheal tube, a ventilator and ongoing developmental needs due to underdeveloped airways and his premature status. Medical Staff advised that there would need to be 2 fully trained 24-hour caregivers prior to discharge. Restrictions included no smoking in the home, vehicles or smoke residue on the hands or clothes of anyone providing care for or being with [Jason]. [Respondent-Father] advised that he needed to take some time and consider the information and speak with his employer. He shared that he is a very hard sleeper and doesn't hear alarms while sleeping. [Respondent-Mother] and her supports

recommended that the child be placed in her care. The Department noted ongoing concerns and provided various options for the care and placement of [Jason]. During the CFT, [Respondent-Father] stated that he encouraged [Respondent-Mother] to be dishonest with the Department about her initial story about [Jason's] conception and naming the father. [Respondent-Mother] advised that this was true. [DSS employee] Turner inquired about the current status of their relationship and their plan for his care. [Respondent-Mother] advised that they were only co-parenting. [DSS employee] Turner asked what that meant and what that looked like, and [Respondent-Mother] advised that they communicate regarding [Jason's] care and updates. [DSS employee] Turner asked who the trained caretakers would be for [Jason] as [Respondent-Father] expressed his plan to care for him. [DSS employee] Turner asked whose home would be the primary residence and whether the other parent would join them at that home. [Respondent-Father] instructed [Respondent-Mother] not to answer [DSS employee] Turner. After the CFT was concluded, Nurse Merrill advised that when she visited [Respondent-Mother's] home, there was a "smokey smell" that she would be working with [Respondent-Mother] on the smell.

24. On [18 December 2019], a meeting was held with [Respondent-Mother] per her request and present were, CC4C Nurse Manager Merrill, [DSS employee] Turner, Social Worker Supervisor Susie Edwards, Foster Care [DSS employee] Kimberly Young, Program Manager Carole Allison, Foster Care Program Manager Karen Williamson, the father was not in attendance. The Department's concerns were re-explained to [Respondent-Mother] as well as other placement options including transfer of custody to caretakers identified by [Respondent-Father] and she was asked if she had any other placement options for the child and she advised she did not have any additional placement options.

25. On [14 January 2020], [DSS employee] Turner spoke with . . . [Respondent-Father's] sister in-law

> and identified caretaker. [Respondent-Father's sister in-law] advised that although she still wanted to be the caretaker for [Jason], she and her husband felt that there were too many concerns regarding [Respondent-Mother], and they would no longer [be] interested in being the caretakers for [Jason].
>
> 26. On [23 January 2020], [DSS employee] Turner called and spoke with . . . [Respondent-Father's] brother and desired potential caretaker. [Respondent-Father's brother] advised that he and his wife have decided to no longer be the caretakers for [Jason]. [Respondent-Father's brother] advised that he had not heard from his brother regarding any other plans. [DSS employee] Turner asked if their mother would be an option and [Respondent-Father's brother] stated that they had not discussed it since she was caring for another grandchild and they did not want to add additional burdens to her. [DSS employee] Turner called [Respondent-Father] and was unable to leave a voicemail as it was not set up. [DSS employee] Turner sent [Respondent-Father] a text requesting that he contact [DSS employee] Turner to address a plan of care for [Jason] with no response as of [30 January 2020].
>
> 27. On [24 January 2020], [DSS employee] Turner phoned . . . paternal grandmother of [Jason] and inquired about her interest and ability to be a possible caretaker and placement option for [Jason]. [She] advised that she would not be able to care for or be a placement option for [Jason].

These findings are nearly identical to paragraphs 4 through 17 of Exhibit A of the juvenile petition, although the language has been updated in most places to remove abbreviations. Additionally, of the three handwritten edits to Exhibit A, only one was incorporated into the findings of fact.

¶ 56 Bearing in mind the principles of *In re: H.P.*, I agree with Respondent-Mother. Against a comprehensive review of the Record and the transcript of the adjudicatory hearing, a significant portion of these findings of fact are entirely unsupported by the evidence at the adjudicatory hearing. These unsupported aspects include, in significant part,

Respondent-Mother's alleged statements about the status of her case involving her daughters in Finding of Fact 15; the attendees of the Child and Family Team Meetings, the information regarding Respondent-Mother's daughters and therapist Lisa Partin, Jason's weights, and the reference to the diligent efforts search in Finding of Fact 16; the status of Respondent-Mother's and Respondent-Father's relationship, Respondent-Father's statements regarding his criminal history, and several of the crimes included in his criminal record in Finding of Fact 18; the entirety of Findings of Fact 19 and 20; the status of Respondent-Mother and Respondent-Father's relationship, Respondent-Father's statements concerning the relationship, and some of Respondent-Father's statements concerning the false paternity story in Finding of Fact 21; some of the attendees of the CFT meeting, Respondent-Mother's recommendation for the child's placement, and the statement that there was a smoky smell in Respondent-Mother's home[2] in Finding of Fact 23; the attendees of the meeting that Respondent-Mother requested in Finding of Fact 24; Respondent-Father's brother's statements regarding other plans and the difficulty reaching Respondent-Father in Finding of Fact 26; and the dates provided in Findings of Fact 17 through 22 and 25 through 27.

¶ 57 Here, like in *In re H.P.*, I struggle to conclude that "the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case." *Id.* at ¶ 23 (quoting *In re J.W.*, 241 N.C. App. at 48-49). While "[i]t is not *per se* reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party," the trial court's findings of fact that mirror the juvenile petition in this case so frequently contain statements unsupported by evidence on the Record that they do not appear to reflect the trial court's own "processes of logical reasoning." *Id.*

¶ 58 Admittedly, this case is distinct from *In re H.P.* in two ways. First, the findings of fact did not undermine other findings of fact. Second, DHHS's case was not limited to Exhibit A as DHHS presented the testimony of two DSS employees that included matters outside the scope of Exhibit A.

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2. I note that there was some discussion of this statement by Nurse Merrill on cross-examination only. There was also some indication that the house smelled like incense from DSS employee Young; however, the allegations of the juvenile petition do not mention Respondent-Mother's smelling of smoke other than in reference to Nurse Merrill. *See In re A.B.*, 179 N.C. App. 605, 609 (2006) (emphasis added) ("Unlike in the dispositional stage, where the trial court's primary consideration is the best interest of the child and any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, *evidence in the adjudicatory hearing is limited to a determination of the items alleged in the petition*.").

Nonetheless, our task is to determine "whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case." *Id.* (quoting *In re J.W.*, 241 N.C. App. at 48-49); *see also In re Anderson*, 151 N.C. App. at 97 ("Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts."). And, reviewing the findings of fact holistically, it did not.[3] The findings of fact in the trial court's Amended Adjudication Order in this case were not "specific ultimate facts," and the Record does not demonstrate "that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case." *In re H.P.*, 278 N.C. App. 195, 2021-NCCOA-299 at ¶ 23. As a result, I would remand this order to the trial court to make appropriate findings of fact based upon the evidence, and I need not reach the other issues on appeal.

CONCLUSION

¶ 59 The trial court's Amended Adjudication Order quoted the language included in the juvenile petition verbatim, including information not presented at the adjudicatory hearing at any point and only presented in the juvenile petition. Due to the pervasive reference to information that was not presented at the hearing, I cannot conclude "that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case." *Id.* This constituted reversible error, and I would vacate the Amended Adjudication Order and related Disposition Order and remand

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3. I also note that the facts of this case are similar to those of *In re O.W. See generally In re O.W.*, 164 N.C. App. 699 (2004). In *In re O.W.*, we reversed an adjudication order based on the respondent-mother's argument that the trial court erred by failing to make ultimate findings of fact. The order in *In re O.W.* contained "twenty findings of fact, fifteen of [which] [were] a verbatim recitation of the facts stated in [the] petition for abuse and neglect, some of which [were] unsupported by any evidence." *Id.* at 702. We noted that several of the findings of fact were simple recitations of what someone else had told the DSS and that there was a lack of clarity regarding whether the trial court found an event had occurred or found DSS concluded there was an injurious environment based upon what someone told them. *Id.* We held:

> [T]he trial court's findings are not "specific ultimate facts," which are sufficient for this Court to determine that the adjudication of abuse and neglect is adequately supported by competent evidence. We remand this order to the trial court to make appropriate findings of fact, not inconsistent with this opinion. It is unnecessary for us to address the remainder of [the] respondent's [issues on appeal].

Id. at 704.

for the entry of appropriate findings of fact based upon the evidence. Furthermore, for the reasons stated in the first paragraph of this opinion, I would not allow the trial court's "orally rendered judgment" to play any role in our review.

¶ 60 For these reasons, I respectfully dissent.

IN RE M.C.

No. COA22-13

Filed 6 December 2022

Child Abuse, Dependency, and Neglect—neglect—substantial risk of future neglect—newborn—mental health, care of newborn, older siblings

The trial court's order adjudicating respondents' newborn baby as neglected was affirmed where the unchallenged findings of fact showed a substantial risk of future neglect to the baby based on significant mental health and parenting capacity issues with each of the parents, the parents' failure to address those issues, the parents' inability to provide basic care to the newborn during his post-birth hospital stay, and prior social services involvement with the parents' other children. Although the unchallenged findings were sufficient to support the trial court's conclusions, the appellate court also held that the challenged findings—including additional facts concerning the parents' behavior and care of the newborn and a social services employee's understanding of records she reviewed—were supported by clear and convincing evidence.

Appeal by Respondents from order entered 22 September 2021 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 20 September 2022.

Lauren Vaughan for petitioner-appellee Onslow County Department of Social Services.

Peter Wood for respondent-appellant mother.

J. Thomas Diepenbrock for respondent-appellant father.

IN RE M.C.

[286 N.C. App. 632, 2022-NCCOA-786]

Administrative Office of the Courts, Guardian Ad Litem Program, by Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

MURPHY, Judge.

¶ 1 When reviewing a trial court's adjudication of a child as a "neglected juvenile," we determine whether clear and convincing evidence supports the challenged findings such that they are binding on appeal. Here, we hold the challenged findings are supported by clear and convincing evidence, though we also reiterate the principle that an adjudication determines the status of the child, not the culpability of the parents or others that may have created circumstances resulting in that status.

¶ 2 We affirm a neglect adjudication if it is supported by the trial court's findings of fact. To support a neglect adjudication, we have required the findings show some physical, mental, or emotional impairment to the juvenile or a substantial risk of such impairment as a result of the failure to provide proper care, supervision, or discipline. A juvenile may not be adjudicated as neglected based solely on previous social services involvement relating to either parent's other children, as the findings must show other current circumstances presenting a risk to the juvenile, but it is relevant that a juvenile lives in a home where another child has been adjudicated as neglected. Additionally, a newborn need not be discharged from the hospital and allowed to return home before "neglect" can occur that supports a neglect adjudication.

¶ 3 Here, the findings show there were current circumstances, not limited to prior social services involvement with the parents' other children, that presented a substantial risk of impairment to the juvenile. These circumstances include the significant mental health and parenting capacity issues of each parent, failure of the parents to address their respective issues, and parents' inability to provide even the most basic care for the juvenile while in the hospital despite clearly communicated discharge expectations and repeated staff instruction. We therefore hold that the findings support the trial court's neglect adjudication. Accordingly, we affirm.

BACKGROUND

¶ 4 Oscar,[1] the minor child that is the subject of this case, is the fourth child of Respondent Mother ("Mother"). Mother's three older children have been permanently removed from her care. Mother and Respondent

1. We use pseudonyms for all relevant persons throughout this opinion to protect the juvenile's identity and for ease of reading.

Father ("Father") began seriously dating around 2013 and married around 2016. Mother has reported diagnoses of post-traumatic stress disorder, anxiety disorder, borderline personality disorder, seizures, and obsessive compulsive disorder. She completed a full psychological evaluation in August 2016 and was found to have significant cognitive limitation; the evaluator concluded that Mother should not be expected to parent independently.

¶ 5 Respondent Parents ("Parents") share two children. Their older child was adjudicated neglected in a Pitt County juvenile case by order filed 3 January 2019. On 17 September 2019, in connection with that case, Father underwent a psychological evaluation to assess his parenting capacity ("Parenting Capacity Evaluation"). The psychologist, Dr. Amy James, found Father met the criteria for unspecified personality disorder with turbulent, histrionic, and antisocial traits and recommended Father engage in weekly therapy with a cognitive behavioral therapist.

¶ 6 Mother prematurely gave birth to Oscar in the hospital on 1 November 2019. On 5 November 2019, the Onslow County Department of Social Services ("DSS") received a report that Oscar was born with significant respiratory issues because Mother had not managed her diabetes while pregnant. Oscar was treated with a continuous positive airway pressure ("CPAP") device and cared for in the newborn intensive care unit ("NICU").

¶ 7 Parents generally did not stay in the hospital with Oscar and instead stayed in a local hotel. Parents, however, slept in Oscar's hospital room at least one night during Oscar's time in the hospital. Parents were present when a doctor came to examine Oscar on 12 November 2019; the doctor observed Parents struggling to prepare Oscar's formula. Father then changed Oscar's diaper but failed to support Oscar's head, even after being instructed by the doctor. At around 6:18 p.m., a nurse's note stated that Parents had been struggling to prepare formula "since about [1:00 p.m.]" and that Mother "appear[ed] to [have an] issue changing diaper[s] independently." A half hour later, the nurse noted Father had left the hospital for about an hour and, "[w]hen he returned[,] his eyes were blood-shot, his speech was slurred, and he was unable to hold a coherent conversation with [the nurse or doctor]."

¶ 8 At 1:05 a.m. on 13 November 2019, a nurse entered Oscar's hospital room after hearing Oscar crying. Parents were not in the room, and Oscar was wearing an unbuttoned sleeper and lying in a crib that had multiple other items in it. While the nurse was in the room, Parents returned and struggled to change Oscar's diaper for several minutes. When

Parents finished, they were informed the diaper was not properly fastened. At 4:00 a.m., the nurse woke Father to tell him it had been four and a half hours since Oscar's last feeding, stressing the importance of keeping track of how much time passed between each feeding. At 8:25 a.m., the nurse woke Parents because it had been another four and a half hours since Oscar's last feeding. Parents left at 9:30 a.m. that morning, returning that night at 7:08 p.m. When the nurse asked if Parents were going to stay overnight, Father indicated they had already paid for a hotel room; the nurse "reiterated the importance of meeting NICU discharge expectations."

¶ 9 Also on 13 November 2019, a DSS employee, Tanesha Speller, went to the hospital, saw Oscar, and spoke with hospital staff. She was informed that Oscar was medically ready for discharge but Parents had not completed their discharge teaching; Parents were not present during DSS employee Speller's visit. Parents had planned to complete the discharge teaching when they stayed overnight the previous night but failed to do so.

¶ 10 At 3:54 a.m. on 14 November 2019, the nurse had to educate Parents on how to measure how much formula Oscar had consumed. The nurse helped Father swaddle Oscar and place him in a bassinet. Approximately 45 minutes later, the nurse entered the room because Oscar was crying. Oscar was lying in the bassinet with a soiled blanket draped over him and was visibly hungry. When Parents returned to the room about an hour later, the nurse reinforced safe sleep practices and hunger cues.

¶ 11 That same morning, Father asked the nurse for help finding supplies for preparing a bottle of formula and changing linens. The nurse directed him to the supplies and reminded him he had been shown their location the past two days. Later that day, the nurse offered to complete a feeding to allow Parents to eat lunch; after the feeding, the nurse changed Oscar's diaper, outfit, and blankets that had been soiled with dried vomit.

¶ 12 On 14 November 2019, DSS filed a petition alleging Oscar was a neglected and dependent juvenile. DSS obtained a nonsecure custody order when it filed the petition. After holding an adjudication hearing on 24 and 25 May 2021, the trial court adjudicated Oscar a neglected juvenile by an *Amended Adjudication Order* entered 22 September 2021. Parents timely appealed.

ANALYSIS

¶ 13 Father challenges four of the trial court's findings of fact, and Parents collectively make two arguments concerning the court's conclusions of

law. We consider (A) Father's challenges to the findings and (B) Parents' arguments that the adjudication of Oscar as neglected was based solely on Parents' prior DSS history involving other children and that the findings do not demonstrate there was a substantial risk of harm to Oscar.

A. Findings of Fact

¶ 14 Father argues that Findings 11, 13, 18, and 24 are not supported by clear and convincing evidence.

¶ 15 Under N.C.G.S. § 7B-805, "allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C.G.S. § 7B-805 (2021). Accordingly, " '[t]he role of this Court in reviewing a trial court's adjudication of neglect . . . is to determine [first] whether the findings of fact are supported by clear and convincing evidence . . . .' " *In re K.W.*, 2022-NCCOA-162, ¶ 10 (quoting *In re T.H.T.*, 185 N.C. App. 337, 343 (2007) (cleaned up in original), *aff'd in part, modified in part*, 362 N.C. 446 (2008)). " 'The clear and convincing standard is greater than the preponderance of the evidence standard required in most civil cases.' " *Id.* (quoting *In re K.L.*, 272 N.C. App. 30, 36 (2020)). " '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.* (quoting *In re T.H.T.*, 185 N.C. App. at 563).

¶ 16 "Unchallenged findings of fact are deemed supported by the evidence and are binding on appeal." *In re K.H.*, 2022-NCCOA-3, at ¶ 13. We address the challenged findings below.

1. Finding of Fact 11

¶ 17 Finding 11 reads, "[Father] had to be shown where the infant's formula was kept and how to mix the infant's bottles numerous times. [Father] could not find the formula and would often forget where it was placed in the room." Father claims Finding 11 is unsupported by clear and convincing evidence, as the Record shows only one time, 14 November 2019 at 4:13 a.m., that this occurred.

¶ 18 We disagree. According to a hospital record[2] marked 12 November 2019 at 6:18 p.m., "[Mother] and [Father] have been preparing [Oscar's] milk since about [1:00 p.m.]. They have . . . needed prompting on how to use warmer multiple times, full education on warm[er] was provide[d]

2. We do not address whether this hospital record or others were properly admitted during the adjudication hearing. On appeal, Parents make no argument relating to their objection to the admission of the records during the hearing and the objection is deemed abandoned. *See* N.C. R. App. P. 28(a) (2021).

3 times." Then, on 14 November 2019, a hospital record noted in relevant part,

> [w]hile this [nurse] was in another [patient]'s room, [Father] approached H. Stine RT in the hallway for assistance with changing infant's linens and preparing a bottle. . . . This [nurse] reoriented [Father] to [Oscar's] room, reminding [Father] where items such as nipples, formula, and linens are located. . . . This [nurse] reminded [Father] that this [nurse] had oriented [Father] and [Mother] to [the] room including the location of supplies on [November 12] and [November 13].

Based on this evidence, we hold that clear and convincing evidence supports Finding 11 because hospital records indicate Father had to be shown where supplies were on three separate days and how to use the warmer three times.

2. Finding of Fact 13

¶ 19 Finding 13 reads, "[p]remature children need to be fed consistently and [Parents] need to know how much to feed infants." Father claims Finding 13 is not rooted in Record evidence. The Record, however, shows hospital staff reminding Parents to feed Oscar frequently and Parents not knowing how much they had fed Oscar. On 12 November 2019, a doctor noticed Father leaning at a sink counter attempting to prepare formula and saying "how do you do this?" and "I see 30[ml], how do you tell the number?" Records from the next morning noted,

> [t]his [nurse] woke up [Father] at [4:00 a.m.] and explained that it was time for the infant to eat since it had been 4.5hrs since his last feeding. [Respondent Father] stated, "he wants to sleep just like us and if you would just leave him alone he'd be fine." This [nurse] reinforced to [Father] the importance of ensuring that he is mindful of the amount of time that has passed since infant has eaten last.

Later that morning, at 8:25 a.m., hospital records show that a nurse had to wake Parents to feed Oscar because it had been another four and a half hours since his last feeding. The next day, on 14 November 2019, Father asked a nurse to help him determine the volume of formula consumed by Oscar. The nurse taught Parents how to measure liquid

volumes, but they struggled to quantify the feeding volume for the last feeding. On the same day, hospital records stated in relevant part,

> [Father] stated, "I will be so happy to leave this hospital because we'll be able to sleep and I won't have to worry about all this." This [nurse] reinforced teaching of newborn care and reminded [Father] that the same care would be required for [Oscar] at home. [Respondent Father] stated, "but at home we will be able to sleep more because we won't have to wake him up this much." This [nurse] reinforced education regarding the importance of adequate nutritional intake.

Based on the foregoing, we hold that Finding 13 is supported by clear and convincing evidence.

3. Finding of Fact 18

¶ 20 Finding 18 reads,

> 18. That [DSS employee], Tanesha Speller, testified at today's hearing and from that testimony, [t]he Court finds as follows:
>
> a. On [5 November 2019], [DSS] received a report involving the family with concerns for the mental health, physical health, domestic violence, substantial child protective services history with both [Parents] and concerns for [Parents'] lack of ability to care for an infant.
>
> b. That [Parents] have an older child, who was in the custody and care of Pitt County Department of Social Services at the time of the filing of this petition.
>
> c. That at the time of this hearing, [Parents] do not have of their children in their care or custody.
>
> d. That [Father] told [DSS employee] Speller that [Mother] can care for herself and her children independently.
>
> e. That [DSS employee] Speller reviewed the findings of Dr. Amy James's report with [Father].

f. That [Father] did not feel the results of his assessment from Dr. James were correct, and that he should have another assessment, yet he has not received another assessment.

g. That [DSS employee] Speller visited with [Oscar] for over two hours in the hospital, and [Parents] were not with the child. That nurses had to perform the juvenile's feedings.

h. That on [12 November 2019], [Parents] stayed overnight to complete discharge teaching and to care for the baby themselves; however [Parents] slept in the room and did not participate in the baby's care, including feeding the baby.

i. That while in the hospital, [Parents] began to argue over whether the baby would be christened or baptized.

j. That on [14 November 2019], [Parents] wrote [Oscar] had consumed a total of 340 ml between the hours of 8:30 am and 1:30 pm. [Parents] also wrote that they changed [Oscar's] diaper four times during that time period.

k. That when the [nurse] changed [Oscar's] diaper at 2:00 p.m., the diaper was full of urine and stool, [Oscar's] outfit and blankets were soiled, and [Oscar] had not been changed recently, contrary to what [Parents] reported on the feeding log.

l. That [Parents] would often leave the hospital for long periods at a time, leaving [Oscar] unfed and dirty.

m. That [Mother] and [Father] had to be prompted repeatedly to feed, swaddle, and change the baby.

n. That on [13 November 2019], [Parents] would not spend the night in the hospital with [Oscar] because they already paid money for a hotel and stated they could[ ] [not] get sleep when they were in the hospital.

> o. That after being prompted by nursing staff to feed [Oscar] during the night, [Father] stated "[Oscar] wants to sleep just like us, and if you would just leave him alone, [he would] be fine[."]
>
> p. That after leaving [Oscar's] room for about an hour, [Father] returned to the room with blood-shot eyes, slurred speech, and was unable to hold a coherent conversation with the nurse or Doctor.
>
> q. That [Father] told [DSS employee] Speller that Pitt County DSS took his child . . . illegally and that Onslow County DSS was trying to take [Oscar] illegally as well.

Father claims Finding 18 is not supported by clear and convincing evidence on the basis that it is "inaccurate" because paragraphs h-q were not based on DSS employee Speller's testimony but rather appear to be based on medical records. Father challenges no other portion of this finding. We do not agree with Father's characterization of Finding 18.

¶ 21 Finding 18 summarizes the testimony of the DSS employee that caused the petition to be filed. When questioned about Oscar's medical records[3] from the days after Oscar was born, DSS employee Speller testified that she had received and reviewed the records and that such records "contribute[d] to [her] decision to file a petition." The records were admitted over objection during Speller's direct examination, and neither Father nor Mother contend on appeal that the trial court improperly overruled the objection. As such, Finding 18 is correct to the extent it summarizes DSS employee Speller's testimony at the adjudication hearing, which was based in part on Speller's review of the records that Father argues are the source of the finding's substance. This is further confirmed by the fact that several of the medical records are summarized in findings of fact separate from Finding 18. For example, Findings 7 through 14 deal with the nursing and other hospital staff's concerns about the care that Parents were providing Oscar. Finding 18 is supported by clear and convincing evidence given DSS employee Speller's testimony.

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3. Such "medical records" included the hospital records written by staff, including nurses, that we discuss earlier in the opinion. *See supra* at ¶¶ 18-19.

4. Finding of Fact 24

¶ 22 Finding 24 reads, "[F]ather's failure to acknowledge responsibility for his neglect of his other juvenile in Pitt County shows a substantial risk of future neglect for [Oscar]." Father argues this finding is inaccurate, reflects a misapprehension of law, and is not supported by clear and convincing evidence. Father contends that the trial court in the Pitt County case was not determining neglect or culpability on the part of either parent but rather the circumstances and status of the juvenile and that most of the findings in that adjudication order were related to Mother, not Father. Reviewing the Record, we conclude portions of Finding 24 are supported by clear and convincing evidence.

¶ 23 Father is correct that the Pitt County adjudication was about the status of Parents' other shared child as a neglected juvenile, not his or Mother's culpability. As our Supreme Court has explained,

> [w]here the evidence shows that a parent has failed or is unable to adequately provide for his child's physical and economic needs, whether it be by reason of mental infirmity or by reason of willful conduct on the part of the parent, and it appears that the parent will not or is not able to correct those inadequate conditions within a reasonable time, the court may appropriately conclude that the child is neglected. *In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent.*

In re Montgomery, 311 N.C. 101, 109 (1984) (emphasis added). The Record, however, shows that Parents' other shared child was adjudicated as neglected in the Pitt County case but that Father has not acknowledged the facts found therein or the relevance of this adjudication in the case *sub judice*.

¶ 24 Parents were parties to the Pitt County case in which their other child was adjudicated as neglected, and their respective actions and inactions were described in the findings of fact in that case's adjudication order. Additionally, DSS employee Speller's testimony before the trial court here reveals (1) Mother stated she "would be unable to parent independently," (2) Speller talked to Father when unable to reach Mother, (3) Father told Speller that Mother could parent independently and that "he believed Pitt County had made the report [about Oscar] and [] had taken his [other son with Mother] illegally," (4) the employee

heard Mother in the background during the call with Father but "could[] [not] hear exactly what she was saying," and (5) Father later continued to question the legitimacy of the Pitt County case and suggest the case concerning Oscar was an effort by Pitt County. During that later conversation, in which Speller discussed the Parental Capacity Evaluation performed on Father pursuant to the Pitt County case, Father responded that he "feels he could have another assessment completed by -- that's not requested by Pitt County and one that can be unbiased." Father also "spoke about his case in Pitt County again, that they had never given him a case plan[,]" and that he "was[] [not] aware of recommendations." Clear and convincing evidence supports portions of Finding 24 because the Record shows Father failed to acknowledge the legitimacy of the Pitt County adjudication, an order by which he was bound as a party, and Father's lack of acknowledgement of a recent neglect adjudication regarding the only other child that Father shares with Mother created questions about the risk of impairment to Oscar.

¶ 25 Furthermore, as neglect adjudications are about the status of the child rather than the culpability of either parent, it is irrelevant that most of the findings in the Pitt County adjudication order refer to Mother because that adjudication was about Parents' *shared* child being neglected rather than Father or Mother's culpability. The Pitt County trial court did not enter separate adjudications of neglect based on the individual conduct of Mother and Father, nor would it be appropriate to do so. The Pitt County adjudication was about Parents' older *shared* child being neglected, and the adjudication before us here is about Parents' younger *shared* child being neglected. As such, we are not persuaded by Father's argument that the Pitt County adjudication is not relevant due to most of its findings referring to Mother because the underlying facts found therein should be viewed as explaining the status of Parents' other child, not Mother or Father's culpability in creating circumstances resulting in that status.

¶ 26 Finally, assuming *arguendo* that Finding 24 is unsupported by clear and convincing evidence, because we hold the findings nevertheless support the trial court's conclusion that Oscar is a neglected juvenile, the supposed lack of any particular fact regarding Father's culpability is immaterial at the adjudication stage. *See In re A.L.T.*, 241 N.C. App. 443, 451 (2015) (citation omitted) ("Because we rule the trial court's findings of fact support its conclusions of law that the juveniles were neglected, the lack of findings in the adjudication order regarding [the] [m]other's fault or culpability in contributing to the adjudication of neglect is immaterial."). A trial court need not make a specific finding about

the substantial risk of impairment resulting from the failure to provide proper care where the findings demonstrate that such a risk exists. *See In re A.D.*, 2021-NCCOA-398, at ¶ 19. As explained *infra*, the adjudication was supported by other findings that regard separate, then-existing circumstances presenting a substantial risk of impairment to Oscar. *See In re J.A.M.*, 372 N.C. 1, 10 (2019) ("[T]he prior orders entered into the record were not the sole basis for the trial court's decision. Rather, the trial court also properly found 'the presence of other factors' indicating a present risk to J.A.M. when it reached its conclusion that J.A.M. was neglected as a matter of law."). Finding 24, even if erroneous, does not constitute reversible error given the ample other findings supporting the adjudication. *See In re T.M.*, 180 N.C. App. 539, 547 (2006).

B. Neglect Adjudication

¶ 27 Under N.C.G.S. § 7B-101(15), a "neglected juvenile" is

> [a]ny 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.
>
> . . . .
>
> In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C.G.S. § 7B-101(15) (2021). Here, the trial court made three conclusions of law in its order adjudicating Oscar as a neglected juvenile:

> 1. That the Court has jurisdiction over the parties and subject matter.

> 2. [Oscar] does not receive proper care or supervision from [Parents], and therefore is neglected within the meaning of N.C.G.S. § 7B-101(15), and that the same has been proven by clear, cogent, and convincing evidence.
>
> 3. A return of [Oscar] to the home of [Parents] at this time would be contrary to the best interests of the juvenile.

In challenging these conclusions, Parents argue the trial court erred in adjudicating Oscar as neglected when there was no harm to Oscar at the hospital. They claim the evidence failed to show even a risk of harm. They also contend the trial court erroneously adjudicated Oscar as a neglected juvenile based on their prior DSS history with other children because "[a] court may not adjudicate a juvenile neglected solely based upon previous [DSS] involvement relating to other children[,]" and, "in concluding that a juvenile 'lives in an environment injurious to the juvenile's welfare,' . . . the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile." *In re J.A.M.*, 372 N.C. 1, 9 (2019) (quoting N.C.G.S. § 7B-101(15) (2021)). As we explain below, such arguments are unavailing.

¶ 28 As we have concluded that the trial court's findings are supported by clear and convincing evidence, we must "determine . . . whether the legal conclusions are supported by the findings . . . ." *In re K.W.*, 2022-NCCOA-162, ¶ 10 (citation and marks omitted). The determination that a child is neglected is a conclusion of law subject to *de novo* review. *In re J.R.*, 243 N.C. App. 309, 312-13 (2015). "Under a *de novo* review, [we] 'consider[] the matter anew and freely substitute [our] own judgment for that of the lower tribunal.' " *In re K.W.*, 2022-NCCOA-162, at ¶ 11 (quoting *In re A.K.D.*, 227 N.C. App. 58, 60 (2013)).

¶ 29 For neglect adjudications based on N.C.G.S. § 7B-101(15)(a), as here, we have " 'required that there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide proper care, supervision, or discipline . . . .' " *In re G.C.*, 2022-NCCOA-452, ¶ 15 (quoting *In re Helms*, 127 N.C. App. 505, 511 (1997) (citation and marks omitted) (emphasis in original)); *see also* N.C.G.S. § 7B-101(15)(a) (2021). "[H]owever, there is no requirement that the court make a specific finding where the facts support a finding of harm or substantial risk of harm." *In re A.D.*, 2021-NCCOA-398, ¶ 19 (citing *In re Safriet*, 112 N.C. App. 747, 753 (1993)). " '[A] prior and closed case with other children

. . . cannot support an adjudication of current or future neglect.' " *In re G.C.*, 2022-NCCOA-452, at ¶ 15 (quoting *In re J.A.M.*, 372 N.C. at 9 (citation and marks omitted)). "Instead, we require[ ] the presence of other factors to suggest that the neglect . . . will be repeated." *Id.* (citation and marks omitted). "The trial court is granted 'some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside.' " *In re A.D.*, 2021-NCCOA-398, at ¶ 19 (quoting *In re C.M.*, 183 N.C. App. 207, 210 (2007) (internal citation and marks omitted)).

¶ 30 We have previously affirmed a neglect adjudication of a newborn child who was in the hospital when the petition was filed. *See In re A.B.*, 179 N.C. App. 605, 611 (2006). We found the trial court correctly "consider[ed] the substantial risk of impairment to the remaining children when one child in a home has been subjected to abuse or neglect." *Id.* We explained, "to hold that a newborn child must be physically placed in the home where another child was abused or neglected would subject the newborn to substantial risk, contrary to the purposes of [N.C.G.S. § 7B-101(15),]" and we held that "a newborn still physically in residence in the hospital may properly be determined to 'live' in the home of his or her parents for the purposes of considering . . . whether a substantial risk of impairment exists to that child." *Id.* Accordingly, here, we reject any contention from Parents that the trial court must wait for Oscar to be discharged from the hospital and returned home before it may adjudicate Oscar neglected.

¶ 31 Next, while a neglect adjudication may not be based solely on previous DSS involvement relating to other children, the General Assembly directed that such involvement is "relevant" in determining whether a child is a neglected juvenile: "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." N.C.G.S. § 7B-101(15) (2021). Here, DSS involvement with Parents' other children was the subject of only a few of the abundant unchallenged findings that support a substantial risk of impairment to Oscar based on the circumstances surrounding him at the hospital and on the potential for future neglect if returned home:

> 7. That over the thirteen days that [Mother] and [Father] were in the NICU with [Oscar], the nursing staff became concerned with [Parents'] behavior.
>
> 8. That [Parents] were leaving the child alone in his bassinet, [Oscar] was not properly swaddled, and

[Parents] put items in [Oscar's] bassinet that could interfere with safe sleeping, such as stuffed animals.

9. That on more than one occasion, the nurse assigned to the room came in to find the infant crying, [Mother] and [Father] were not present, and [Oscar] was left unattended.

10. That [Parents] had to be assisted in changing the infant's diaper on numerous occasions.

. . . .

12. That [Father] was not able to measure the appropriate amounts of formula [Oscar] was fed.

. . . .

14. That during [Oscar's] thirteen day stay at the hospital, the nurses and medical staff[ ] continued to have concerns because [Parents] could not take proper care of [Oscar].

15. That Dr. Amy James was qualified as an expert in Forensic Psychology, and from her testimony, [t]he Court finds as follows:

a. A Parental Capacity Evaluation was performed on [Father] on [16 September 2019], pursuant to an on-going CPS case in Pitt County.

b. Dr. James opined that it is improbable that [Father] is capable of sole caregiving to his child as he is in need of stable employment, individual and couple's therapy.

c. That [Father] is in need of stable employment because his prior history of unstable employment has led to housing instability.

d. That [Father] struggled with accurate dates and times during his historical timeline of his life.

e. That [Father] has five other children.

f. That [Father] has not parented any of his other children to adulthood.

g. That Dr. James identified individual therapy as a need for [Father's] ability to parent.

h. That [Father's] behaviors impair his ability to assist [Mother] in parenting.

i. That [Father] would need to be meaningfully engaged in therapy for at least 90 to 180 days to show any significant progress in his behaviors.

j. That [Father's] past behaviors show an impairment in his ability to empathize, ability to communicate, lack of self-awareness, and his interactions with others.

k. That this impairment of his behaviors are what led to his diagnosis of Unspecified Personality Disorder with significant Turbulent, Histrionic, and Antisocial Traits.

l. That if [Father] addresses his risk factors, he could independently parent, however [Father] does not recognized or acknowledge any issues, and has not received any treatment.

16. That Dr. James[ ] made her report in September of 2019, and [Oscar] was born less than two months later in November of 2019. That the report is relevant as to this child, due to the closeness in time of the report and [Oscar's] birth.

17. That as of the date of this hearing, [Father] has not participated in individual therapy.

. . . .

19. That [Mother] has had three previous children, two of which the Maternal Grandfather is the father of the children. All three children have been removed from her custody.

20. [Mother's] Parental Rights to [Oscar's] half siblings were terminated on [24 May 2018].

21. [Parents] have an older child that was adjudicated neglected in Pitt County on [11 October 2018].

22. That pursuant to Petitioner's Exhibit #5, [Mother] was court ordered to participate in mental health treatment, demonstrate skills learned in parenting class, maintain sufficient and stanch housing,

> maintain communication with the Department and sign any releases as requested.
>
> 23. That [Mother] has not completed any of the Court ordered recommendations from Petitioner's Exhibit #5.
>
> . . . .
>
> 25. That [Mother] is diagnosed with Post-Traumatic Stress Disorder, Anxiety Disorder, Borderline Personality Disorder, seizures, and Obsessive-Compulsive Disorder. That [Mother] does not take any medications for these conditions, does not seek any on-going mental health treatment for these conditions, and struggles with mental instability and cognitive delays.
>
> 26. That [Mother] has been found to not have the capacity to independently parent pursuant to a prior parental capacity evaluation in 2016.
>
> 27. That based upon the above findings of fact, the Court hereby finds [Oscar] to be [a] neglected juvenile in that [Oscar] does not receive proper care or supervision from [Parents].

The trial court's adjudication of Oscar as neglected was based on several facts that did not involve Parents' DSS involvement regarding their other children, including Parents' actions in the hospital in the days following Oscar's birth, Parents' respective failures to undergo therapy and other treatment for conditions that have been found to impair their individual parenting capacities, and Father's lack of acknowledgment of the concerns raised by Dr. James and DSS employee Speller. These unchallenged findings show a substantial risk of physical, mental, and emotional impairment to Oscar from Parents' failure to provide proper care for Oscar while he was in the hospital because Oscar missed feedings, was not fed enough at times even when hospital staff repeatedly showed Parents how to mix his formula, was left alone with a soiled blanket draped over him, and was put down for bed in violation of safe sleeping practices that were explained to Parents multiple times. Even with instruction and assistance from hospital staff, Parents were not providing proper care and supervision for Oscar, and neither the binding findings nor anything in the Record suggest Parents' care would suddenly be proper outside the hospital and would not result in physical, mental, or emotional impairment to Oscar.

¶ 32 Furthermore, such findings also show a substantial risk of physical, mental, and emotional impairment to Oscar because they reveal Parents have failed to make the changes necessary for at least one of them to provide proper care for Oscar. *See In re A.D.*, 2021-NCCOA-398, at ¶¶ 20-23 (finding substantial risk of impairment from the respondent-mother's failure to complete required therapy and make changes recommended by DHHS, in addition to the respondent-mother's use of improper discipline on her children); *In re J.A.M.*, 372 N.C. at 10-11 (finding substantial risk of impairment based in part on the respondent-mother's failure to "develop[] the necessary skills" for avoiding placing child in a dangerous living situation). Mother has not made progress on any of the recommendations ordered in the Pitt County case, and she continues to not take medication or receive other treatment for her diagnosed mental health conditions. While Father's recommendations were not court-ordered, they are found in Dr. James's report that unchallenged Finding 16 refers to as "relevant" due to the "closeness in time of the report and [Oscar's] birth," and Father has made no progress implementing the suggested changes and instead has characterized the report as biased. Yet Father has not received another assessment.

¶ 33 We therefore hold that the trial court's conclusions of law adjudicating Oscar as neglected were supported by the findings. The unchallenged findings are sufficient for us to reach this conclusion. Additionally, the challenged findings that we hold are supported by clear and convincing evidence, which involve additional facts of the care and supervision Parents provided in the hospital and of DSS employee Speller's understanding of the records she reviewed, support adjudicating Oscar as neglected. We, however, make clear that our decision is based on the status of Oscar, not Mother or Father's alleged culpability in creating the circumstances surrounding him.

CONCLUSION

¶ 34 As the findings support the existence of a substantial risk of physical, mental, or emotional impairment to Oscar resulting from Parents' failure to provide proper care, the trial court did not err in adjudicating Oscar as a neglected juvenile.

AFFIRMED.

Chief Judge STROUD and Judge ZACHARY concur.

IN THE MATTER OF T.D.N.

No. COA22-240

Filed 6 December 2022

Child Abuse, Dependency, and Neglect—permanency planning—termination of reunification efforts—irreconcilable contradictions in trial court's order

The trial court's permanency planning order terminating efforts to reunite respondent-mother with her child was vacated and remanded where the order's findings and decrees contained irreconcilable contradictions. Specifically, the order found both that reunification "clearly would be unsuccessful and futile" and that reunification "may be possible within the next six months," and it ordered the mother to undergo a parental capacity assessment as part of a psychological evaluation (which would be unnecessary if reunification were no longer a goal).

Judge CARPENTER concurring in part and dissenting in part.

Appeal by Respondent-Mother from an order entered 16 September 2021 by Judge Pauline Hankins in Brunswick County District Court. Heard in the Court of Appeals 21 September 2022.

Mark L. Hayes, for Respondent-Mother.

Jane R. Thompson, for Brunswick County Department of Social Services, Petitioner-Appellee.

N.C. Administrative Office of the Courts Guardian ad Litem Program, by Michelle FormyDuval Lynch, for Guardian ad Litem.

WOOD, Judge.

¶ 1 Respondent-Mother appeals the modification of a permanency planning order that terminated efforts to reunite Mother with her child. We hold competent evidence supports the trial court's factual findings, but certain factual findings, legal conclusions, and decrees are materially inconsistent. We vacate and remand the order.

I. Background

¶ 2 On 24 February 2017, Todd[1] was born to Mother and Father. Todd has medical diagnoses which affect his development such that he experiences seizures and requires constant medical attention.

¶ 3 On 18 November 2019, Brunswick County Department of Social Services ("DSS") visited Mother's home after receiving a concerning report that Mother had been impaired while caring for Todd. While DSS was at Mother's home, Mother was not able to stand without support, spoke with slurred speech, and was not able to properly focus. Mother was belligerent toward DSS, Father, and law enforcement, who soon arrived upon the request of DSS. DSS later took custody of Todd and removed him from the home.

¶ 4 On 27 November 2019, the trial court continued nonsecure custody of Todd with DSS and ordered Mother to have a minimum of one hour supervised visitation with Todd every week. The trial court further ordered Mother to work with DSS to develop a case plan to "allow her to be intricately [sic] involved in the child's care."

¶ 5 On 12 December 2019, the trial court conducted another nonsecure custody hearing and continued custody with DSS. The trial court ordered Mother to cooperate with medical staff at Duke Hospital where Todd frequently was seen due to his developmental diagnoses.

¶ 6 On 31 March 2020, the trial court adjudicated Todd a neglected juvenile. Mother stipulated that she was not able to properly care for or supervise the child at the time of the 18 November 2020 incident and that she "created an environment injurious to the welfare of the juvenile." The trial court cited Mother's mental instability as a contributing factor in the initial adjudication order. This same day, the trial court entered a disposition order. The trial court ordered Todd to remain in the legal and physical custody of DSS. Mother and Father were permitted unsupervised time with Todd for four and a half hours every day. DSS was ordered to pursue reunification efforts between Todd and his parents while they worked to comply with their case plans. The case plans had Father and Mother pursue mental health treatment, cooperate with Todd's in-home nursing staff, re-establish occupational and speech therapy services for Todd, and dispose of Todd's expired prescription medications.

¶ 7 On 19 August 2020, the trial court entered a review order and authorized DSS to begin a trial home placement with Mother. However,

1. A pseudonym is used here to protect the identity of the child.

on 30 October 2020, the trial court entered a permanency planning order which modified Mother's contact with Todd due to concerns about her ability to properly supervise or care for him by herself following a home visit by a DSS worker on 30 September 2020. On that day, a DSS worker visited the home and observed Todd alone in the living room. Mother was nowhere to be seen, and, after forty-five minutes of repeated attempts to have someone answer the door, the DSS worker gained entry with the aid of law enforcement. Mother was found asleep in her bed while Todd stood in hot bathwater. When Mother came-to, she was "incoherent" and "had to brace herself while walking." Until this incident, DSS recommended that Mother should receive custody of Todd at the next hearing. The trial court ordered Todd could remain in Mother's home but that Mother "shall be supervised at all times around [Todd] by an individual vetted and approved by the Department." DSS had in-home nursing care provide nineteen hours of supervision while Father supervised five hours after he finished work for the day. At this point, Todd remained in DSS' custody and reunification with Mother remained a primary plan.

¶ 8 Shortly after the previous incident, Mother enrolled in a twelve-week drug rehabilitation program. Todd was removed from Mother's home and placed in a foster home on 12 November 2020, while Mother was absent. Todd remained in foster care after Mother's return.

¶ 9 On 31 December 2020, the trial court ordered DSS to arrange for Todd to participate in a developmental screening. This was necessary so that DSS could coordinate daycare services for Todd; however, Mother refused to consent to the screening.

¶ 10 On 11 January 2021, the trial court entered another permanency planning order which relieved DSS of reunification efforts with Father, largely due to Father not having housing and his unwillingness to participate in services to assist him in finding housing. However, Father was still permitted to visit with Todd unsupervised and was allowed to serve as a respite provider. Todd's foster parents noted Todd "struggled with engaging with the other children and appears to lack social skills" but believed that he could excel if placed in a program with proper assistance and training. Todd bit other children in the home. He was not permitted to be placed in a daycare due to Mother's objections to immunizations for religious reasons. He was subsequently placed in the home of a married couple without other children where the foster parents noticed that Todd appeared to struggle with separation anxiety. Mother was able to participate in shared parenting with these providers. At this time, Mother was willing to attend an inpatient treatment program so

that she could work to regain her ability to properly care for Todd. The trial court noted that Mother was making adequate progress with her case plan and was cooperating with the court, DSS, and the Guardian *ad Litem*. However, the trial court did not return custody of Todd to Mother "as it is contrary to the juvenile's health and safety, however, it may be possible within the next six months, provided his parents are able to satisfactorily complete the requirements of the Family Services Case Plan and demonstrate an ability to provide proper care for the child." Thus, Todd remained in DSS' legal and physical custody.

¶ 11 On 18 February 2021, the trial court entered another permanency planning order maintaining Todd in the custody of DSS and reinstating reunification efforts with Father. The court noted that Todd was currently residing in his fourth foster home but that there were no concerns about his well-being. Mother, at this time, was able to visit with Todd for a minimum of one hour per week and remained opposed to immunizing him. The court noted that during a visit, Mother became concerned about a diaper rash and accused the social worker of sexually abusing Todd. The caregiver took him to the doctor and confirmed that Todd merely suffered from a diaper rash. The trial court noted that Mother was "relentlessly" calling Todd's foster parents from 9:00 p.m. to 2:00 a.m. and questioning and criticizing their care of Todd. DSS reported that she had done this with other placement providers as well. These incidents took place almost one year after Mother participated in a comprehensive clinical assessment on 13 March 2020. The assessment recommended that Mother take part in an outpatient program "to manage depressive symptoms and anxiety."

¶ 12 On 20 May 2021, the trial court entered an order denying DSS' request to have Todd vaccinated because he was enrolled in a daycare that did not require vaccinations. Mother remained opposed to Todd receiving any vaccinations for religious reasons and from fear that, due to his Epilepsy and other medical issues, he might suffer greater harm.

¶ 13 During the hearing, a medical expert testified that he did not see a problem with Todd receiving vaccinations, but he would not vaccinate Todd against Mother's wishes. On this same day, the trial court entered another permanency planning order. The order did not materially alter the prior order except that visitation with the parents was modified, and the trial court noted that Mother continued to call the foster parents at odd hours of the night and had called Todd to tell him that he would be coming home with her that day.

¶ 14 On 16 September 2021, the trial court entered another permanency planning order and eliminated reunification with the parents as a

permanent plan due to inadequate progress in their case plan to address the issues that led to Todd coming into the custody of DSS. In its order, the trial court referenced several incidents tending to show Mother had not demonstrated mental stability and was no longer cooperating with DSS. For instance, Mother accused the foster parents of not feeding Todd and claimed he was losing weight, although his pediatrician confirmed his weight gain. Mother "would not allow the nursing staff to complete required tasks, like evaluating [Todd's] vitals." Mother missed therapy appointments and tested positive for Fentanyl on 19 July 2021. The trial court found concerns about Mother's use of her prescribed medications due to DSS' report. Additionally, Mother and Father continued to raise suspicions with Todd's placement and said that Todd "will die in foster care." In another instance, Mother falsely alerted the hospital that Todd had been kidnapped and pointed to bruises on his body which she claimed were needle marks. She alleged that he had been subjected to abuse. The examining doctor did not notice any issues but ordered a chest and pelvic X-Ray due to Mother's concerns. Mother, at one point, called 911 to have an officer visit Todd's placement provider to perform a welfare check at approximately midnight before also contacting a detective with concerns about her son. An anonymous report from "[Mother's] friend" was made to the Horry County Abuse and Neglect Hotline alleging abuse to Todd. Mother claimed that Todd had a broken rib before an X-Ray revealed otherwise. Mother eventually revoked her consent to allow Columbus County Schools to conduct a child development assessment of Todd so that he could enter kindergarten. In sum, the trial court noted generally that Mother had "not demonstrated mental stability" and was "minimally cooperating with the Department and the Guardian *ad Litem*."

¶ 15 The trial court ordered Mother and Father to continue with their case plans, Mother to cooperate with medical service providers, and Mother to "participate in a psychological assessment that includes a parental capacity assessment." The trial court noted that Todd was now four years old and in his sixth foster home, had learned some sign language, and was potty trained. Although the daycare had not reported any concerns during pick-up and drop-off, DSS expressed concerns that Mother returned Todd to the caretaker numerous times naked or wearing pullups, although being potty trained.

¶ 16 The trial court made findings about many other occurrences to support its finding that Mother had not demonstrated mental stability and was no longer cooperating with DSS. Finally, the court found that

> 51. Continued efforts toward reunification clearly would be unsuccessful, futile, inconsistent and

> contrary to the health, safety and best interests of the child to secure a safe, stable home within a reasonable period of time and the Department should continue to be relieved of same.
>
> 52. That legal custody of the juvenile cannot be returned to the parents today as it is contrary to the juvenile's health and safety, however, it may be possible within the next six months, provided his parents are able to satisfactorily complete the requirements of the Family Services Case Plan and demonstrate an ability to provide proper care for the child.

¶ 17 Upon these findings, the trial court relieved DSS of reunification efforts and established the new concurrent plan, "the primary plan being custody with a court-approved caregiver and the secondary plan being guardianship."

¶ 18 On 14 December 2021, Mother filed a timely notice of appeal of the permanency planning order alleging that material portions of the order were improperly contradictory and that several findings of fact were not supported by competent evidence.

II. Standard of Review

¶ 19 We review a permanency planning order to determine "whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re J.T.*, 252 N.C. App. 19, 20, 796 S.E.2d 534, 536 (2017) (quoting *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010)). "If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *Id.* Conclusions of law are reviewed *de novo*. *Id.*

III. Discussion

¶ 20 After a child is adjudicated neglected and the court orders an initial disposition, the court holds review or permanency planning hearings. N.C. Gen. Stat. § 7B-906.1(a) (2021). At the conclusion of each permanency planning hearing, the court must make specific findings as to the best permanent plan to achieve a safe, permanent home for the juvenile within a reasonable period of time. *Id.* By statute,

> [r]eunification shall be a primary or secondary plan unless the court made written findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3), the permanent plan is or has been achieved . . . , or the court makes written

> findings that reunification efforts *clearly would be unsuccessful* or *would be inconsistent with the juvenile's health or safety.*

N.C. Gen. Stat. § 7B-906.2(b) (emphasis added). Since here the trial court did not make findings pursuant to sections 7B-901(c) or 7B-906.1(d)(3) and did not conclude that the permanent plan was unachieved, we look to see if the trial court made "written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." *Id.* We note here that the trial court did appropriately make both findings. Within this framework, we now consider Mother's arguments.

A. Material Contradictions

¶ 21 Mother first argues that several findings, conclusions, and decrees materially contradict others within the trial court's order. As with orders terminating parental rights,

> [i]t is not unusual for an order . . . to include both favorable and unfavorable findings of fact regarding a parent's efforts to be reunited with a child, and the trial court then weighs all the findings of fact and makes a conclusion of law based upon the findings to which it gives the most weight and importance.

In re A.B., 239 N.C. App. 157, 166, 768 S.E.2d 573, 578 (2015). Such competing findings are not forbidden and should be encouraged. *See In re A.B. & J.B.*, 245 N.C. App. 35, 47, 781 S.E.2d 685, 693 (2016). However, this Court cannot uphold an order supported by findings which "are actually antagonistic, inconsistent, or contradictory such that the reviewing court cannot 'safely and accurately decide the question.' " *Spencer v. Spencer*, 70 N.C. App. 159, 168, 319 S.E.2d 636, 643-44 (1984) (quoting *Lackey v. Hamlet City Bd. of Ed.*, 257 N.C. 78, 84, 125 S.E.2d 343, 347 (1962)).

¶ 22 Here, Mother specifically challenges findings of fact 24 and 52, conclusion of law 4, and decrees 5 and 8. She claims these writings are irreconcilable with the cessation of reunification efforts.

> [Finding] 24. There are continued concerns regarding medications that [Mother] is currently taking, and the Department would like for [Mother] to receive a medication evaluation.
>
> [Finding] 52. That legal custody of the juvenile cannot be returned to the parents today as it is contrary to the

> juvenile's health and safety, however, it may be possible within the next six months, provided his parents are able to satisfactorily complete the requirements of the Family Services Case Plan and demonstrate an ability to provide proper care for the child.
>
> [Conclusion] 4. [Mother] should make her best efforts to fully comply with the goals and objectives of her case plan.
>
> [Decree] 5. The Respondent parents are ordered to work with the social worker, the placement providers and the treatment team at Duke in a productive manner moving forward.
>
> [Decree] 8. [Mother] shall participate in a psychological assessment that includes a parental capacity assessment.

¶ 23 Competent evidence in the record supports finding of fact 24. Though Mother urges this Court to consider the contradictory nature of DSS' recommended medication evaluation when reunification efforts have ceased, the trial court is not prohibited from noting DSS' concerns. Although DSS is seeking to be relieved of reunification efforts with Mother, nothing precludes Mother from continuing to address DSS' and the trial court's concerns in an attempt to ultimately reunify with her child. The court did not order termination of mother's parental rights. It changed "the primary plan [to] custody with a court-approved caregiver and the secondary plan [to] guardianship."

¶ 24 Finding of fact 52, on the other hand, is troubling. Immediately preceding this finding, in finding 51, the trial court writes, "[R]eunification clearly would be unsuccessful [and] futile." This finding is necessary before the trial court may allow DSS to cease reunification efforts with the parents in accordance with N.C. Gen. Stat. § 7B-906.2(b) (2021) ("Reunification shall be a primary or secondary plan unless the court . . . makes written findings that reunification efforts clearly would be unsuccessful . . . ."). In finding 52, by contrast, the court states that reunification "may be possible within the next six months." A finding that "reunification clearly would be unsuccessful [and] futile" and a finding that reunification "may be possible within the next six months," are materially contradictory. Reunification cannot be both futile and possible. This contradiction amounts to more than a mere clerical error and cannot be reconciled with the previous finding in order to relieve DSS of reunification efforts. *See In re A.S.*, 275 N.C. App. 506, 511, 853 S.E.2d 908, 912

(2020); *In re A.P.W.*, 378 N.C. 405, 2021-NCSC-93, ¶ 31 ("the trial court satisfied the substance of N.C.G.S. § 7B-906.2(b) by finding that '[i]t is not possible for the children to be returned to the home of a parent or within the next six months and it would be contrary to the children's health and safety and their general welfare to be returned to the home of a parent.' "). Certainly, reunification "efforts" by DSS could be "futile" based on mother's uncooperative history but be "possible" if Mother changes her behaviors. We emphasize, however, that a permanency planning order directs the efforts of DSS—not the efforts of Mother to regain reunification. *In re E.A.C.*, 278 N.C. App. 608, 2021-NCCOA-298, ¶ 37. Though "[t]he focus of [Section 7B-906.2(b)] is on the actions of the parents," *In re J.M.*, 276 N.C. App. 291, 2021-NCCOA-92, ¶ 24, the permanency planning order must direct DSS "to make efforts toward finalizing the primary and secondary permanent plans." N.C. Gen. Stat. § 7B-906.2(b) (2021).

¶ 25 Also in finding 51, the trial court states that DSS should "continue" to be relieved of reunification efforts when the prior primary plan had been reunification. Standing alone, this apparent oversight might be considered clerical error or needless "surplusage" as the Guardian *ad Litem* suggests. Yet, taken together, "the internal inconsistencies of the order go far beyond" this one issue, and we cannot ignore it. *In re A.B.*, 239 N.C. App. 157, 167, 768 S.E.2d 573, 579 (2015).

¶ 26 Contrary to the Guardian *ad Litem* and DSS' contention, this case is distinguishable from *In re M.T.-L.Y.* In that case, the mother also alleged a contradiction in the findings of fact.

> In finding of fact 30, the trial court found that "[t]here is a *slim likelihood* of reunification with [Mother] within the next six months as [she] *may have completed* some of the court ordered requirements in [Virginia]," but "has failed to provide verification of this to date." (emphasis added). But finding of fact 33 determined that "[Mother is] *not making adequate progress* within a reasonable period of time under the plan."

In re M.T.-L.Y., 265 N.C. App. 454, 467, 829 S.E.2d 496, 505 (2019). This Court did not take issue with the apparent contradiction when "the trial court was merely performing its statutory mandate in determining the likelihood of reunification between [the child] and Mother in the following months" consistent with the requirements of N.C. Gen. Stat. § 7B-906.1(e)(1). *Id.* at 467, 829 S.E.2d at 506. More specifically, this Court held that the finding could not have been contradictory because

"partially performing a required condition does not necessarily preclude a conclusion that the performance is inadequate." *Id.* Here, by contrast, the finding that reunification efforts would clearly be unsuccessful and futile and DSS' release from all reunification efforts most certainly would thwart the possibility of Mother being reunited with her child given the court's findings about her mental health instability.

¶ 27 Concerning conclusion of law 4, a decision that Mother should continue with her case plan could be perceived as contradictory because, by removing reunification efforts as a primary plan, it does not follow that Mother should continue to pursue a case plan as if reunification were still an objective. However, DSS is the party relieved of making reunification efforts, not she. If Mother still desires to reunify with her child before a permanent plan is achieved, then it follows that she should continue to comply with her case plan to correct the conditions which led to the removal of her child from her home.

¶ 28 As to decree 5 that orders Mother to work with the social workers, placement providers, and hospital staff, DSS was relieved of reunification efforts, but Mother is still afforded visitation. In order to effectuate visitation or to be able to participate in Todd's medical treatment, she will necessarily need to work with the social worker, placement providers, and hospital staff. Again, DSS was relieved of making efforts toward reunification, but that does not preclude Mother from making her own efforts, as she is able, to "possibly" reunify with her child.

¶ 29 We agree, however, with Mother's contention that decree 8 is contradictory at this stage of the proceedings. The trial court ordered Mother to undergo a psychological evaluation that includes a parental capacity assessment. Mother has been working with DSS for four years and has undergone mental health evaluations. This evaluation specifically would have Mother also complete a "parental capacity assessment." Such an evaluation would be unnecessary if reunification were no longer a goal. Further, the trial court did not make a finding that such an evaluation would be in the child's best interest. If reunification were still the goal, then a presumption could be made that Mother completing the evaluation would be in the child's best interest. As the DSS worker noted in her testimony, this evaluation would "give us some guidance regarding the best and most appropriate permanent plan." Paradoxically, by ordering the evaluation, the trial court held that such measure might aid in a reunification determination while simultaneously holding that reunification was futile.

¶ 30 DSS and the Guardian *ad Litem* argue that these apparent inconsistencies amount to mere clerical errors and that the overwhelming

majority of the trial court's findings logically support the conclusion that reunification efforts should cease. Clerical error, in this context, "is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *In re A.S.*, 275 N.C. App. 506, 511, 853 S.E.2d 908, 912 (2020) (quoting *In re R.S.M.*, 257 N.C. App. 21, 23, 809 S.E.2d 134, 136 (2017)). For the reasons outlined above, it is not clear to us that the trial court's inclusion of findings 51 and 52 and decree 8 was the result of "a minor mistake or inadvertence."

IV. Conclusion

¶ 31 Because the trial court's findings and decrees contain irreconcilable contradictions to the trial court's cessation of reunification as a permanent plan, we vacate and remand to the trial court for further consideration and findings not inconsistent with this opinion.

VACATED AND REMANDED.

Judge TYSON concurs.

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

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

¶ 32 I respectfully disagree with my colleagues in holding that finding of fact 51 and finding of fact 52 collectively constitute a "material contradiction," requiring the trial court's order to be vacated and remanded. Furthermore, I disagree with the majority's reason for vacating decree 8. Therefore, I dissent in part. I would hold finding of fact 52 is unsupported by the evidence, and the remaining findings and the record support the trial court's cessation of reunification efforts. In addition, I would hold the trial court erred in entering decree 8 because it did not find that T.D.N.'s best interests require Respondent-Mother to undergo a psychological evaluation.

¶ 33 North Carolina General Statute § 7B-906.2(b) governs when reunification efforts may be eliminated by the trial court:

> Reunification shall be a primary or secondary plan unless the court made written findings under [N.C. Gen. Stat. §] 7B-901(c) or [N.C. Gen. Stat. §] 7B-906.1(d)(3), the permanent plan is or has been

> achieved in accordance with subsection (a1) of this section, or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. *The finding that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety may be made at any permanency planning hearing, and if made, shall eliminate reunification as a plan.*

N.C. Gen. Stat. § 7B-906.2(b) (2021) (emphasis added).

¶ 34 In this case, the trial court made finding of fact 51, which is sufficient to eliminate reunification as a plan, pursuant to N.C. Gen. Stat. § 7B-906.2(b). Finding of fact 51 provides: "Continued efforts toward reunification clearly would be unsuccessful, futile, inconsistent and contrary to the health, safety, and best interests of the child to secure a safe, stable home within a reasonable period of time and [DSS] should continue to be relieved of same." In conclusion of law 7, the trial court relieved DSS of reunification efforts with Respondent-Parents. The trial court then set the new primary plan for the juvenile as custody with a court-approved caregiver and the new secondary plan as guardianship.

V. Challenged Findings of Fact

¶ 35 In considering Respondent-Mother's argument that finding of fact 51 and finding of fact 52 are inconsistent, the majority concludes "[a] finding that 'reunification clearly would be unsuccessful [and] futile,' and a finding that reunification 'may be possible within the next six months,' are materially contradictory" because "[r]eunification cannot be both futile and possible." Based in part on this apparent discrepancy, the majority has chosen to vacate and remand the order in its entirety. Because I conclude the record and the remaining findings leave no doubt as to the trial court's intention to cease reunification efforts, I would affirm the order in part. For reasons discussed in section II, I would vacate decree 8 of the order.

¶ 36 First, I acknowledge finding of fact 8 addresses the possibility of Respondent-Parents obtaining *physical custody* in the next six months and provides in pertinent part: "In accordance with [N.C. Gen. Stat. §] 7B-906.1(e)(1), it is not possible for the juvenile to be returned to his parents within the next 6 months due to the inadequate progress towards the case plan in addressing the concerns that have led to [DSS's] involvement." Respondent-Parents do not challenge finding of fact 8,

and it is therefore "binding on appeal." *See In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019).

¶ 37 On the other hand, finding of fact 52 addresses the possibility of Respondent-Parents obtaining *legal custody* in the next six months:

> That legal custody of the juvenile cannot be returned to the parents today as it is contrary to the juvenile's health and safety, however, it may be possible within the next six months, provided his parents are able to satisfactorily complete the requirements of the Family Services Case Plan and demonstrate an ability to provide proper care for the child.

¶ 38 Our Juvenile Code sets forth the dispositions the trial court may order: "At any review hearing, the court may maintain the juvenile's placement under review or order a different placement, appoint an individual guardian of the person pursuant to [N.C. Gen. Stat. §] 7B-600, or order any disposition authorized by [N.C. Gen. Stat. §] 7B-903 . . . ." N.C. Gen. Stat. § 7B-906.1(d1) (2021).

¶ 39 The grant of legal custody to the juvenile's parents, while physical custody remains with DSS or another placement, is not a disposition authorized under N.C. Gen. Stat. § 7B-906.1, nor is it an alternative disposition allowed under N.C. Gen. Stat. § 7B-903. *See* N.C. Gen. Stat. § 7B-906.1(d1); N.C. Gen. Stat. § 7B-903 (2021). Therefore, the trial court erred in making two findings, which taken together, support a disposition not permitted by statute. *See In re H.S.F.*, 177 N.C. App. 193, 202, 628 S.E.2d 416, 422 (concluding the trial court's grant of physical custody to the juvenile's parent and order of physical placement with the juvenile's grandfather was not permitted by the Juvenile Code), *disc. rev. denied*, 360 N.C. 534, 633 S.E.2d 817 (2006).

¶ 40 DSS and the guardian *ad litem* both cite *In re Brenner* for the proposition that this Court can affirm an order containing inconsistencies where "[t]he record resolves the conflict" and no other result could follow from the evidence and remaining findings. 83 N.C. App. 242, 254, 350 S.E.2d 140, 148 (1986). There, two findings of fact, which our Court deemed conclusions of law, were "in direct conflict." *Id.* at 254, 350 S.E.2d at 148. We affirmed the trial court's decision where the record left no doubt as to the trial court's intentions. *Id.* at 254, 350 S.E.2d at 148.

¶ 41 Here, like *In re Brenner*, "[t]he record resolves the conflict" because finding of fact 52 is not supported by competent evidence and is inconsistent with finding of fact 8 and numerous other findings made by

the trial court. *See id.* at 254, 350 S.E.2d at 148. It is clear the trial court did not intend to consider granting Respondent-Parents legal custody of T.D.N. within the next six months where the remaining findings support the cessation of reunification with Respondent-Parents and where the trial court found Respondent-Parents could not obtain physical custody of T.D.N. in the next six months. Moreover, at the conclusion of the 11 August 2021 permanency planning hearing, the trial court orally announced extensive findings, supporting its decision to cease reunification efforts with Respondent-Parents. The trial court noted it had "some serious concerns in th[e] matter," and made specific findings relating to Respondent-Mother's actions during the pendency of the case, including "her attempts to sabotage placement" and her making false reports concerning T.D.N.'s welfare. It also made findings regarding Respondent-Parents' non-compliance with their case plans. The trial court expressly found legal and physical custody would remain with DSS. Contrary to written finding of fact 52, the trial court did not find at the hearing that T.D.N. may be returned to Respondent-Parents within the next six months. Therefore, I conclude finding of fact 52 is unsupported by competent evidence in the record. *See In re J.T.*, 252 N.C. App. 19, 20, 796 S.E.2d 534, 536 (2017) ("This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law.").

VI. Decree 8

¶ 42 Next, the majority concludes the trial court's mandate for Respondent-Mother to undergo a psychological evaluation, including a parental capacity assessment, "would be unnecessary if reunification were no longer a goal." Because the trial court did not satisfy the statutory requirement of determining the best interests of the juvenile, I would not reach the issue of whether the court's mandate for Respondent-Mother to complete a psychological evaluation was needed.

¶ 43 North Carolina General Statute § 7B-904 governs the trial court's authority over parents of a juvenile adjudicated as abused, neglected, or dependent. N.C. Gen. Stat. § 7B-904 (2021). In order for the trial court to order a parent to complete a psychological evaluation, it must "determine whether the best interests of the juvenile require" such an assessment. N.C. Gen. Stat. § 7B-904(c).

¶ 44 In this case, the trial court's written order is silent as to whether T.D.N.'s best interests require Respondent-Mother to complete a psychological evaluation. Therefore, the trial court did not fulfill the statutory

requirement of N.C. Gen. Stat. § 7B-904(c). Accordingly, I would vacate decree 8.

VII. Conclusion

¶ 45 I agree with the majority that finding of fact 24 is supported by the evidence and that conclusion of law 4 is supported by findings of fact. Additionally, I agree that the trial court did not error in entering decree 5. I disagree with the majority's conclusion that finding of fact 51 and finding of fact 52 create an "irreconcilable contradiction," requiring this Court to vacate the entire order. I conclude finding of fact 52 is unsupported by the evidence. Further, I conclude the trial court erred in entering decree 8 because it did not determine that T.D.N.'s best interests require Respondent-Mother to undergo a psychological evaluation. Accordingly, I would vacate only decree 8 and affirm the rest of the permanency planning order. As such, I concur in the majority's opinion in part and dissent in part.

MIDFIRST BANK, Plaintiff
v.
BETTY J. BROWN and MICHELLE ANDERSON, Defendants

No. COA22-283

Filed 6 December 2022

1. Liens—real property—execution sale—status of deed of trust—recorded after lien of judgment—extinguished by sale

In a bank's declaratory judgment action to quiet title to a home sold under execution (which was held to satisfy a lien of judgment), although the bank argued that the property continued to be encumbered by its deed of trust even after the sale, the appellate court interpreted N.C.G.S. § 1-339.68(b) to conclude that since the bank's deed of trust was filed after the judgment under which the execution sale took place, the bank's lien was extinguished by the sale. Therefore, the trial court's order granting summary judgment to the bank was reversed and the matter remanded for entry of summary judgment in favor of defendants (the homeowner and her daughter, who purchased the property in the execution sale through an upset bid).

2. Deeds—sheriff's deed—execution sale—subordination of one lien to another—lien extinguished by sale

In a bank's declaratory judgment action to quiet title to a home sold under execution, where, pursuant to N.C.G.S. § 1-339.68(b), the bank's deed of trust was extinguished by the execution sale (because it was filed after the judgment under which the execution sale took place), there was no merit to the bank's argument that the sheriff's deed controlled which encumbrances remained on the property. The plain terms of the sheriff's deed merely expressed that the property may be subject to any liens or encumbrances not extinguished by the sale and did not operate to transfer the property subject to the bank's deed of trust.

3. Equity—action to quiet title—equitable subrogation—lien information publicly available—no excusable ignorance

In a bank's declaratory judgment action to quiet title to a home sold under execution, where the bank's deed of trust was extinguished by the execution sale (because it was filed after the judgment under which the execution sale took place), the bank was not entitled to relief through equitable subrogation because the judgment against the homeowner was publicly recorded and available for inspection. Therefore, the bank could not claim excusable ignorance and, even if the homeowner made misrepresentations about the status of the judgment, the bank could not assert reasonable reliance on the homeowner's statements where it had the opportunity to review the public records but did not do so.

Appeal by Defendants from order entered 19 July 2021 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 October 2022.

The Green Firm, PLLC, by Bonnie Keith Green, and The Deaton Law Firm, PLLC, by Wesley L. Deaton, for Defendants-Appellants.

Alexander Ricks PLLC, by Benjamin F. Leighton, Roy H. Michaux, Jr., Ryan P. Hoffman, and David Q. McAdams, for Plaintiff-Appellee.

JACKSON, Judge.

¶ 1 Betty J. Brown and Michelle Anderson (collectively "Defendants") appeal from the trial court's order denying summary judgment for Defendants and granting summary judgment in favor of Midfirst Bank ("Plaintiff"). For the reasons detailed below, we reverse the order of the trial court and remand for entry of summary judgment in Defendants' favor.

I. Background

¶ 2 In 2000, Ms. Brown purchased her home, the property that is the subject of the litigation in this matter, in Charlotte, North Carolina. Ms. Brown obtained a loan from First Horizon Home Loan Corporation for the property on 26 March 2004. The deed of trust for this loan was recorded in the Mecklenburg County Register of Deeds.

¶ 3 On 21 January 2010, judgment was entered against Ms. Brown in Charleston County, South Carolina, in a matter unrelated to the case before us. This judgment, in the amount of $114,812.35 including post-judgment interest, was domesticated by United General Title Insurance Company in North Carolina pursuant to N.C. Gen. Stat. § 1C-1703 and filed in the Office of the Clerk of Mecklenburg County Superior Court on 15 July 2014.

¶ 4 In August of 2016, Ms. Brown refinanced her First Horizon loan. Nationstar Mortgage LLC made a loan to Ms. Brown, paying off the First Horizon loan. Nationstar recorded the deed of trust for this loan with the Mecklenburg County Register of Deeds. Nationstar recorded satisfaction of the First Horizon loan on 12 September 2016. Plaintiff is Nationstar's successor in interest for the August 2016 loan made to Ms. Brown.

¶ 5 In 2019, United General began enforcement proceedings in North Carolina for the 2010 judgment against Ms. Brown. On 19 July 2019, the Mecklenburg County Sheriff's Office levied the judgment against Ms. Brown's property. An initial foreclosure sale was held on 12 August 2019. The sale was postponed for one week because there were no bids. A second sale was held on 19 August 2019, where First American Title Insurance Company placed a high bid of $98,000.00. On 22 August 2019, after pooling together funds provided by relatives and withdrawn from her and her husband's retirement and savings accounts, Ms. Brown's daughter, Ms. Anderson, placed an upset bid of $102,900.00, with the intention of having Ms. Brown remain living at the property if the bid was successful. No subsequent bids were placed to upset Ms. Anderson's bid, and the Clerk of Mecklenburg County Superior Court filed a confirmation of sale on 4 September 2019.

¶ 6 On 22 April 2020, Plaintiff filed its complaint seeking to quiet title by way of a declaratory judgment asking the court to rule that the Nationstar deed of trust still encumbers the property that Ms. Anderson took title to through her upset bid. In the alternate, Plaintiff asserted that upon paying off the First Horizon Loan, Nationstar and its successors

in interest were equitably subrogated to the rights and priorities of the First Horizon deed of trust.

¶ 7 On 29 April 2021, Defendants jointly moved for summary judgment. On 3 May 2021, Plaintiff moved for summary judgment. A hearing on the competing motions was held on 26 May 2021 before the Honorable Karen Eady-Williams. On 19 July 2021, the trial court granted Plaintiff's motion for summary judgment and denied Defendants' motion for summary judgment.

¶ 8 Defendants filed timely notice of appeal of both the grant of Plaintiff's motion and the denial of their own summary judgment motion on 13 August 2021.

II. Analysis

¶ 9 Defendants make three arguments on appeal: (1) the trial court erred in granting summary judgment to Plaintiff because the property was no longer subject to Plaintiff's lien after the execution sale; (2) the Sheriff's deed cannot dictate whether liens remain on real property; and (3) Plaintiff cannot rely on the doctrine of equitable subrogation for survival of its lien because it cannot claim that it was excusably ignorant of the publicly recorded judgment against the property.

A. Standard of Review

¶ 10 Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). "The burden is on the moving party to show that there is no triable issue of fact and that he is entitled to judgment as a matter of law. In deciding the motion, all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Fin. Servs. of Raleigh, Inc. v. Barefoot*, 163 N.C. App. 387, 391, 594 S.E.2d 37, 40 (2004) (internal marks and citations omitted). We review a grant of summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

B. Status of the Nationstar Deed of Trust After the Execution Sale

¶ 11 **[1]** Defendants first argue that following the execution sale, the subject property no longer secured the Nationstar deed of trust. We agree.

¶ 12 North Carolina General Statute § 1-339.68(b) provides that "[a]ny real property sold under execution remains subject to all liens which

became effective *prior to* the lien of judgment pursuant to which the sale is held, in the same manner and to the same extent as if no such sale had been held." N.C. Gen. Stat. § 1-339.68(b) (2021) (emphasis added).

¶ 13 While this statutory provision does not specifically address the status of liens that become effective *after* the lien of judgment upon which a prior lienholder executes to force a judicial sale, we construe the language of this provision to mean that liens recorded after a prior lien holder has executed and forced a sale are extinguished by the sale.

¶ 14 It is a basic tenet of statutory construction that the intent of the legislature controls. *Campbell v. Church*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1978). "The intent of the legislature may be ascertained from the phraseology of the statute as well as the nature and purpose of the act and the consequences which would follow from a construction one way or another." *Id.*

¶ 15 A longstanding canon of statutory construction is that of *expressio unius est exclusio alterius*, which means "the expression of one thing is the exclusion of the other." *See Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987). This doctrine provides that where the legislature has specifically mentioned exceptions in a statute there is an implied exclusion of other exceptions on which the statute is silent. *See, e.g., id.* (holding that where a statute explicitly excepted actions for breach of express warranties from available defenses but was silent on actions for breach of implied warranties, those defenses were available in breach of implied warranty actions).

¶ 16 While N.C. Gen. Stat. § 1-339.68(b) expressly provides that liens which exist prior to a lien of judgment under which an execution sale is held survive that sale and remain an encumbrance on the real property, the statute is silent on the status of liens that become effective after the lien of judgment under which an execution sale is held. Applying the *expressio unius* canon, however, we can conclude that this implied exclusion was intentional on the part of our Legislature. Therefore, liens that come to encumber a property after the lien of judgment under which an execution sale is held do not survive the sale and are extinguished.

¶ 17 Here, judgment was entered against Ms. Brown in South Carolina on 21 January 2010. This judgment was domesticated in North Carolina and filed with the Office of the Clerk of Mecklenburg County on 15 July 2014. Nationstar's deed of trust was filed in the Mecklenburg Register of Deeds on 16 August 2016, more than six years after the judgment against Ms. Brown was initially entered and more than two years after it was

domesticated and filed in Mecklenburg County. The subject property was sold via execution sale pursuant to the 2010 judgment. Because the Nationstar deed of trust became effective as a lien on the property after the judgment under which the execution sale took place, it was extinguished by the sale.

C. Sheriff's Deed

¶ 18 **[2]** Defendants next argue that the Sheriff has no authority to subordinate one lien to another when conducting an execution sale, and that N.C. Gen. Stat. § 1-339.68(b), not the Sheriff's deed, controls with respect to what encumbrances remain on the property. Plaintiff argues, on the other hand, that the Sheriff's deed for the execution sale dictates the terms of the conveyance and controls what liens or other encumbrances remain attached to a property after the property is sold. We agree with Defendants.

¶ 19 The relevant portion of the Sheriff's deed here states:

> NO TITLE OPINION RENDERED. Deed remains subject to all liens and any encumbrances of any kind or nature (recorded or unrecorded) against the subject property, including without limitations a certain Deed of Trust recorded in the Mecklenburg County Register of Deeds on or about April 17, 2000, Book 11222 Page 893-911; a Deed of Trust filed on or about September 22, 2000, Book 11590 Page 792-798, and a Deed of Trust filed on or about June 28, 2001, Book 12385 Page 941-959; and any other restrictions, easements, rights of way, deeds of trust, liens, encumbrances, conveyances or any other clouds on title whatsoever related to prior transfers of and/or encumbrances on the subject property, whether filed or unfiled against the subject property. Purchaser was advised prior to the Sheriff's sale that it is very likely that this property is subject to the above and such conveyances, transfers, encumbrances or restrictions *which are not extinguished by the Sheriff's sale* or issuance of this Sheriff's Deed and Purchaser was advised to perform a full title search prior to purchasing the property subject to this Sheriff's Deed.

(Emphasis added). The deed further specifies that "[g]rantee accepts this deed 'as is, where is', including without limitation, subject to all

prior liens, restrictions, transfers and/or encumbrances which may or may not be of record regarding the property."

¶ 20 Plaintiff is correct that "[i]n construing a deed and determining the intention of the parties, ordinarily the intention must be gathered from the language of the deed itself when its terms are unambiguous." *Parker v. Pittman*, 18 N.C. App. 500, 505, 197 S.E.2d 570, 574 (1973). However, the Sheriff's deed here cannot be construed to transfer the property subject to the Nationstar lien. The deed simply provides a warning to the buyer that the property may be subject to any liens or encumbrances *not extinguished by the sale*. It notifies the buyer that they should conduct an independent title search to determine what liens or encumbrances, if any, remain attached the property at the time of the sale. The deed also specifically draws the grantee's attention to several deeds of trust that may encumber the property, none of which are the 16 August 2016 Nationstar deed of trust.

¶ 21 Further, even where a deed or deed restriction unambiguously states a term or condition of transfer, it will not stand if it violates or is contravention to a provision of our General Statutes. *See Belmont Association, Inc. v. Farwig*, 381 N.C. 306, 313, 2022-NCSC-64, ¶ 21 (holding that a restrictive covenant which had the effect of prohibiting the installation of solar panels violated our statutory prohibition on such deed restrictions, covenants, or other binding agreements). Because, as we have held above, pursuant to N.C. Gen. Stat. § 1-339.68(b), liens which attach to a property after a judgment under which the execution sale took place are extinguished by that sale, the Sheriff's deed could not work in contravention to that statute and mandate that such a lien survives, and we decline to read it as doing so.

D. Equitable Subrogation

¶ 22 **[3]** Defendants further contend that the remedy of equitable subrogation is not available to Plaintiff because it cannot assert excusable ignorance of the 2010 judgment that pre-dates its lien on Ms. Brown's property. Plaintiff counters that, if we hold that the Nationstar lien was extinguished upon the execution sale, it is entitled to relief pursuant to the doctrine of equitable subrogation because of misrepresentations made by Ms. Brown about the status of encumbrances on the property at the time that the Nationstar loan was made, and therefore the Nationstar lien should remain on the property. We agree with Defendants.

¶ 23 The earliest case in North Carolina to discuss the doctrine of equitable subrogation was our Supreme Court's decision in *Peek v. Wachovia Bank & Tr. Co.*, 242 N.C. 1, 86 S.E.2d 745 (1955). The Court there said:

> [A]s a general rule one who furnishes money for the purpose of paying off an encumbrance on real or personal property, at the instance either of the owner of the property or of the holder of the encumbrance, either upon the express understanding or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, will be subrogated to the rights of the prior lienholder as against the holder of an intervening lien, of which the lender was excusably ignorant.

Id. at 15, 86 S.E.2d at 755.

¶ 24 Essentially, equitable subrogation may apply to place a lender whose security has been extinguished in the position of a prior creditor where the lender provides money on the condition that "(1) the money be used to extinguish debt owed by the seller of the property so that (2) the lender gains a first-position lien over the property[.]" *U.S. Bank Nat'l Ass'n v. Woods*, 268 N.C. App. 311, 318, 836 S.E.2d 270, 275 (2019). As an equitable creation, this form of subrogation "is the doing of complete, essential, and perfect justice between all the parties without regard to form, and its object is the prevention of injustice." *Id.* at 318, 836 S.E.2d at 275-76.

¶ 25 Historically, we have applied the doctrine of equitable subrogation where some mistake has led to the extinguishing of a lender's security. For example, in *Bank of New York Mellon v. Withers*, a lender provided funds for a prior deed of trust on a property to be paid in full in exchange for a first position lien on the property. 240 N.C. App. 300, 303, 771 S.E.2d 762, 765 (2015). As a requirement of the loan, the property was to be transferred to the two individuals to whom the loan was made as joint tenants. *Id.* The closing attorney mistakenly transferred the property to those individuals and three additional people, resulting in the lender only having a security interest in two-fifths of the property rather than the entirety of the property. *Id.* We held that "equity would not allow the attorney's mistake to defeat the agreed purpose of the transaction, which was to secure a loan by granting a first position lien on the property[.]" *Id.* Therefore, the application of equitable subrogation was appropriate. *Id.*

¶ 26 In *Woods*, we held for the first time that the doctrine of equitable subrogation may apply not only in the context of refinancing but also

in real estate purchase transactions. *Woods*, 268 N.C. App. at 319, 836 S.E.2d at 276.

¶ 27 However, equitable subrogation "is not an absolute right." *First Union Nat. Bank of N.C. v. Lindley Labs., Inc.*, 132 N.C. App. 129, 130, 510 S.E.2d 187, 188 (1999). The party asserting a right to equitable subrogation must be excusably ignorant of the intervening lien. *See id.* at 131, 510 S.E.2d at 188; *Peek*, 242 N.C. at 15, 86 S.E.2d at 755.

¶ 28 Our equitable subrogation precedent has produced a bright-line rule for what excusable ignorance means, and we decline to do so here. Instead, we determine that it is a fact-intensive inquiry that depends on the specific circumstances of each case.

¶ 29 In *Lindley Labs*, we held that the plaintiff could not claim excusable ignorance of the superior rights of a deed of trust that was recorded upon the cancellation of the plaintiff's deed of trust. *Lindley Labs.*, 132 N.C. App. at 131, 510 S.E.2d at 188. In *American General Financial Services, Inc. v. Barnes*, we held that equitable subrogation did not apply where the plaintiffs failed to properly search the public record before refinancing, resulting in an existing judgment becoming a first priority lien on the property when two higher priority deeds of trust were paid off. 175 N.C. App. 406, 409, 623 S.E.2d 617, 619 (2006).

¶ 30 While the record is sparse regarding what, if any, title search took place prior to the Nationstar loan and what the results of that search were, Plaintiff here concedes that the judgment against Ms. Brown was publicly recorded. However, it contends that it is still excusably ignorant of that judgment because Ms. Brown, in filling out the Nationstar loan documents in 2016 at closing, checked a box that indicated that no liens or judgments encumbered the property. We are unpersuaded by this argument.

¶ 31 The notion that a party cannot assert ignorance where the information is available via a public record or title search is not a novel one in our law. In claims of misrepresentation, we have held that a party cannot assert reasonable reliance on statements concerning matters in the public record where they failed to review those public records when they had the opportunity to do so. *See Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 346-47, 511 S.E.2d 309, 313 (1999) (where a security interest and deed of trust was publicly and accurately recorded in the county Register of Deeds, the defendant's reliance on misrepresentations made about those documents in a subordination agreement was not reasonable). We similarly hold here that Plaintiff cannot rely on Ms.

Brown's statement to relieve it of the consequences of failing to identify a publicly available judgment.

¶ 32 While the undisputed facts are that the Nationstar loan was provided to Ms. Brown on the condition that it be used to pay off the First Horizon loan, because the judgment against Ms. Brown under which the execution sale of her property took place was publicly recorded, Plaintiff cannot claim excusable ignorance of its existence. Therefore, Plaintiff is not entitled to be equitably subrogated as a first-position lienholder in the shoes of the First Horizon loan.

¶ 33 Plaintiff throughout its brief refers to Defendants' conduct, particularly Ms. Brown's, as fraudulent, and contends that not allowing it relief under the doctrine of equitable subrogation would allow Defendants to be unjustly enriched. However, Plaintiff has not brought a claim for fraud or for unjust enrichment against Defendants, despite there being no apparent or argued bar to it doing so at the time it filed its initial complaint. Plaintiff instead opted to pursue relief under a quiet title action and an equitable doctrine, which we hold is not available to it on this particular set of facts.

E. Summary Judgment

¶ 34 Because, as we have determined above, the Nationstar lien was extinguished at the time of the execution sale and Plaintiff is not entitled to relief pursuant to the doctrine of equitable subrogation, Plaintiff is thus unable to show, as a matter of law, that it is entitled to a declaratory judgment that the Nationstar lien to which it is a successor remains an encumbrance on the property. Plaintiff has therefore failed to meet its burden for entry of summary judgment in its favor. Consequently, because the undisputed facts and applicable law defeat Plaintiff's claims against Defendants, Defendants are entitled to entry of summary judgment in their favor.

III. Conclusion

¶ 35 For the aforementioned reasons, we reverse the order of the trial court and remand to the trial court for entry of summary judgment in Defendants' favor.

REVERSED AND REMANDED.

Judges INMAN and COLLINS concur.

RADIANCE CAP. RECEIVABLES TWENTY ONE, LLC v. LANCSEK

[286 N.C. App. 674, 2022-NCCOA-789]

RADIANCE CAPITAL RECEIVABLES TWENTY ONE, LLC,
ASSIGNEE OF FIRST BANK, PLAINTIFF
v.
TIMOTHY E. LANCSEK, DEFENDANT

No. COA22-146

Filed 6 December 2022

1. Judgments—supplemental proceedings—subject matter jurisdiction—sections 1-358 and 1-360

In a matter involving plaintiff's attempt to collect on a judgment against defendant, where the clerk had already issued a writ of execution, the trial court had subject matter jurisdiction to institute a supplemental proceeding pursuant to N.C.G.S. §§ 1-358 and 1-360 to prevent third-party financial institutions from transferring or disposing of defendant's property. There was no requirement that the execution be returned unsatisfied before institution of the supplemental proceeding.

2. Appeal and Error—preservation of issues—collection on judgment—alleged procedural errors—no timely objection—no ruling by trial court

In a matter involving plaintiff's attempt to collect on a judgment against defendant, defendant's challenges to the validity of the issued writ of execution based on alleged procedural errors regarding service of the Notice of Right were not preserved for appeal because defendant failed to timely object. Even assuming defendant did timely object, the record contained no ruling on defendant's objections by the trial court, so defendant failed to meet both requirements for preservation under Appellate Rule 10(a).

3. Judgments—satisfaction—exemption—N.C.G.S. § 1-362—family support

In a matter involving plaintiff's attempt to collect on a judgment against defendant, the trial court did not err by finding that defendant failed to meet his burden under N.C.G.S. § 1-362 to exempt a portion of the seized funds for family purposes where competent evidence showed that defendant commingled his personal and business funds, defendant's spreadsheet in support of his affidavit did not distinguish between business and family expenses, defendant's wife testified that family expenses were $6,000 per month, and after the total amount for satisfaction of the judgment was levied

defendant still had nearly $39,000 remaining (not including funds contributed by his wife).

4. Laches—failure to protect rights—debt collection—appellate argument—failure to ground in fact or law

In a matter involving plaintiff's attempt to collect on a judgment against defendant, the Court of Appeals rejected defendant's argument that the trial court erred in concluding that defendant was guilty of laches for being dilatory through his failure to protect his rights, where defendant's recitation of the facts in his argument on appeal conflicted with the record and he failed to ground his argument in law. Furthermore, defendant testified that he took no action when he was in receipt of the writ of execution because he was unfamiliar with the processes conducted by plaintiff.

Appeal by defendant from judgment entered 9 September 2021 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 9 August 2022.

Gregory P. Chocklett for plaintiff-appellee.

Sharp, Graham, Baker & Varnell, LLP, by Casey C. Varnell, for defendant-appellant.

GORE, Judge.

I.

¶ 1 A Default Judgment ("Judgment") was entered against defendant Timothy E. Lancsek in favor of First Bank on 18 January 2012 in the Dare County Superior Court for money owed on a Note secured by a deed of trust on land located in Dare County, North Carolina. The Judgment was sold and assigned to plaintiff Radiance Capital Receivables Twenty One, LLC on 13 June 2017 and filed with the court 18 March 2020. The parties dispute when collection efforts began; defendant claims efforts began November 2020, while plaintiff claims efforts began with a solicitation to settle and resolve the Judgment in the summer of 2020. Settlement discussions failed and on 28 September 2020, plaintiff obtained a Notice of Right to Claim Exempt Property ("Notice of Right") from the Dare County Clerk of Court's office to serve upon defendant.

¶ 2 Plaintiff attempted to serve defendant with his Notice of Right by certified mail, but it was returned unsigned after three attempts. Plaintiff

then attempted service by USPS First Class Mail on 5 November 2020 to defendant's last known address, which was returned unclaimed. Plaintiff filed an Affidavit of Service of Notice of Right and sought a writ of execution. The writ of execution was issued by the Dare County Clerk on 31 December 2020. When plaintiff requested the clerk to issue the writ, plaintiff's counsel requested the clerk send the writ to his office, because plaintiff's counsel intended to obtain an Order in Aid of Execution and send both the writ and the Order to the Sheriff's Office. Parties disagree as to when the Sheriff first attempted service upon defendant with the writ.

¶ 3 On 12 January 2021, plaintiff filed an Ex Parte Motion for an Order in Aid of Execution ("Ex Parte Order") for the "Dare County Sheriff's office to levy on defendant's bank or credit union accounts, deposits, certificates of deposits, or other assets located in Dare County." On 25 January 2021, the trial court granted the Ex Parte Order "conclud[ing] as a matter of law that the property of defendant [was] subject to levy upon a Writ of Execution pursuant to, *inter alia*, [N.C. Gen. Stat.] §§ 1-359, 1-360, and 1-362." The Ex Parte Order forbade Dare County financial institutions from transferring or disposing of defendant's property and required them to freeze the accounts up to the amount outstanding on the Judgment. On 1 February 2021, the Dare County Sheriff personally served defendant with the Writ of Execution and the Ex Parte Order. The date of return of the Writ of Execution is listed as 14 September 2021. On 4 February 2021, the Sheriff seized defendant's Wells Fargo joint bank account and Wells Fargo then transferred $153,805.24 from the account to the Sheriff's Office to satisfy the total amount of the Writ of Execution.

¶ 4 Counsel for both parties then conferred as to the ownership of the joint bank account and what amount from the account was subject to the Sheriff's levy, but discussions failed. On 12 March 2021, plaintiff filed a Motion for Order Granting Plaintiff's First Request for Production of Documents in Supplemental Proceedings to Defendant Timothy E. Lancsek requesting the trial court order defendant to produce certain bank documents to determine proper ownership of the joint bank account. Plaintiff also filed a Motion for an Additional Order in Aid of Execution in which plaintiff sought a hearing regarding the portion of the funds owned by defendant and subject to the levy.

¶ 5 On or about 26 March 2021, the trial court entered an Additional Order in Aid of Execution and Order for Production of Documents in Supplemental Proceedings after hearing arguments from counsel. This Order granted plaintiff's motion for first request for production of

documents in supplemental proceedings and required the Dare County Sheriff to retain the levied funds until resolution. The trial court also required an evidentiary hearing after exchange of the documents to determine the remaining issues regarding the levied funds. Defendant produced the requested documents and on 14 June 2021, plaintiff filed an affidavit summarizing the discovered bank statements along with the percentages of contributions between defendant and his wife to the joint bank account.

¶ 6 On 21 June 2021, a Second Additional Aid in Order of Execution hearing occurred to determine who owned the joint bank account, whether the funds were properly levied, and any exemptions available to defendant. At the beginning of the hearing, defendant's counsel briefly made claims of procedural error in the issuance of the Notice of Right, stating defendant never received service of the Notice of Right and thus the writ of execution and Ex Parte Order were issued prematurely.

¶ 7 Judge Tillett asked defendant's counsel what was done in response to the personally served writ of execution given this claim of procedural error, to which defense counsel responded they did not act because of belief the joint account was inaccessible to execution. On 2 July 2021, Judge Tillett sent a letter with his findings to parties' counsel, and on 9 September 2021, issued his Second Additional Order in Aid of Execution. The trial court found defendant's joint account held approximately 82% of defendant's deposits and approximately 18% of his wife's deposits, and further found the Sheriff levied 66% of the funds from the joint account, which resulted in $38,461.54 of defendant's deposits remaining in the account after levy. The trial court also found defendant failed to meet his burden of proof of any equitable reasons to exempt any of the funds seized or that any funds were necessary for family purposes under Section 1-362. Finally, the trial court concluded that defendant was "guilty of laches in being dilatory in exercising or protecting his rights or property." Defendant timely appealed the entry of the Second Additional Order in Aid of Execution.

II.

¶ 8 Defendant raises the following issues on appeal: (1) whether the issuance of the writ of execution was valid for lack of proper service of the Notice of Right; (2) whether the trial court erred in granting the Ex Parte Order allowing seizure of defendant's joint bank account at Wells Fargo; (3) whether defendant met his burden of proof for exemption of the last sixty days of his income per Section 1-362; and (4) whether the trial court erred in concluding that defendant was guilty of laches for

being dilatory in his efforts to protect his rights. After careful review of the record and applicable law, we affirm.

A.

¶ 9 **[1]** Defendant challenges the trial court's jurisdiction to issue the Ex Parte Order, claiming the court acted beyond its authority under Section 1-360 in his Appellant Brief and Section 1-358 in his Reply-Brief. N.C. Gen. Stat. §§ 1-358, 1-360 (2021). Defendant claims the trial court lacked subject matter jurisdiction to grant this supplemental proceeding prior to any unsuccessful attempt by plaintiff to satisfy the writ of execution in whole or in part. We disagree.

¶ 10 A challenge to subject matter jurisdiction does not require preservation to appeal. "Subject matter jurisdiction, a threshold requirement for a court to hear and adjudicate a controversy brought before it, is conferred upon the courts by either the North Carolina Constitution or by statute." *In re M.B.*, 179 N.C. App. 572, 574, 635 S.E.2d 8, 10 (2006) (internal quotations and citations omitted). "[T]he issue of subject matter jurisdiction may be raised for the first time on appeal." *Burgess v. Burgess*, 205 N.C. App. 325, 328, 698 S.E.2d 666, 669 (2010) (citations omitted). A challenge to subject matter jurisdiction is reviewed *de novo*. *Milone & MacBroom, Inc. v. Corkum*, 279 N.C. App. 576, 580, 2021-NCCOA-526, ¶ 11.

¶ 11 In *Milone & MacBroom, Inc.*, this Court considered a trial court's jurisdiction to institute a supplemental proceeding under Section 1-352 prior to the issuance of a writ of execution. *Id.* at 578, 2021-NCCOA-526, ¶¶ 7, 15. This Court held the trial court lacked statutory authority under Section 1-352 over the supplemental proceedings conducted prior to the issuance of the writ of execution. *Id.* at 582, 2021-NCCOA-526, ¶¶ 15, 16. This Court reasoned the record did not establish the issuance of a writ of execution. *Id.* This Court concluded the plain language of Section 1-352 required both the issuance of the writ of execution prior to a supplemental proceeding, and that the writ of execution be returned unsatisfied in part or in whole. *Id.*, 2021-NCCOA-526, ¶ 15.

¶ 12 Unlike Section 1-352, Section 1-358 and Section 1-360 do not require a return of the execution unsatisfied prior to any supplemental proceeding. Section 1-358 states, "The court or judge may, by order, forbid a transfer or other disposition of, or any interference with, the property of the judgment debtor not exempt from execution." N.C. Gen. Stat. § 1-358 (2021). Generally, supplemental proceedings in Article 31 of Chapter 1 of the General Statutes are only available after the creditor attempts to satisfy an issued execution and it is returned unsatisfied. *Massey v. Cates*, 2 N.C. App. 162, 164, 162 S.E.2d 589, 591 (1968). The requirement

that the execution be returned unsatisfied is explicitly included within certain statutes and excluded from other statutes. *See* N.C. Gen. Stat. §§ 1-352 and 1-360. Thus, as stated in *Milone & MacBroom, Inc.*, "It is apparent from both the plain language of the supplemental proceeding statutes and our prior case law that a statutory precondition to instituting supplemental proceedings against a defendant is the issuance of a writ of execution and, under Section 1-352, the return of that writ unsatisfied in whole or in part." 279 N.C. App. at 582, 2021-NCCOA-526, ¶ 15.

¶ 13 The proceeding in this case differs from *Milone & MacBroom, Inc.*, because the supplemental proceeding in that case, per Sections 1-352, 1-352.1, and 1-352.2, was a procedural mechanism directed at the judgment debtor to discover his existing property. Whereas in this case the supplemental proceeding, per Sections 1-358 and 1-360, is a procedural mechanism to pursue the judgment debtor's property that is in the hands of third parties not party to the suit. As stated in *Motor Finance Co. v. Putnam*,

> When [Sections 1-358 and 1-360] are read either singly or as a component part of Article 31 of the General Statutes, it is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person . . . at the time of the issuance and service of the order[.]

229 N.C. 555, 557, 50 S.E.2d 670, 671 (1948); *see also Cornelius v. Albertson*, 244 N.C. 265, 267–68, 93 S.E.2d 147, 149 (1956) (explaining the procedure of Section 1-360 when a person, not party to the suit, has property of the judgment debtor).

¶ 14 In *Milone & MacBroom, Inc.*, the plaintiff served interrogatories and requests for production of documents, which are supplemental proceedings available within Sections 1-352.1 and 1-352.2. 279 N.C. App. at 577, 2021-NCCOA-526, ¶ 4. These were proceedings directed at the judgment debtor to discover the debtor's property. However, in the present case, the Ex Parte Order was entered to prevent transfer of defendant's property and/or funds by a Dare County financial institution, a third party with access to the property. Such a proceeding is directed at third parties to assist in the levying of defendant's personal property as authorized by the writ of execution. Since the Ex Parte Order was issued pursuant to Sections 1-358 and 1-360 to prevent third parties from disposing of property, the Ex Parte Order differed from the supplemental proceeding in *Milone & MacBroom, Inc.*, in which the trial court lacked subject matter jurisdiction.

¶ 15 In the present case, the clerk issued a writ of execution on 31 December 2021. Plaintiff then filed a Motion for an Ex Parte Order on 12 January 2021. Plaintiff sought the Ex Parte Order as supplemental to the issued writ of execution. The trial court granted the Ex Parte Order on 25 January 2021. While the parties dispute the issuance of the writ of execution and any attempts, this Court is limited to the record before it and without further evidence may only rely on the dates of issuance, and the Orders confirming the same. Since the writ of execution was issued prior to the supplemental proceeding of an Ex Parte Order per Sections 1-358 and 1-360, we conclude the trial court had proper subject matter jurisdiction to grant the Order and such order was valid. *See Songwooyarn Trading Co. v. Sox Eleven, Inc.*, 219 N.C. App. 213, 218, 723 S.E.2d 569, 572–73 (2012) (holding it was within the trial court's jurisdiction and authority to prohibit the defendant's "transfer, disposal, or removal of property or assets" under Section 1-358).

B.

¶ 16 **[2]** Defendant challenges the validity of the issued writ of execution, claiming plaintiff failed to follow statutory procedure in serving the Notice of Right prior to seeking the writ of execution. Because defendant failed to properly preserve his right to appeal these alleged procedural errors, this Court may not review the same under North Carolina Rules of Appellate Procedure 10(a).

¶ 17 Under Rule 10(a) of the North Carolina Rules of Appellate Procedure,

> to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted . . . may be made the basis of an issue presented on appeal.

Our Supreme Court has stated there are two requirements for preserving an issue: "(1) a timely objection clearly (by specific language or by context) raising the issue; and (2) a ruling on that issue by the trial court." *M.E. v. T.J.*, 380 N.C. 539, 559, 2022-NCSC-23, ¶ 50. While a recitation of "certain magical words" is not required to preserve the issue for appeal,

there is a "functional requirement of bringing the trial court's attention to the issue such that the court may rule on it." *Id.* at 559, 2022-NCSC-23, ¶ 51. In *M.E.*, the Court determined the plaintiff properly preserved her right to appeal because she raised the issue and obtained a ruling on her claim regarding the constitutionality of relief in a Chapter 50B case. *Id.* at 560, 2022-NCSC-23, ¶ 53.

¶ 18 In the present case, defense counsel failed to challenge the Notice of Right service and validity of the writ of execution and Ex Parte Order until an equitable hearing of the Second Additional Order in Aid of Execution, conducted for the purpose of determining equitable exemptions under Section 1-362. Even if this attempt could constitute raising and preserving the issue for appeal, absent a record of the trial court's ruling on the issue, defendant fails to meet both requirements for preservation of the right to appeal under Rule 10(a). Defendant claims service of the Notice of Right was inadequate in 2020, and that the writ was not delivered along with the Ex Parte Order until 4 February 2021, yet defendant made no efforts to contest errors to these procedural mechanisms from February 2021 until June 2021. The record is silent as to any challenges to these alleged violations, any motions, or other attempt to set aside the writ or Ex Parte Order. This Court will not review an unpreserved issue on appeal. N.C. R. App. P. 10(a).

C.

¶ 19 **[3]** Defendant next challenges the trial court's finding he failed to meet his burden of proof to claim exemption of his earnings for family purposes the sixty days prior to levy. We disagree.

¶ 20 The purpose of supplemental proceedings "is to afford the creditor an equitable remedy for the enforcement of his judgment[.]" *Hasty v. Simpson*, 77 N.C. 69, 70 (1877); *Johnson Cotton Co. v. Reaves*, 225 N.C. 436, 443, 35 S.E.2d 408, 413 (1945) ("This being a supplemental proceeding under Article 31 of Chapter 1 of General Statutes, equitable in its nature . . ."). The standard of review for a non-jury trial is "whether there is competent evidence to support the court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (citation omitted). "[T]his Court's review . . . is limited to a determination of whether an abuse of discretion occurred. An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

¶ 21 Section 1-362 explicitly requires exemption from execution or garnishment of the debtor's earnings if the debtor shows by affidavit these "earnings are necessary for the use of a family supported wholly or partly by his labor." *Elmwood v. Elmwood*, 295 N.C. 168, 185, 244 S.E.2d 668, 678 (1978) (quoting N.C. Gen. Stat. § 1-362). In *Elmwood*, the Supreme Court referred to a prior Supreme Court case, *Goodwin v. Clayton*, 137 N.C. 224, 49 S.E. 173 (1904), for the proposition that the interpretation of this statute should be "given a liberal construction favorable to the exemption." *Elmwood*, 295 N.C. at 185, 244 S.E.2d at 678. The debtor must demonstrate his earnings are necessary to support his family for purposes of claiming exemption under Section 1-362. *Sturgill v. Sturgill*, 49 N.C. App. 580, 586, 272 S.E.2d 423, 428 (1980).

¶ 22 The trial court included findings of fact in the Second Additional Order in Aid of Execution to support its conclusions of law. The trial court determined defendant failed to meet his burden of proof showing equitable reasons for exemption of any seized funds sixty days prior to levy, and that he failed to prove the seized funds were needed for family purposes under Section 1-362. Prior to entering this order, the trial judge sent a letter to both parties explaining in further detail his findings. Within the letter, the trial judge explained defendant's funds were commingled and used without "sufficient segregation" for business expenses, such as for taking clients to dinner and paying taxes.

¶ 23 Further, defendant's spreadsheet in support of his affidavit included both business expenses and family expenses and did not distinguish between these expenses. Defendant testified all expenses were family expenses since he is self-employed. Defendant testified he expended $15,000 per month in expenses, yet his wife claimed the family expenses were $6,000 per month. Even after levying the total amount for satisfaction of the Judgment, defendant still had in his possession a total of $38,461.54 of funds not including the funds contributed by his wife. Accordingly, viewing these facts as a whole, competent evidence supported the trial court's finding that defendant failed to meet his burden of proof for exemption under Section 1-362. Defendant has failed to show any abuse of discretion in this determination.

D.

¶ 24 **[4]** Finally, defendant argues the trial court erred in concluding that defendant was guilty of laches for being dilatory through his failure to protect his rights. We disagree.

¶ 25 Under the doctrine of laches, a showing is required that (1) the party against whom the doctrine is charged "negligently failed to assert an

enforceable right within a reasonable period of time, . . . and (2) that the propounder of the doctrine was prejudiced by the delay in bringing the action." *Costin v. Shell*, 53 N.C. App. 117, 120, 280 S.E.2d 42, 44 (1981). "What will constitute laches depends on the facts and circumstances of each case." *Capps v. City of Raleigh*, 35 N.C App. 290, 298, 241 S.E.2d 527, 532 (1978). In *Capps*, this Court held, based upon the facts, that the delay of five years and nine months was unreasonable and without a rational excuse. *Id.* While the "mere passage or lapse of time is insufficient to support a finding of laches," if the finding is based on the delay being unreasonable and working to the "disadvantage, injury or prejudice of the person seeking to invoke it," then this will support an ultimate finding of laches. *Id.* (citation omitted).

¶ 26 In challenging the trial court's finding, defendant merely points to his statutory rights under Section 1C-1603, and when waiver applies within the statutory scheme for the notice of rights. *See* N.C. Gen. Stat. § 1C-1603 (2021). Defendant also incorrectly states the first attempts of post-judgment enforcement were on 4 February 2021, yet at the hearing, defendant testified he had communications with plaintiff over settlement efforts in the summer of 2020. Defendant's recitation of the facts conflicts with the record, and defendant fails to ground his defense against a finding of laches in law. Defendant also testified he took no action once in receipt of the writ of execution, because he was unfamiliar with the processes conducted by plaintiff. Having reviewed the record, we conclude that competent evidence supported the trial court's determination that defendant was guilty of laches for failure to exercise his rights.

III.

¶ 27 The trial court possessed subject matter jurisdiction to enforce plaintiff's Judgment against defendant, and defendant's issues of procedural error were unpreserved on appeal. The trial court did not err in finding defendant failed to meet his burden under Section 1-362 to exempt a portion of the seized funds, nor did it err in concluding that defendant was guilty of laches in being dilatory in exercising his rights in a reasonable time frame.

AFFIRMED.

Judges TYSON and INMAN concur.

RICKY SPOON BUILDERS, INC, PLAINTIFF
v.
EMGEE LLC, DEFENDANT

No. COA22-391

Filed 6 December 2022

Contracts—compliance—full or substantial—real estate agreement—earnest money deposit

In a dispute over a real estate agreement (the Agreement) that allowed both plaintiff and defendant the opportunity to purchase certain property under certain terms—which included the date and time of the Agreement's expiration, a "time is of the essence" provision, and the requirement that the offering party must deposit $100,000 of earnest money with a certain third-party escrow agent at the time of the submission of the party's offer—defendant was entitled to summary judgment where plaintiff failed to comply with the Agreement in attempting to make an offer to purchase the property. Although plaintiff submitted a written offer to defendant, plaintiff's placement of a non-certified check in the mail (made payable to the appropriate escrow agent) around 4:00 p.m. on the date that the Agreement would expire at 5:00 p.m. constituted neither full compliance nor substantial performance with the terms of the Agreement. Specifically, the placement of a check in the mail did not qualify as a deposit with the escrow agent, and the "time is of the essence" provision rendered the doctrine of substantial performance inapplicable.

Appeal by Plaintiffs from order entered 21 February 2022 by Judge Alyson Adams Grine in Chatham County Superior Court. Heard in the Court of Appeals 4 October 2022.

Harris Sarratt & Hodges, LLP, by Donald J. Harris, for Plaintiffs-Appellants.

Wyrick Robbins Yates & Ponton LLP, by Charles George and Mary Kate Gladstone, for Defendant-Appellee.

COLLINS, Judge.

¶ 1 Ricky Spoon Builders, Inc., Ricky Spoon, and Melissa K. Spoon (collectively, "Plaintiffs") appeal from the trial court's order granting

summary judgment for EmGee LLC ("Defendant"). Plaintiffs argue that the trial court erred by granting Defendant's motion for summary judgment because Plaintiffs either fully complied or substantially complied with the parties' Agreement. As Plaintiffs did not fully or substantially comply with the Agreement, we affirm.

I. Procedural History and Factual Background

¶ 2 Plaintiffs owned approximately 150 acres of real property in Chatham County, North Carolina ("Property"). On 15 August 2014, Plaintiffs and Defendant entered into a memorandum of understanding whereby the parties agreed, among other things, that Defendant would acquire title to the Property and convey it to a newly created LLC, jointly owned by Plaintiffs and Defendant. When the parties disagreed about whether they had complied with the memorandum of understanding, litigation ensued.

¶ 3 After mediation, the parties entered into an Agreement, which allowed both parties the opportunity to buy the Property under certain terms, including the following:

> The Initial Offer: Either Party may make a one-time, all cash offer to purchase the [Property] (the "Initial Offer"). The Initial Offer shall be in writing and shall set forth the purchase price at which the Party making the offer (the "Offering Party") is willing and able to close. At the same time it submits its Initial Offer to the other party (the "Receiving Party"), the Offering Party shall deposit a non-refundable earnest money deposit in the amount of One Hundred Thousand Dollars ($100,000.00) with Investors Title Insurance Company–Chapel Hill Branch, which shall serve as a third-party escrow agent (the "Escrow Agent").
>
> The Response Offer: If the Offering Party makes an Initial Offer as set forth in subsection (a), the Receiving Party may then exercise a one-time absolute right to purchase the [Property] (the "Response Offer"). The Response Offer shall exceed the Initial Offer by One Hundred Thousand Dollars ($100,000.00) and shall be submitted to the Offering Party in writing within ten (10) days of the Receiving Party's receipt of the Initial Offer and confirmation from Escrow Agent that it has received the earnest money deposit from the Offering Party. Simultaneous with submission of

> the Response Offer to the Offering Party, the Receiving Party shall deposit a non-refundable earnest money deposit in the amount of One Hundred Thousand Dollars ($100,000.00) with the Escrow Agent. Once the Receiving Party has submitted its Response Offer, the Offering Party may not increase its Initial Offer. After confirming receipt of the Receiving Party's earnest money deposit, the Escrow Agent will release and return Offering Party's earnest money deposit to it.
>
> . . . .
>
> Expiration: The Buy-Sell Agreement expires at 5 pm EST on November 3, 2020. In no event shall the Receiving Party have less than ten days to respond to an Initial Offer that is made prior to the expiration date and time. Upon expiration of the Buy-Sell Agreement, any and all rights and responsibilities of the Parties under the Buy-Sell Agreement . . . are terminated.
>
> . . . .
>
> 7. **Time of Essence:** The Parties agree that time is of the essence with regard to this Agreement and the transactions and events contemplated hereby.

Of particular relevance in this case are the following terms: "At the same time it submits its Initial Offer to the other party (the "Receiving Party"), the Offering Party shall deposit a non-refundable earnest money deposit in the amount of One Hundred Thousand Dollars ($100,000.00) with Investors Title Insurance Company–Chapel Hill Branch"; the Agreement expires "at 5 pm EST on November 3, 2020"; and "[t]he Parties agree that time is of the essence with regard to this Agreement and the transactions and events contemplated hereby."

¶ 4 On the afternoon of 2 November 2020, Ricky Spoon wired $100,000 in earnest money into Plaintiffs' counsel's trust account. The funds cleared on 3 November 2020, and Plaintiffs' counsel drew a check from his trust account made payable to Investors Title Insurance. At 3:52 p.m. that day, Plaintiffs, through their counsel, submitted a written Initial Offer via email to Defendant, through its counsel. Shortly thereafter, Plaintiff Ricky Spoon hand-delivered the written Initial Offer to Defendant's counsel.

¶ 5 Yvonne Rodriguez Sanchez, a legal assistant for Plaintiffs' counsel, called Wells Fargo and was told that the bank was closed to walk-in customers due to COVID-19 and that an appointment was required to wire the funds to Investors Title. Sanchez was also told that there were no appointments available that afternoon.

¶ 6 At some point that afternoon, Plaintiffs' counsel spoke with Gina Webster, the Vice President of Escrow and Settlement Operations for Investors Title. Plaintiffs' counsel asked Webster whether Investors Title would accept a check drawn from his firm's trust account; Webster confirmed that it would. At that time, Webster did not have a copy of the Agreement or Escrow Addendum. Plaintiffs' counsel testified that he was told Investors Title was closed. Webster submitted an affidavit in which she averred that she generally recalled speaking with Plaintiffs' counsel, but she did not recall him asking whether he could hand-deliver a check to the office. Shortly after 4:00 p.m., Plaintiffs' counsel put the earnest money check into an envelope and placed it in the mail at the post office near his office.

¶ 7 On 4 November 2020, Plaintiffs' counsel and Defendant's counsel exchanged a series of emails, which included the following from Defendant's counsel at 9:41 p.m.:

> As of 2:00 today, Titles Investor (sic) had not received Spoon's funds as required to be deposited by 5:00 on 11/3. The Settlement Agreement was created 90 days ago, and each party knew and agreed to the timelines. "Time is of the essence" was part of the agreement, to make certain that time lines were strictly adhered to and enforced.
>
> The Agreement expired at 5:00 pm on 11/3 at 5:00 (sic). No money was deposited with the Escrow agent by that time. Since the Settlement Agreement expired at 5:00 pm yesterday, the parties no longer have any obligations to each other under the Settlement Agreement. Your client was well-aware of the deadlines, even to the point of driving to Raleigh on 11/3 to personally deliver his offer to purchase to me, as counsel for EmGee. Instead of timely depositing his $100,000 directly with Investors Title, he chose to wire funds to you. And your check, not certified, were not a deposit of readily available, non-refundable funds, as required. As such, Spoon has not made a

> timely offer per the Agreement, and our client has no further obligations to him. Title to the [Property] remains with Emgee, LLC.

The envelope containing the earnest money check was post-marked 5 November 2020 and was not received by Investors Title until 16 November 2020.

¶ 8 When Defendant refused to close on the sale of the Property, Plaintiffs filed suit for breach of contract, breach of covenant of good faith and fair dealing, specific performance, and unjust enrichment. Plaintiffs and Defendant filed competing motions for summary judgment; Plaintiffs subsequently withdrew their motion. After a hearing, by written Order entered 21 February 2022, the trial court granted summary judgment for Defendant. Plaintiffs timely appealed.

II. Discussion

¶ 9 Plaintiffs argue that the trial court erroneously granted summary judgment for Defendant because "Plaintiffs fully or substantially complied with the terms of the Agreement by . . . depositing a non-refundable earnest money deposit in the amount of One Hundred Thousand Dollars ([$]100,000.00) with Investors Title Insurance Company by posting with the USPS prior to 5:00 p.m. on November 3, 2020, a $100,000.00 check written from Plaintiffs' counsel's firm trust account and made payable to Investors Title Insurance Company."

¶ 10 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 Sys., Inc.*, 246 N.C. App. 38, 41, 782 S.E.2d 741, 743 (2016) (quotation marks and citations omitted).

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

A. Full Compliance

¶ 12 Plaintiffs first argue that they fully complied with the terms of the Agreement because the "mailing of the Escrow Deposit to Investors Title constituted a 'deposit' as contemplated by the terms of the [Agreement]."

¶ 13 "Whenever a court is called upon to interpret a contract[,] its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973) (citations omitted). "When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning." *Id.* at 410, 200 S.E.2d at 624 (citations omitted). "Further, in interpreting a contract, the common or normal meaning of language will be given to the words of a contract unless the circumstances show that in a particular case a special meaning should be attached to it." *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 620, 659 S.E.2d 442, 455 (2008) (quotation marks and citation omitted).

¶ 14 Here, the relevant portions of the Agreement are free from ambiguity. The Agreement provides that either party may make a written Initial Offer and that at the same time the Offering Party submits its Initial Offer to the Receiving Party, "the Offering Party shall deposit a non-refundable earnest money deposit in the amount of One Hundred Thousand Dollars ($100,000.00) with Investors Title Insurance Company–Chapel Hill Branch . . . ." The Agreement also explicitly "expires at 5 pm EST on November 3, 2020."

¶ 15 The term "deposit with" as used in the Agreement's term "deposit . . . with Investor's Title" is not defined in the Agreement. The verb "deposit"[1]

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1. Not to be confused with the noun "deposit" used in the Agreement's term "earnest money deposit." An earnest money deposit is "[a] deposit paid (often in escrow) by a prospective buyer (esp. of real estate) to show a good-faith intention to complete the transaction, and ordinarily forfeited if the buyer defaults." *Earnest Money*, *Black's Law Dictionary* (11th ed. 2019). The parties do not argue about the significance of this term.

is defined as "[t]he act of giving money or other property to another who promises to preserve it or to use it and return it in kind; esp., the act of placing money in a bank for safety and convenience." *Deposit*, *Black's Law Dictionary* (11th ed. 2019). The preposition "with" is generally defined as "in the care, guidance, or possession of[.]" *Webster's Third New International Dictionary* 2626 (2002). Taken together, the term "deposit with" means "giving or placing in the care, guidance, or possession of." Accordingly, the Agreement required Plaintiffs, as the Offering Party, to give or place the earnest money in the care, guidance, or possession of Investors Title Insurance Company–Chapel Hill Branch at the same time they submitted their Initial Offer to Defendant, and no later than "5 pm EST on November 3, 2020[,]" when the Agreement expired.

¶ 16 Here, by placing the earnest money check drawn on Plaintiffs' counsel's trust account into the mail on 3 November 2020 around 4:00 p.m., Plaintiffs did not give or place a non-refundable earnest money deposit in the amount of One Hundred Thousand Dollars ($100,000.00) in the care, guidance, or possession of Investors Title Insurance Company–Chapel Hill Branch at the same time they submitted their Initial Offer to Defendant and before the expiration of the Agreement "at 5 pm EST on November 3, 2020." Accordingly, Plaintiffs failed to fully comply with the Agreement.

B. Substantial Performance

¶ 17 Plaintiffs next argue that if "mailing the Escrow Deposit did not constitute full compliance with the terms of the [Agreement] under the circumstances existing as of November 3, 2020, then [it] certainly constituted substantial performance."[2]

¶ 18 North Carolina recognizes the equitable doctrine of substantial performance, which "allow[s] a party to recover on a contract although [it] has not literally complied with its provisions." *Cator v. Cator*, 70 N.C. App. 719, 722, 321 S.E.2d 36, 38 (1984) (citations omitted). "[T]he doctrine was conceived for use in a situation where the []plaintiff has given the []defendant a substantial portion of that for which he bargained and the performance is of such a nature that it cannot easily be returned." *Black v. Clark*, 36 N.C. App. 191, 195, 243 S.E.2d 808, 811 (1978) (citation omitted). While building and construction contracts readily lend themselves to the application of the doctrine of substantial performance, the doctrine is not limited in its application to those types of contracts. *Id.*

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2. Plaintiffs use the terms substantial compliance and substantial performance interchangeably. We will refer to "substantial performance" in this opinion.

¶ 19 A "time is of the essence" clause makes completion dates and times a material term of a contract, causing a material breach if performance is late. *See Fairview Developers, Inc. v. Miller*, 187 N.C. App. 168, 173, 652 S.E.2d 365, 369 (2007); *see also Fletcher v. Jones*, 314 N.C. 389, 393 n.1, 333 S.E.2d 731, 734 n.1 (1985). North Carolina courts recognize that "[f]reedom of contract is constitutionally guaranteed and provisions in private contracts, unless contrary to public policy or prohibited by statute, must be enforced as written." *Great Am. Ins. Co. v. C. G. Tate Constr. Co.*, 303 N.C. 387, 391, 279 S.E.2d 769, 772 (1981). Accordingly, the doctrine of substantial performance traditionally has not applied where the parties, by the terms of their agreement, make it clear that only strict or complete performance will be satisfactory. 17A Am Jur 2d Contracts § 603.

¶ 20 Here, the Agreement includes a "time is of the essence" provision, making the time for depositing a non-refundable $100,000 earnest money deposit with Investors Title Insurance Company–Chapel Hill Branch and the time for the expiration of the Agreement material terms of the Agreement. Accordingly, the parties made it clear by the terms of their Agreement that only strict or complete performance would be satisfactory, and the doctrine of substantial performance does not apply.

¶ 21 Even were we able to consider tempering the traditional rule by recognizing that a "time is of the essence" provision does not automatically render untimely performance a breach and will not be enforced if doing so would constitute a forfeiture on an otherwise substantially complying party, the doctrine of substantial performance does not excuse Plaintiffs' breach in this case.

¶ 22 The earnest money check was received and deposited by Investors Title Insurance Company–Chapel Hill Branch on 16 November 2020, 13 days after the expressed expiration of the Agreement. Plaintiffs deposited no portion of the earnest money prior to the Agreement's expiration. As no portion of the earnest money was deposited with Investors Title Insurance Company–Chapel Hill Branch prior to the expiration of the Agreement, Plaintiffs did not perform at all, much less substantially perform, under the Agreement. *See, i.e.*, *Lake Ridge Acad. v. Carney*, 66 Ohio St. 3d 376, 378-79, 613 N.E.2d 183, 185-86 (1993) (holding that there was "no reasonable argument that [defendant] 'substantially complied' with the provision of the contract requiring him to notify [plaintiff] of his child's withdrawal prior to August 1 . . . when [defendant's] cancellation letter was dated August 1, 1989, mailed or postmarked August 7, 1989, and received August 14, 1989"). Moreover, Plaintiffs did not forfeit the Property, they merely forfeited the opportunity to potentially purchase

it; and Plaintiffs' earnest money was returned to them in full in March 2021, restoring them to their original position.

¶ 23 Plaintiffs also argue that "whether there has been substantial performance of a contract is actually a question of fact for the jury" such that whether Plaintiffs substantially complied with the Agreement "was not an appropriate consideration for the trial court on summary judgment." However, the cases cited by Plaintiffs in support of their argument all involved *some* performance by the plaintiff such that the jury had to resolve a factual issue. *See Clark*, 36 N.C. App. at 193, 196, 243 S.E.2d at 810, 812; *Bryant & Assocs. v. Evans*, 224 N.C. App. 397 (2012) (unpublished); *Almond Grading Co. v. Shaver*, 74 N.C. App. 576, 578, 329 S.E.2d 417, 418 (1985); *Gibson Contractors, Inc. v. Church of God in Christ Jesus of Angier*, 165 N.C. App. 543, 600 S.E.2d 899 (2004) (unpublished). Here, as previously noted, no performance was tendered, and thus no triable issue of fact of substantial performance arose for the jury.

¶ 24 Accordingly, as Plaintiffs did not perform or substantially perform under the Agreement, the trial court did not err by granting Defendant's motion for summary judgment.

III. Conclusion

¶ 25 As Plaintiffs did not fully or substantially comply with the Agreement, the trial court's order granting summary judgment for Defendant is affirmed.

AFFIRMED.

Judges TYSON and INMAN concur.

ROLLINGS v. SHELTON

[286 N.C. App. 693, 2022-NCCOA-791]

SHERIKA ROLLINGS, PLAINTIFF
v.
RYAN SHELTON, DEFENDANT

No. COA22-523

Filed 6 December 2022

Domestic Violence—domestic violence protection order—act of domestic violence—pleading requirements—Rule 12(b)(6) analysis

The trial court improperly dismissed under Civil Procedure Rule 12(b)(6) (failure to state a claim) plaintiff's complaint seeking a domestic violence protective order, where plaintiff adequately pled all the required elements, including that defendant committed an act of domestic violence as defined in N.C.G.S. § 50B-1(a)(1) by choking plaintiff after an argument. When dismissing the action, the trial court improperly focused on plaintiff's five-day delay in filing her complaint and improperly judged the credibility of plaintiff's allegations rather than treating them as true pursuant to Rule 12(b)(6).

Appeal by plaintiff from order entered 14 December 2021 by Judge Andrew Kent Wigmore in District Court, Carteret County. Heard in the Court of Appeals 1 November 2022.

Legal Aid of North Carolina, Inc., by Cynthia Sanders, Sandy L. Lee, TeAndra H. Miller, James Battle Morgan, Jr., and Celia Pistolis, for plaintiff-appellant.

No brief filed for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Plaintiff Sherika Rollings appeals from an order granting Defendant Ryan Shelton's motion to dismiss Plaintiff's "Complaint and Motion for Domestic Violence Protective Order" under Rule of Civil Procedure 12(b)(6). (Capitalization altered.) Because Plaintiff adequately pled all the required elements for a complaint seeking a Domestic Violence Protective Order ("DVPO"), the trial court erred by dismissing her complaint based upon failure to state a claim. We therefore reverse the trial court's dismissal and remand for further proceedings.

I. Background

¶ 2 On 13 October 2021, Plaintiff filed a "Complaint and Motion for Domestic Violence Protective Order" against Defendant using form AOC-CV-303. (Capitalization altered.) Plaintiff alleged on 8 October 2021 Defendant "choked [her] after an argument." Plaintiff further alleged Defendant was a "threat" to her because it was not the first time he hit her. Plaintiff then alleged on 12 October 2021 Defendant had keyed her car by carving "[B—]" into it so "[a]t this point" she was "starting to get scared of what he might do to" her. Finally, Plaintiff alleged Defendant had a gun and a concealed carry permit and, while drunk, had "threatened [her] with his gun saying he will kill himself if [she] left him." Because Defendant had a gun, Plaintiff alleged she "need[ed] to be careful" and was "afraid for [her] life." As a result, Plaintiff stated she "would like a protective order against [Defendant] so he can stay away from me." Plaintiff also checked boxes on the form indicating: she believed "there is danger of serious and immediate injury" to her; Defendant had firearms; Defendant had threatened her with a deadly weapon (the gun); and Defendant had threatened to commit suicide.

¶ 3 Based on those allegations, Plaintiff requested the trial court initially enter an *ex parte* order. Plaintiff also requested an order barring Defendant from her residence, place of employment, and school, and from her "child(ren)['s]" day care and school. Finally, Plaintiff asked the order include a no contact provision and a provision requiring Defendant to "attend an abuser treatment program."

¶ 4 On the same day Plaintiff filed her Complaint, the trial court granted an "*ex parte* Domestic Violence Order of Protection" based on a finding Defendant had "intentionally caused bodily injury" to Plaintiff on 8 October 2021 as indicated in Plaintiff's Complaint.[1] The *ex parte* DVPO was effective until 19 October 2021 and a hearing was set for that day. But on 19 October, upon Defendant's request, the trial court entered an "Order Continuing Domestic Violence Hearing and Ex Parte Order" to allow Defendant time to hire an attorney. (Capitalization altered.) On 2 November 2021, the trial court entered another order continuing the hearing and *ex parte* DVPO for the same reason.

¶ 5 On 14 December 2021, the trial court held a hearing on Plaintiff's Complaint and Motion for a DVPO. At the start of the hearing, Defendant's

1. It is not entirely clear which judge issued the *ex parte* DVPO because only a signature, which was illegible, was required and the name was not printed or typed. But the signature on the *ex parte* DVPO appears to be different from Judge Wigmore's, so it appears a different trial judge granted the *ex parte* DVPO.

counsel moved to dismiss under Rule of Civil Procedure 12(b)(6) because Plaintiff did not contact police after the alleged choking incident, waited five days after the alleged choking incident to file the Complaint, and Plaintiff made "no allegation of any personal knowledge . . . that she knows" about the car keying incident. Plaintiff's attorney responded Plaintiff had alleged "on October 8 the Defendant physically assaulted her. Which is defined by the 50B Statute as an act of domestic violence. Which she's here to testify to." Plaintiff's attorney also argued the domestic violence statutes do not have "a requirement . . . as to when" complaints are filed and Plaintiff's testimony would "address" the "five-day lag."

¶ 6 After hearing those arguments, the trial court made an oral ruling dismissing Plaintiff's Complaint:

> The problem I got is in her own writing. I mean, it happens on the eighth, and there's a delay. And people have delays for many reasons. Ability to get to the courthouse. Seeking legal counsel. Trying to decide what they want to do, if they should go forward or not. But, then, her own words at the bottom of page 2, her car gets keyed. There's nothing to show evidence that in this document that there's a police report. That there's anything that she knows this individual keyed the car. But the most important part of the whole document is, "at this point, I am starting to get scared of him." So that says on October 8, she wasn't scared of him. So that goes back to explain why nothing was done on the eighth. And that's basically the essential paragraph to go forward is the allegation of domestic violence that in it, you know, is fear of it happening again. So, based on the Motion, the 12(b)(6) Motion on the four corners of the complaint, I'm going to dismiss this action.

¶ 7 Following that ruling, Plaintiff's attorney again argued Plaintiff's testimony would explain the delay. The trial court responded because it was a motion on the pleading, "the pleading itself has to prove the domestic violence." Plaintiff's attorney countered the domestic violence statute requires only showing "the Defendant attempted or physically caused bodily injury" and "[f]ear is not an element." The trial court ended the hearing at that time by saying it had already dismissed the Complaint.

¶ 8 On the same day as the hearing, 14 December 2021, the trial court entered a written order dismissing Plaintiff's Complaint based on Rule

12(b)(6) and voiding the *ex parte* order as a result. Plaintiff filed written notice of appeal on or about 12 January 2022.

II. Analysis

¶ 9 Plaintiff argues on appeal "the Complaint alleges the necessary elements sufficient for a claim under Chapter 50B." (Capitalization altered.) Specifically, Plaintiff contends "the allegations in the complaint that Defendant choked [her] are sufficient to state a claim upon which relief may be granted under N.C. Gen. Stat. § 50B-1(a)(1)" and the allegations "Defendant had threatened [her] and she was afraid state a claim upon which relief may be granted under N.C. Gen. Stat. § 50B-1(a)(2)." (Capitalization altered.)

¶ 10 Plaintiff also argues "under notice pleading, the complaint provided Defendant sufficient notice of the nature and basis for [her] claim for a" DVPO. (Capitalization altered.) Specifically, Plaintiff asserts Rule of Civil Procedure 8 "does not require detailed fact-pleading in Chapter 50B complaints so long as the pleading provides sufficient notice of the nature and basis of the claim" and she has met that requirement. This argument mirrors Plaintiff's contention her Complaint states a claim because Rule 12(b)(6) serves to test whether a pleading has met the requirements of Rule 8. *See Westover Products, Inc. v. Gateway Roofing Co., Inc.*, 94 N.C. App. 63, 70, 380 S.E.2d 369, 374 (1989) (setting out requirements of Rule 8 and then stating "[t]he first avenue by which a party may properly address the failure to state a claim is through Rule 12(b)(6)"); *see also Quackenbush v. Groat*, 271 N.C. App. 249, 256, 844 S.E.2d 26, 31 (2020) (addressing together arguments on the "sufficiency" of a claim "for purposes of Rule 12(b)(6) and notice pleading" under Rule 8). Thus, the question before us is only whether Plaintiff stated a claim sufficient to survive a Rule 12(b)(6) motion to dismiss because that covers her Rule 8 argument as well.

¶ 11 When reviewing a Rule 12(b)(6) motion, the issue is

> whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim.

Quackenbush, 271 N.C. App. at 251, 844 S.E.2d at 28 (citation and quotation marks omitted). This Court reviews a Rule 12(b)(6) dismissal of

a claim *de novo*. *Holton v. Holton*, 258 N.C. App. 408, 416, 813 S.E.2d 649, 655 (2018). When conducting this review, we must remember "[o]ur 'system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss.' " *Id.* (quoting *Wray v. City of Greensboro*, 370 N.C. 41, 46, 802 S.E.2d 894, 898 (2017)).

¶ 12 In the context of seeking a DVPO specifically, the statutory requirements for a complaint are as follows:

> Any person residing in this State may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes *alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person*.

N.C. Gen. Stat. § 50B-2(a) (2021) (emphasis added). Allegations of domestic violence include

> the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
>
> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
>
> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33.

N.C. Gen. Stat. § 50B-1(a) (2021).

¶ 13 Thus, to survive a motion to dismiss under Rule 12(b)(6), a complaint seeking a DVPO must allege (1) the plaintiff resides in North Carolina, (2) the plaintiff and the defendant have or have had a "personal relationship," and (3) the defendant has committed an act of domestic violence as defined in § 50B-1(a)(1)–(3). N.C. Gen. Stat. §§ 50B-1(a), -2(a) (2021). The first two requirements are not in dispute. Plaintiff clearly pled them in the first two paragraphs of the Complaint when she

listed her county of residence in North Carolina and checked the box indicating she and Defendant "are persons of the opposite sex who are in or have been in a dating relationship." The only question before us is whether the Complaint adequately pled Defendant committed an act of domestic violence.

¶ 14 Here, the Complaint adequately pled such an act of domestic violence. Accepting the Complaint's allegations as true, the 8 October incident where Defendant "choked" Plaintiff "after an argument" aligns with the plain language of § 50B-1(a)(1) because it involved either "attempting to cause bodily injury, or intentionally causing bodily injury." N.C. Gen. Stat. § 50B-1(a)(1). This alleged incident also resembles the only binding precedent applying § 50B-1(a)(1). In *In re A.L.T.*, this Court employed the definition of domestic violence from § 50B-1(a) when reviewing an argument the trial court had mischaracterized a father's actions as domestic violence in a child protection case. *See In re A.L.T.*, 241 N.C. App. 443, 448–50, 774 S.E.2d 316, 319–20 (2015) (applying definition under heading on "Adjudication of Neglect"). Specifically, the *In re A.L.T.* Court found the father's actions were "properly characterized" as domestic violence under § 50B-1(a)(1) when he "struck" one child and "hit" another "in the mouth, causing her to suffer a busted lip." *Id.* at 450, 774 S.E.2d at 320. Here, the alleged choking incident resembles the strikes in *A.L.T.* in scope and force. *See id.*

¶ 15 As Plaintiff argues on appeal, her Complaint included other allegations such as Defendant threatening Plaintiff with a gun in the past and carving an insulting epithet on her car causing Plaintiff to fear for her life. Those allegations, which we must take as true for purposes of review of the ruling on a motion to dismiss, do tend to support Plaintiff's request for a protective order and may be relevant to a trial court's ultimate determination as to the terms of the DVPO, but we do not need to address them to review the trial court's decision to grant Defendant's motion to dismiss. Plaintiff only needed to allege one act of domestic violence, and the choking incident alone meets the pleading requirement as already discussed. *See* N.C. Gen. Stat. § 50B-1(a) ("Domestic violence means the commission of *one or more of the following acts* . . . ." (emphasis added)).

¶ 16 The trial court's stated reasoning for granting the motion to dismiss also indicates the trial court failed to apply the appropriate analysis for a motion to dismiss under Rule 12(b)(6). Instead of taking the allegations of the Complaint as true, as required for purposes of a motion to dismiss, *see Quackenbush*, 271 N.C. App. at 251, 844 S.E.2d at 28, the trial court's comments tend to indicate that it both imposed a legal requirement not

found in Chapter 50—a specific timing requirement for the Plaintiff's fear—and made a credibility assessment of the allegations without hearing any testimony from Plaintiff. The trial court primarily focused on Plaintiff's "delay" in filing the Complaint after the October 8 choking incident. Specifically, the trial court believed Plaintiff delayed filing the pleading because she was not scared of Defendant on October 8 since she wrote, immediately after detailing the October 12 car keying incident, "*At this point I am starting to get scared* of what [Defendant] might do to me." (Emphasis added.) The trial court then indicated the lack of fear after the October 8 incident was an issue because "basically the essential paragraph to go forward is the allegation of domestic violence that in it, you know, is fear of it happening again."

¶ 17 The trial court erred in its reasoning about the delay in filing in several ways. First, fear is not an element Plaintiff was required to plead. Plaintiff only had to plead: she resided in the State; she had a personal relationship with Defendant; and Defendant had committed an act of domestic violence. N.C. Gen. Stat. §§ 50B-1(a), -2(a). While fear is part of the definition of some of the possible acts of domestic violence, *see* N.C. Gen. Stat. § 50B-1(a)(2) ("Placing the aggrieved party . . . in fear of imminent serious bodily injury or continued harassment . . . ."), it is not part of the definition in § 50B-1(a)(1). *See* N.C. Gen. Stat. § 50B-1(a)(1) ("Attempting to cause bodily injury, or intentionally causing bodily injury."). And as we have already discussed, the alleged choking incident falls under § 50B-1(a)(1). Second, even if an allegation of fear were required, Plaintiff wrote she was "afraid for [her] life" and was "starting to get scared of what he might do to" her. Plaintiff also checked the box on the form indicating she "believe[d] there [was] danger of serious and immediate injury to me or my child(ren)."

¶ 18 Further, the trial court's focus on the timing of her fear was misguided because it is undisputed Plaintiff pled she was afraid at the time of her Complaint, which is the document reviewed by a Rule 12(b)(6) motion. Finally as to any delay, we take judicial notice of the calendar for the month of October 2021. *See Simpson v. Simpson*, 209 N.C. App. 320, 325–26, 703 S.E.2d 890, 894 (2011) (permitting judicial notice of "the days, weeks, and months of the calendar" (citations and quotation marks omitted)). While the trial court expressed concern about a delay, we note 8 October 2021 was a Friday and Plaintiff filed her Complaint the following Wednesday morning, 13 October 2021. The weekend in between the choking incident and filing of the Complaint might explain part of the delay. It is possible an extended unexplained delay—which would still not include the five day delay here—between an alleged act

and filing of a complaint may present an issue if the *only* allegation of domestic violence is under North Carolina General Statute § 50B-1(a)(2), "Placing the aggrieved party or a member of the aggrieved party's family or household in fear of *imminent* serious bodily injury or continued harassment." N.C. Gen. Stat. § 50B-1(a)(2) (emphasis added). Here Plaintiff alleged a specific incident of choking only five days prior to filing the Complaint, in addition to other allegations—which we must consider as true for purposes of a motion to dismiss, *see Quackenbush*, 271 N.C. App. at 251, 844 S.E.2d at 28, which would tend to indicate an escalation of the threat since the choking occurred. But here, five days, including a weekend, can barely be characterized as a delay.

¶ 19 Beyond its focus on delay, the trial court noted there was "nothing to show evidence that in this document that there's a police report. That there's anything that she knows this individual keyed the car." Chapter 50B does not require a plaintiff to report incidents to police prior to filing a complaint, nor does it require Plaintiff to state in the complaint all the facts and circumstances which led her to believe that Defendant was the person who keyed her car. In addition to the sufficiency of the allegation of the choking incident alone, even without reference to the car keying incident, the trial court did not correctly account for the procedural posture of the case. Since the trial court was addressing a Rule 12(b)(6) motion to dismiss, the court was required to treat *all* the allegations in the Complaint as true. *See Quackenbush*, 271 N.C. App. at 251, 844 S.E.2d at 28 (stating the allegations in a complaint are "treated as true" when reviewing a Rule 12(b)(6) motion). Since the Complaint alleged *Defendant* carved a derogatory epithet into Plaintiff's car, the trial court had to accept that allegation as true when reviewing the motion to dismiss. The trial court's comments reveal it did not do that. Instead, the trial court proceeded to make an evaluation of Plaintiff's credibility and the weight of her evidence, based on the bare allegations of the Complaint. If the trial court had held a hearing and heard all the evidence, it then would have the duty to consider the credibility and weight of the evidence and could make finding of fact accordingly, *see*, *e.g.*, *Stancill v. Stancill*, 241 N.C. App. 529, 543, 773 S.E.2d 890, 899 (2015) ("[d]eferring to the trial court on the issue of credibility" based on the plaintiff's testimony she feared for her life and finding competent evidence to support its determination the plaintiff suffered substantial emotional distress because of the defendant's actions), but for purposes of a motion to dismiss, the allegations must be taken as true. *See Quackenbush*, 271 N.C. App. at 251, 844 S.E.2d at 28.

III. Conclusion

¶ 20 After our *de novo* review, the trial court erred in granting Defendant's motion to dismiss under Rule 12(b)(6). Plaintiff pled all the required elements in her Complaint, including an act of domestic violence under North Carolina General Statute § 50B-1(a)(1) because she pled Defendant choked her. Therefore, we reverse the trial court's order dismissing Plaintiff's Complaint and remand for further proceedings.

REVERSED AND REMANDED.

Judges HAMPSON and JACKSON concur.

STATE OF NORTH CAROLINA
v.
KENNETH LEE BAILEY, DEFENDANT

No. COA22-196

Filed 6 December 2022

Appeal and Error—writ of certiorari—Rule 2—request for *Anders*-type review—probation revocation

The Court of Appeals granted defendant's petition for a writ of certiorari to review the order revoking his probation based on a new criminal offense where defendant did not properly notice his appeal pursuant to Appellate Rule 4. However, the court deemed as abandoned any issues not specifically raised in defense counsel's appellate brief—which sought *Anders*-type review due to counsel's inability to identify an issue with sufficient merit to support a meaningful argument—because *Anders* was not applicable where defendant did not have a constitutional right to counsel at his probation revocation hearing. The court further concluded that it would be an abuse of discretion to invoke Appellate Rule 2 to consider arguments not raised in defense counsel's brief.

Judge INMAN concurring in result only by separate opinion.

Appeal by Defendant from order entered 27 September 2021 by Judge Cynthia K. Sturges in Person County Superior Court. Heard in the Court of Appeals 6 September 2022.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for Defendant-Appellant.

DILLON, Judge.

¶ 1 Defendant Kenneth Lee Bailey appeals from the trial court's post-conviction order revoking his probation based on a new criminal offense and urges this Court to conduct a review of the record similar to our review of criminal judgments pursuant to *Anders v. California*, 386 U.S. 738, 744, 18 L. Ed. 2d 493, 498 (1967).

¶ 2 We note that Defendant did not properly notice his appeal pursuant to Rule 4 of our Rules of Appellate Procedure. He has, however, petitioned our Court to issue a writ of *certiorari* to aid in our jurisdiction.

¶ 3 We, hereby, grant Defendant's petition for a writ of *certiorari* to give us jurisdiction to review the order revoking Defendant's probation.

¶ 4 Contemporaneously with the petition for writ of *certiorari*, Defendant's counsel filed a brief seeking *Anders*-type review because counsel had examined the record and applicable law and was "unable to identify an issue with sufficient merit to support a meaningful argument for relief on appeal."[1]

¶ 5 Defendant does not have a *constitutional* right to counsel at a probation revocation hearing. *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967) ("We do not find in the United States Constitution or the North Carolina Constitution any constitutional right to counsel for a defendant in a proceeding to revoke probation."). Though there may be a statutory right to counsel, *Anders* is not invoked. *See Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987) ("[W]e reject respondent's argument that the *Anders* procedures should be applied to a state-created right to counsel[.]").

¶ 6 Accordingly, we can only consider arguments not raised by Defendant's counsel by invoking Rule 2 of our Rules of Appellate Procedure in the exercise of our discretion, as any argument not

1. Though not to be construed to suggest that Defendant had an *Anders*-type right to submit separate arguments for our consideration, we note that Defendant has not done so.

advanced in an appellant's brief is abandoned under Rule 28. However, based on the reasoning of our Supreme Court's opinion in *State v. Ricks*, 378 N.C. 737, 862 S.E.2d 835 (2021), we must conclude that it would be an abuse of our discretion to invoke Rule 2. *Id.* at 743, 862 S.E.2d at 840 (concluding that "[b]y allowing defendant's petition for writ of certiorari and invoking Rule 2 to review defendant's challenge to the [trial court's] order, the Court of Appeals abused its discretion").[2]

¶ 7 We note that in *Ricks*, our Court had invoked Rule 2 to suspend *Rule 10* to consider an argument raised in the defendant's brief, but which had not been preserved during the trial court proceeding. Here, Defendant is essentially asking us to suspend Rule 28 to consider arguments not raised in his brief which might have otherwise been preserved in the trial court for our review. However, we do not see any reason why our Supreme Court's reasoning in *Ricks* would not apply to Defendant's appeal, where Defendant has otherwise "failed to show that a refusal to invoke Rule 2 would result in manifest injustice." *Id.* at 742, 862 S.E.2d at 839.[3]

¶ 8 Notwithstanding, we have reviewed the indictments to ensure that the trial court had jurisdiction to try Defendant in the first instance and are satisfied the indictments were sufficient. *See State v. Rankin*, 371 N.C. 885, 821 S.E.2d 787 (2018). Otherwise, since Defendant has made no argument in his brief for our Court to consider, we do not consider any other argument and affirm the order of the trial court revoking Defendant's probation.

AFFIRMED.

Judge MURPHY concurs.

Judge INMAN concurs in result only by separate opinion.

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2. *Ricks* does contain language which suggests that our Court lacks authority even to issue the writ of *certiorari* "when the petition shows [no] merit." 378 N.C. at 738, 862 S.E.2d at 837. However, this statement by our Supreme Court is *dicta*, and we do not construe the statement as limiting our jurisdiction to issue writs of *certiorari*. Rather, the holding in *Ricks* limits our discretion to invoke Rule 2 where we have obtained jurisdiction by issue a writ of *certiorari*. *See State v. Ore*, 2022-NCCOA-380, §§ 48-51 (J. Dillon concurring).

3. We note that prior to our Supreme Court's decision in *Ricks*, our Court on occasion did invoke Rule 2 to suspend Rule 28 and Rule 10 to consider a criminal appeal before us on *certiorari*. *See, e.g.*, *State v. McGinnis*, 2002 N.C. App. LEXIS 2325 (2002) (unpublished) (suspending Rule 28); *State v. Essary*, 274 N.C. App. 510, 850 S.E.2d 621 (2020) (unpublished) (suspending Rule 10).

INMAN, Judge, concurring in result only.

¶ 9 I concur in the majority's decision to grant Defendant's petition for *certiorari*. But unlike the majority, I would hold that this Court has both the jurisdiction and authority to consider the issues raised in Defendant's *Anders* brief on appeal from an order revoking his probation without invoking Rule 2 of our Rules of Appellate Procedure. But conducting *Anders*-type review in this case, I can discern no prejudicial error. For this reason, I concur only in the result reached by the majority.

¶ 10 This Court has not previously held, explicitly, that appeals from probation revocations may be subject to *Anders*-type review. However, this Court has conducted *Anders*-type reviews in appeals from probation revocations or violation determinations in at least 21 cases, including once in a published decision, over the past nearly three decades.[1] And this Court recently announced its authority to conduct *Anders* review for appeals in another post-conviction setting—DNA testing pursuant to N.C. Gen. Stat. § 15A-270.1 (2021)—in *State v. Velasquez-Cardenas*, 259 N.C. App. 211, 815 S.E.2d 9 (2018).

¶ 11 Although the defendant in *Velasquez-Cardenas* was not entitled to *Anders*-like review as of right because the North Carolina Constitution

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1. *See*, *e.g.*, *State v. Mayfield*, 115 N.C. App. 725, 726-27, 446 S.E.2d 150, 151-52 (1994); *State v. Brooks*, 2022-NCCOA-145, ¶ 1 (unpublished); *State v. Wilder*, 271 N.C. App. 805, 842 S.E.2d 346 (2020) (unpublished); *State v. Branning*, 258 N.C. App. 205, 809 S.E.2d 927 (2018) (unpublished); *State v. Grice*, 254 N.C. App. 611, 801 S.E.2d 398 (2017) (unpublished); *State v. Woods*, 248 N.C. App. 304, 790 S.E.2d 753 (2016) (unpublished); *State v. Williams*, 249 N.C. App. 683, 791 S.E.2d 878 (2016) (unpublished); *State v. Austin*, 238 N.C. App. 199, 768 S.E.2d 63 (2014) (unpublished); *State v. Johnson*, 220 N.C. App. 160, 723 S.E.2d 582 (2012) (unpublished); *State v. Odom*, 212 N.C. App. 693, 718 S.E.2d 737 (2011) (unpublished); *State v. Johnson*, 210 N.C. App. 491, 711 S.E.2d 207 (2011) (unpublished); *State v. Blount*, 204 N.C. App. 596, 696 S.E.2d 925 (2010) (unpublished); *State v. Burgess*, 198 N.C. App. 703, 681 S.E.2d 864 (2009) (unpublished); *State v. McNair*, 197 N.C. App. 760, 680 S.E.2d 902 (2009) (unpublished); *State v. Wilcox*, 197 N.C. App. 233, 676 S.E.2d 669 (2009) (unpublished); *State v. Wiggins*, 187 N.C. App. 307, 652 S.E.2d 752 (2007) (unpublished); *State v. Talley*, 177 N.C. App. 813, 630 S.E.2d 258 (2006) (unpublished); *State v. Parrish*, 167 N.C. App. 807, 606 S.E.2d 459 (2005) (unpublished); *State v. Hampton*, 162 N.C. App. 181, 590 S.E.2d 332 (2004) (unpublished); *State v. Lipscomb*, 156 N.C. App. 698, 578 S.E.2d 1 (2003) (unpublished); *State v. Burrus*, 149 N.C. App. 233, 562 S.E.2d 303 (2002) (unpublished); *State v. Owens*, 149 N.C. App. 233, 562 S.E.2d 303 (2002) (unpublished). *But see State v. Tillman*, 278 N.C. App. 149, 2021-NCCOA-290, ¶ 10 (unpublished) (declining to conduct *Anders* review because defendants do not have a *constitutional* right to counsel at probation revocation hearings); *State v. Brown*, 261 N.C. App. 538, 817 S.E.2d 922 (2018) (unpublished) (questioning the availability of *Anders* review but nonetheless conducting discretionary, independent review in a probation revocation appeal).

does not provide for a right to counsel in post-conviction DNA proceedings, we recognized statutory law confers that right in such cases. 259 N.C. App. at 215-16, 815 S.E.2d at 12-13 ("[B]ecause the General Assembly has created a general right of appeal from the denial of motions made pursuant to the Act, this Court clearly has *jurisdiction* to consider the request for *Anders*-type review made by Defendant's appellate counsel." (emphasis in original) (citing *State v. Thomsen*, 369 N.C. 22, 25, 789 S.E.2d 639, 641-42 (2016)). We noted that "[i]n all prior opinions of this Court involving *Anders* briefs filed pursuant to a[ ] [Section] 15A-270.1 appeal, the State has implicitly accepted the validity of the *Anders* procedure, and simply argued that the defendants' appellate counsel were correct in their determinations that no meritorious issues were identifiable from the trial records." *Id.* at 214, 815 S.E.2d at 11 (citing 13 unpublished opinions conducting *Anders* review in an appeal pursuant to Section 15A-270.1). We further explained there was

> no valid reason to deny *Anders*-type protections to defendants in criminal proceedings from which there is a *statutory right of appeal*, and [could] discern no compelling reason why this Court, or the State, would find it desirable to place appointed counsel in the position of choosing between the duty to zealously assert the client's position under the rules of the adversary position, and the prohibition on advancing frivolous claims.

Id. at 223, 815 S.E.2d at 17 (cleaned up) (emphasis added). We ultimately held, "this Court has *both* jurisdiction *and* the authority to decide whether *Anders*-type review should be prohibited, allowed, or required in appeals from [Section] 15A-270.1. Exercising this discretionary authority, we hold that *Anders* procedures apply to appeals pursuant to [Section] 15A-270.1." *Id.* at 225, 815 S.E.2d at 18 (emphasis in original).

¶ 12 This Court's reasoning and holding in *Velasquez-Cardenas* applies to the availability of *Anders*-like review of the appeal from a probation revocation order in this case. Thus, I respectfully disagree with the majority opinion's holding that this Court is *prohibited* from conducting an *Anders*-type review separate from that constitutionally mandated by *Anders* and its progeny. *See id.* at 214-16, 815 S.E.2d at 12-13 ("The United States Supreme Court is charged with determining what constitutes the minimum rights and protections guaranteed by the United States Constitution. States are of course free to permit, or require, procedures that afford protections beyond what is constitutionally mandated.").

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 13 I supplement the majority opinion with the following facts disclosed from the record below:

¶ 14 On 3 December 2019, after pleading guilty to possession of a firearm by a felon, Defendant was sentenced by the trial court to 17 to 30 months in prison, suspended for 24 months of supervised probation.

¶ 15 In 2021, Defendant was alleged to have violated the terms of his probation by, among other things, committing a new criminal offense. During a hearing on 27 September 2021, Defendant admitted to three violations of the terms of his probation, including committing the criminal offense of possessing a weapon in violation of his offender status. The trial court revoked Defendant's probation and activated his suspended sentence.

¶ 16 Two days later, Defendant filed a handwritten notice of appeal, and the trial court filed appellate entries. Defendant was then appointed appellate counsel, who on 9 May 2022 filed a petition for writ of *certiorari* with this Court as well as a brief seeking *Anders*-type review.

II. ANALYSIS

A. Appellate Jurisdiction

¶ 17 Defendant's handwritten letter filed two days following his probation hearing notices an appeal of "the courts [sic] verdict." The letter fails to comply with Rule 4 of the North Carolina Rules of Appellate Procedure because it does not provide proof of service upon the State or identify the judgment appealed or to which court the appeal is taken. *See* N.C. R. App. P. 4(a)-(c) (2022). Recognizing that Defendant failed to give proper notice of appeal from the probation revocation order, Defendant's appellate counsel filed a petition for writ of *certiorari* with this Court seeking *Anders* review.

¶ 18 This Court may issue a writ of *certiorari* "when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1) (2022). Because Defendant's handwritten note evinces his intent to appeal the trial court's revocation of his probation, in our discretion, I agree with the majority's decision to grant Defendant's petition to review the order revoking Defendant's probation.

¶ 19 But I disagree with the majority's determination that we may "only consider arguments not raised by Defendant's counsel by invoking Rule 2 in the exercise of our discretion, as any argument not advanced

in an appellant's brief is abandoned under Rule 28." Rule 2 of our Rules of Appellate Procedure provides:

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

N.C. R. App. P. 2 (2022). Rule 28(a) provides: "The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned." N.C. R. App. P. 28 (2022).

¶ 20 The majority holds that any issues not specifically raised in Defendant's brief requesting *Anders*-type review have been abandoned. Our Court considered this very question in the context of *Anders* review on appeal from another post-conviction proceeding—a motion for appropriate relief seeking DNA testing—in *Velasquez-Cardenas*. The State contended that this Court should not conduct an *Anders* review of the record. We concluded, independent of Rule 2, "Defendant's brief requesting *Anders* review and the State's brief contending that we cannot apply *Anders* review to this appeal *place this issue squarely before us and meet the requirements of Rule 28*." *Velasquez-Cardenas*, 259 N.C. App. at 224, 815 S.E.2d at 18 (emphasis added). We ultimately held that *Anders* review was appropriate in that context. *Id.* at 225, 815 S.E.2d at 18. A concurring judge wrote a separate opinion expressing concern that the majority had considered arguments beyond this Court's jurisdiction because they were not articulated in compliance with Appellate Rule 28. *Id.* at 226, 815 S.E.2d at 19 (Dillon, J., concurring).

¶ 21 Insofar as an appeal from a probation violation hearing is in the same procedural posture as an appeal from an order denying post-conviction DNA testing, we are bound by this Court's majority decision in *Velasquez-Cardenas*. *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[.]" (citation omitted)). While hearings on probation violations are not identical to hearings on post-conviction motions for DNA testing, they are both post-conviction criminal proceedings.

¶ 22 As in *Velasquez-Cardenas*, Defendant's brief seeking *Anders* review has adequately raised this issue to satisfy Rule 28. Thus, we need not suspend any appellate rules pursuant to Rule 2 to consider whether *Anders* procedures apply to appeals from probation revocations. *See, e.g.*, *State v. Robinson*, 279 N.C. App. 643, 2021-NCCOA-533, ¶ 9 (allowing a petition for writ of *certiorari* based on the defendant's failure to timely notice an appeal to conduct an *Anders* review without invoking Rule 2).

¶ 23 I also cannot agree with the majority's holding that our Supreme Court's recent decision in *State v. Ricks*, 378 N.C. 737, 2021-NCSC-116, compels us to conclude that it would be an abuse of discretion to invoke Rule 2 in this case. *Ricks* holds that we "may only invoke Rule 2 when injustice appears manifest to the court or when the case presents significant issues of importance to the public interest." *Id.* ¶ 1. Like one member of the majority in this case,

> 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.

State v. Ore, 283 N.C. App. 524, 2022-NCCOA-380, ¶ 49 (Dillon, J., concurring).

¶ 24 Though I conclude that this Court has jurisdiction to review Defendant's appeal without invoking Rule 2, in the alternative, I would conclude that this appeal properly falls within the narrow scope of the rule. Invoking Rule 2 would not be an abuse of discretion, as the majority asserts, because review at this time would " 'expedite decision in the public interest,' . . . and settle a question of law that would be certain to otherwise recur," particularly in light of Defendant's "clear reliance on the precedent of this Court in conducting *Anders* review, without reservation," on appeals pursuant to N.C. Gen. Stat. § 15A-1347(a) (2021). *Velasquez-Cardenas*, 259 N.C. App. at 224-25, 815 S.E.2d at 18. As in *Velasquez-Cardenas*, countless defendants have relied upon *Anders* review of an activation of their prison sentences upon a revocation of probation, and many future defendants will rely on the mechanism to vindicate their civil liberties. It would expedite decision in the public interest to address whether this Court has the authority to conduct *Anders* review of probation revocation appeals. *See* N.C. R. App. P. 2.

¶ 25 Assuming *arguendo* that determining whether we have the authority to conduct *Anders* review on appeal from probation revocations somehow does not present a "significant issue[] of importance in the public interest," the Supreme Court's reasoning in *Ricks* about the other prong of Rule 2, to prevent manifest injustice, does not apply here. This case is distinguishable from *Ricks*, which concerned an unpreserved challenge to an order for satellite-based monitoring ("SBM")—a "civil, regulatory scheme." *Ricks*, ¶¶ 1, 6; *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 24 (citing *State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010)). In this case, Defendant appeals from a criminal judgment, a distinction this Court has held is dispositive. *Velasquez-Cardenas*, 259 N.C. App. at 219, 815 S.E.2d at 15 ("This Court in *Lineberger* determined it was bound by *Harrison* because SBM proceedings are *civil* in nature. Neither *Harrison* nor any other opinion involving *Anders* review in civil matters constitutes binding precedent in the criminal matter presently before us." (emphasis in original)).

B. *Anders*-type Review in Probation Revocation Appeals

¶ 26 Having established our jurisdiction over this matter and because the briefs have raised the issue, *see* N.C. R. App. P. 28(a), I would take this opportunity to clarify whether this Court *may*, in its discretion, conduct an *Anders*-type review in an appeal from a probation revocation. *See Velasquez-Cardenas*, 259 N.C. App. at 226, 815 S.E.2d at 19 (Dillon, J., concurring) ("I agree with the majority's statement to the extent that it suggests that we have jurisdiction (i.e., the authority) to conduct an *Anders*-like review in the context of an appeal brought pursuant to N.C. Gen. Stat. § 15A-270.1. However, to the extent that the majority's statement suggests that we are *required* to conduct an *Anders*-like review, I respectfully disagree." (emphasis added)). For this reason, I disagree with the majority's cursory conclusion that "*Anders* is not invoked" in this setting.

¶ 27 In its appellate brief, as in the context of appeals from post-conviction DNA testing in which this Court conducted *Anders* review, the State does not contest Defendant's application of *Anders*-type review for probation revocation appeals. And like defendants pursuing post-conviction DNA testing, Defendant here cannot rely on a *constitutional* right to counsel in probation revocation proceedings. *Cf. State v. Scott*, 187 N.C. App. 775, 777, 653 S.E.2d 908, 909 (2007) ("A defendant at a probation revocation hearing has a *statutory* right to counsel akin to the right enjoyed in a criminal trial." (emphasis added) (citations omitted)). But, just as it has done in the context of post-conviction DNA litigation, our General Assembly has created a statutory right to counsel at probation revocation hearings. N.C. Gen. Stat. § 7A-451(a)(4)

(2021); *Velasquez-Cardenas*, 259 N.C. App. at 215, 815 S.E.2d at 12-13 ("The right to counsel on appeal from an order denying post-conviction DNA testing is not of constitutional origin. It is purely a creature of statute, specifically [Section] 15A-270.1[.]"). Finally, as is true for appeals from post-conviction DNA testing, defendants also have a statutory right to appeal where the trial court revokes their probation and activates a suspended sentence. N.C. Gen. Stat. § 15A-1347(a) (2021); *Velasquez-Cardenas*, 259 N.C. App. at 223, 815 S.E.2d at 17.

¶ 28 Following our historical practice of conducting *Anders*-type review in this context and our decision in *Velasquez-Cardenas*, I would conclude "this Court has *both* jurisdiction *and* the authority to decide whether *Anders*-type review should be prohibited, allowed, or required in appeals from [probation revocation]. Exercising this discretionary authority, [I would] hold that *Anders* procedures apply to appeals pursuant to [Section 15A-1347(a)]." 259 N.C. App. at 225, 815 S.E.2d at 18 (emphasis in original). Having concluded Defendant's counsel could proceed pursuant to *Anders* procedures in this matter, I would then address the merits of Defendant's arguments. *See id.*

C. *Anders*-type Review in this Case

¶ 29 Contemporaneously with the petition for writ of *certiorari*, Defendant's counsel also filed a brief seeking *Anders*-type review because counsel had examined the record and applicable law and was "unable to identify an issue with sufficient merit to support a meaningful argument for relief on appeal." Defendant has not submitted separate arguments for our consideration.

¶ 30 This Court has summarized *Anders* procedures as follows:

> In order to comply with *Anders*, appellate counsel [is] required to file a brief referring any arguable assignments of error, as well as provide [the] defendant with copies of the brief, record, transcript, and the State's brief. *Kinch*, 314 N.C. at 102, 331 S.E.2d at 666-67 . . . . Pursuant to *Anders*, this Court must conduct "a full examination of all the proceedings[,]" including a "review [of] the legal points appearing in the record, transcript, and briefs, not for the purpose of determining their merits (if any) but to determine whether they are wholly frivolous." *Kinch*, 314 N.C. at 102-103, 331 S.E.2d at 667 (citation omitted).

Robinson, ¶¶ 10-11. *See also Velasquez-Cardenas*, 259 N.C. App. at 225, 815 S.E.2d at 18.

¶ 31 Defendant's appellate counsel has complied with the requirements of *Anders* and *Kinch*. Counsel's brief, consistent with his obligation under *Anders* to refer this Court to "anything in the record that might arguably support the appeal," *Anders v. California*, 386 U.S. 738, 744, 18 L. Ed. 2d 493, 498 (1967), directs us to consider: (1) whether the indictment was legally sufficient to confer jurisdiction on the trial court; (2) whether the revocation of probation was proper; and (3) whether Defendant's sentence was authorized by statute.

¶ 32 Defendant's indictments were legally sufficient and conferred jurisdiction on the trial court because they gave Defendant notice of the criminal charges against him with sufficient detail. *See State v. Harris*, 219 N.C. App. 590, 592-93, 724 S.E.2d 633, 636 (2012) ("[A]n indictment must contain: 'A plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.' " (quoting N.C. Gen. Stat. § 15A-924(a)(5) (2011))).

¶ 33 The trial court appropriately revoked Defendant's probation as authorized by N.C. Gen. Stat. § 15A-1344(a) (2021) after he admitted to the alleged probation violation of committing a new criminal offense. *See, e.g.*, *State v. Melton*, 258 N.C. App. 134, 136-37, 811 S.E.2d 678, 680-81 ("A trial court may only revoke a defendant's probation in circumstances when the defendant: (1) commits a new criminal offense, in violation of N.C. Gen. Stat. § 15A-1343(b)(1) . . . .").

¶ 34 Finally, Defendant's sentence falls squarely within the presumptive range authorized by statute for a Class G Felony at a Prior Record Level III—a minimum of 17 months and a maximum of 30 months imprisonment. *See* N.C. Gen. Stat. § 15A-1340.17(c)-(d) (2021).

¶ 35 Having fully examined the record for issues of arguable merit and given that it is well within a trial court's discretion to revoke a defendant's probation for the commission of a new offense, *Melton*, 258 N.C. App. at 136-37, 811 S.E.2d at 680-81, I am unable to find any possible prejudicial error and would hold that this appeal is wholly frivolous.

¶ 36 Thus, while I reach the same result as the majority and can provide no relief to Defendant, I write separately to distinguish between this Court's authority to exercise its discretion and total want of jurisdiction. *See, e.g.*, *State v. Killette*, 381 N.C. 686, 2022-NCSC-80, ¶ 16 (vacating and remanding this Court's decision denying a defendant's petition for writ of *certiorari* for lack of jurisdiction a second time, after earlier remand from the Supreme Court, because "the Court of Appeals has jurisdiction

and authority to issue the writ of certiorari here, although it is not compelled to do so, in the exercise of its discretion").

III. CONCLUSION

¶ 37 I would hold this Court has jurisdiction to reach the issues raised in the briefs and that *Anders* procedures apply to appeals from probation revocations. After conducting an *Anders*-type review of the record in this case, however, I can discern no prejudicial error. For this reason, I concur only in the result reached by the majority.

STATE OF NORTH CAROLINA
v.
JORGE MEDINA FABIAN

No. COA22-52

Filed 6 December 2022

1. Sexual Offenses—statutory sexual offense—attempt—sufficiency of evidence

The State presented sufficient evidence to survive defendant's motion to dismiss a charge of attempted statutory sexual offense, including that defendant was approximately twelve years older than the victim; that the victim was twelve years old at the time of the incident giving rise to the offense; and that defendant went into the victim's bedroom while she was sleeping, put his hands inside her pajama bottoms, and touched the victim's vagina. Finally, there was evidence from which the jury could reasonably infer that defendant would have completed a sexual offense but was stopped or prevented from doing so by the presence of the victim's parents in the home.

2. Evidence—sexual offense trial—prior bad acts—committed against victim's sister—intent and motive

In a sexual offense prosecution, there was no error, much less plain error, in the admission of evidence without objection that defendant had also committed sexual offenses against the victim's older sister, where the evidence was competent under Evidence Rule 404(b) to show defendant's intent, motive, and on-going plan to gratify his sexual desires by taking advantage of his position of trust by the girls' parents and of having access to the girls in their home.

3. Evidence—sexual offense trial—minor victim—parents' testimony that victim told the truth—credibility vouching

In a sexual offense prosecution, there was no plain error in the admission of testimony by the minor victim's parents—without objection—that they believed their daughter was telling the truth, which defendant argued constituted impermissible vouching of the victim's credibility in a trial that hinged on whether the jury believed defendant or the victim. Defendant failed to demonstrate that the jury would have reached a different result absent the evidence where there was ample other evidence to support the jury's determination that the victim was more credible than defendant, including defendant's texts to the victim's mother that he knew something "very serious" had occurred "that should never have happened," as well as evidence that defendant had also committed sexual offenses against the victim's younger sister.

4. Constitutional Law—effective assistance of counsel—sexual offense trial—no objection to evidence of other bad acts

In a sexual offense prosecution, defense counsel's representation was not deficient for failure to object to the admission of statements that defendant committed sexual offenses against the victim's older sister; even presuming that counsel's conduct was deficient, defendant failed to demonstrate prejudice because the testimony likely would have been admitted under Evidence Rules 404(b) and 403 even had counsel objected.

5. Criminal Law—prosecutor's closing argument—sexual offense trial—failure of defendant to deny victim's allegations

In a sexual offense prosecution, there was no error or prejudice in the prosecutor's statements during closing argument regarding defendant's failure to deny the victim's allegations against him when confronted by the victim's family—by commenting that the father was "still waiting"—or in the prosecutor's reading of texts sent by defendant to the victim's mother asking for mercy and admitting to her that "it . . . should never have happened." The comments did not constitute an improper reference to defendant's Fifth Amendment right to remain silent but, rather, related to the strength of the State's evidence and the absence of contradictory evidence. Further, the jury was presumed to have followed the trial court's instructions not to be influenced by defendant's decision not to testify.

Judge MURPHY concurring in result only as to section VII.

Appeal by defendant from judgments entered 24 June 2021 by Judge William D. Wolfe in Vance County Superior Court. Heard in the Court of Appeals 2 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sharon Patrick-Wilson, for the State.

Kimberly P. Hoppin, for the defendant-appellant.

TYSON, Judge.

¶ 1 Jorge Fabian ("Defendant") appeals the judgments entered on a jury's verdict for: Attempted First-Degree Sexual Offense with a Child under the age of 13, two counts of Statutory Rape of a Child, and Indecent Liberties with a Child. Our review shows no error.

I. Background

¶ 2 Defendant was indicted for: First Degree Rape of a Child and Statutory Sexual Offense with a Child (18 CRS 053195); Statutory Rape of a Child 15 Years or Younger and Indecent Liberties with a Child (18 CRS 053196); and Statutory Rape of a Child 15 Years or Younger (19 CRS 630) on 29 July 2019. The offense dates spanned from 1 August 2007 to 31 May 2012.

¶ 3 Defendant's convictions involve his inappropriate and indecent liberties, and his sexual conduct with his minor maternal cousin, S.F.C. (Pseudonym used to protect identity of minor, and her two sisters, K.C. and T.C., per N.C. R. App. P. 41(b)). S.F.C. was between twelve and fifteen years old during the times each of the sexual offenses and rapes occurred. S.F.C. has four siblings: one older sister, T.C.; one younger sister, K.C; a twin brother; and a younger brother. S.F.C. was twenty-five years old when she testified at trial.

¶ 4 S.F.C. did not report and kept Defendant's actions secret for several years until she broke down one day after breaking up with her boyfriend. At some point prior to 17 March 2018, S.F.C. had told her mother, brother, and twin brother that Defendant "molested" her and "touch[ed] [her] in inappropriate places." Defendant had lived in S.F.C.'s family home for a period of time. Defendant did not have anywhere else to stay, and he worked for S.F.C.'s father. S.F.C.'s parents treated Defendant like their "own child." They did not want to believe Defendant had molested and harmed their daughter.

¶ 5 Her parents individually called S.F.C.'s older sister, T.C., to inquire whether she was aware of any instances where Defendant had sexually assaulted S.F.C. Neither parent informed the other that they had reached out to T.C. T.C. admitted Defendant had assaulted her on several occasions, including one time while Defendant sexually assaulted T.C., another cousin had inserted his finger inside S.F.C.'s vagina.

¶ 6 S.F.C. testified and described multiple occasions when Defendant had molested and raped her. When S.F.C. was twelve years old and asleep, Defendant entered her bedroom. She woke up because Defendant was rubbing her legs and genitalia. Defendant had inserted his hand inside her pajama pants; "as he was going up, he was going down in [her] private area," which she clarified during her testimony meant her vagina.

¶ 7 Defendant moved out of S.F.C.'s family home to another house in close proximity to S.F.C.'s school. On several occasions, S.F.C. walked to Defendant's house and waited for her parents to pick her up after work.

¶ 8 On one occasion, S.F.C. tried to wait outside on Defendant's porch instead of entering his home because of his prior encounters with her. S.F.C. reluctantly entered his home and watched television in the living room because Defendant had "insisted that [she] come in the house."

¶ 9 S.F.C. testified Defendant sat down beside her and "started touching [her]." He "started taking his clothes off, and then he started taking [her] clothes off." S.F.C. further testified Defendant's penis penetrated her vagina, and "he kept on and kept on" for 10 to 20 minutes. After the rape, Defendant forced her to take a shower, as he watched her wash herself.

¶ 10 S.F.C. explained Defendant had raped her in his living room many times before Defendant's wife moved into his house, so often that she could not "remember all [of] the times." She recalled three other specific times when Defendant had raped her. She remembered one occasion when Defendant stopped listening to his music and raped her in his bedroom. On another occasion, Defendant picked her up after a swim meet and again raped her in his bedroom. Defendant also raped her one evening after he was married and while his wife was home. S.F.C. hesitated to scream for help during the assault because she was afraid his wife might think she had initiated it.

¶ 11 On 17 March 2018, S.F.C. attended a family cookout at her aunt's house. At the cookout, S.F.C.'s father and brother confronted Defendant. S.F.C.'s father had hoped Defendant would deny the rape allegations, but he did not. According to S.F.C., Defendant explained "he didn't know why he did the things he did to [S.F.C.], but [admitted] he did it." S.F.C. and her brother reported the incident to the police the following day.

¶ 12 Nearly two years after the indictments were issued, a jury convicted Defendant of: Attempted First-Degree Sexual Offense with a Child under the age of 13 (18 CRS 053195), Statutory Rape Against Victim of 13 or 14 Years Old and Indecent Liberties with a Child (18 CRS 53196); and Statutory Rape Against Victim of 15 Years Old (19 CRS 630) on 24 June 2021.

¶ 13 The trial court sentenced Defendant as a prior record level I offender in the presumptive range of 157 to 198 months on the Attempted First-Degree Sexual Offense with a Child under the age of 13. The remaining offenses were consolidated, and he was sentenced to a consecutive term in the presumptive range of 192 to 240 months in prison for two counts of Statutory Rape of a Child 15 Years or Younger and one count of Taking Indecent Liberties with a Child. Defendant filed timely notice of appeal.

II. Jurisdiction

¶ 14 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(4), 15A-1444 (2021).

III. Issues

¶ 15 Defendant presents several issues on appeal. Defendant argues the trial court erred by denying his motion to dismiss the charge of attempted statutory sexual offense due to insufficient evidence. He also argues the trial court erred by allowing certain witnesses to testify Defendant had committed sexual offenses against S.F.C's older sister, T.C. He asserts two reasons in support: (1) the allegations were impermissible character evidence under Rule 404(b) "in a case where conviction or acquittal turned almost exclusively on the jury's assessments of S.F.C.'s credibility, and most probably had an impact on the jury's verdicts"; and (2) S.F.C.'s parents' testimony regarding T.C.'s accusation, essentially stating Defendant had committed similar sexual offenses against her, caused them to believed S.F.C improperly vouched for the credibility of S.F.C.

¶ 16 Defendant also asserts his counsel's failure to object to those statements constituted ineffective assistance of counsel. Defendant further argues certain statements made by the prosecutor during closing argument unfairly prejudiced him by impermissibly commenting on his constitutional right to not testify. We address each issue in turn.

IV. Denial of Defendant's Motion to Dismiss

¶ 17 **[1]** Defendant argues the trial court erred by denying his motion to dismiss the charge of attempted statutory sexual offense due to insufficient evidence.

A. Standard of Review

¶ 18 Our Supreme Court stated: "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (quotation marks omitted) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Powell, 299 N.C. at 99, 261 S.E.2d at 117 (citing *State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978); *State v. McKinney*, 288 N.C. 113, 215 S.E.2d 578 (1975)).

¶ 19 "This Court reviews [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) (citation omitted).

B. Analysis

¶ 20 A defendant is guilty of a first-degree statutory sexual offense if they are "at least 12 years old," and "engage[ ] in a sexual act with a victim[,] who is a child under the age of 13 years" and the defendant is "at least four years older than the victim." N.C. Gen. Stat. § 14-27.29 (2021). A sexual act includes "any penetration, however slight, by an object into the genital opening of a person's body." *See* N.C. Pattern Jury Instructions, 207.45A.1A.

¶ 21 "In order to prove an attempt of any crime, the State must show: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Sines*, 158 N.C. App. 79, 85, 579 S.E.2d 895, 899 (2003) (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 15-170 (2021) (noting a defendant indicted on a crime may be convicted "of a less degree of the same crime, or of an *attempt to commit the crime so charged*, or of an attempt to commit a less degree of the same crime" (emphasis supplied)).

¶ 22 The jury was instructed they could convict Defendant only upon a finding that he had engaged in "conduct [which] came so close to bringing about that sexual act that in the ordinary course of events the defendant would have completed the act with the alleged victim had the defendant not been stopped or prevented." *See* N.C. Pattern Jury Instructions, 207.45A.1A.

¶ 23 S.F.C. testified she was twelve years old when Defendant first engaged in sexual conduct with her. Defendant is at least twelve years older than S.F.C., which meets the age disparity requirements of being at least "four years older than the victim" in N.C. Gen. Stat. § 14-27.29. S.F.C. also testified Defendant entered her room while she was sleeping, placed his hands inside her pajama bottoms, and rubbed his hand against her vagina. She explained her mother was making breakfast in the kitchen because she could smell the meal cooking, and her father was getting ready for work by cranking up all of the trucks.

¶ 24 This evidence, viewed in the light most favorable to the State, supports the trial court's decision to deny Defendant's motion to dismiss. The State's evidence could support a jury finding Defendant would have committed a sexual offense against S.F.C. if he was not stopped or prevented by the presence and activities of her parents. This inference is further supported by other evidence Defendant had raped her when her parents or others were not around. The trial court did not err by denying Defendant's motion to dismiss.

V. Testimony Regarding the Alleged Sexual Offenses Against T.C.

¶ 25 Defendant argues the trial court erred by allowing certain witnesses to testify Defendant had also committed sexual offenses against S.F.C's older sister, T.C.

A. Standard of Review

¶ 26 In a criminal case, "an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be [ ] the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4); *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citations omitted) ("Unpreserved error in criminal cases, on the other hand, is reviewed only for plain error."). "[P]lain error review in North Carolina is normally limited to instructional and evidentiary error." *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 (citation omitted); *State v. Patterson*, 269

N.C. App. 640, 645, 839 S.E.2d 68, 72, *review denied*, 847 S.E.2d 886 (2020) (citing *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018); then quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334) ("[P]lain error is to be 'applied cautiously and only in the exceptional case.' ").

¶ 27 "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *Id.* at 518, 723 S.E.2d at 334 (affirming how to apply the plain error standard of review, as set forth in *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). In deciding whether an unpreserved evidentiary error rises to plain error, this Court "must examine the entire record and determine if the [ ] error had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79 (citation omitted); *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted) (explaining a defendant must convince this Court on appeal "not only that there was error, but that absent the error, the jury probably would have reached a different result").

B. Analysis

¶ 28 Defendant objected to certain statements indicating he had committed prior similar sexual offenses against S.F.C's younger sister, K.C., under North Carolina Rules of Evidence 404(b). The trial court held the evidence was admissible to show Defendant's motive, opportunity, and intent.

¶ 29 The evidence tended to show Defendant's motive because "both girls were between 12 and 15 years of age when the acts occurred, had a familial relationship with Defendant, and were targeted by Defendant when their parents or other adults were not in the room." This evidence also tended to show opportunity because "Defendant took advantage of situations which made it less likely for him to be detected[,] and less likely that if either girl informed on him, that they would be believed."

¶ 30 The prior bad acts were "sufficiently similar" and in "temporal proximity" to the current offense because: both sisters were around the same ages when the offenses occurred, both had a familial relationship with Defendant, Defendant never spoke to either of the sisters when committing the offenses, and both girls were approached and initially victimized when asleep.

¶ 31 Defendant failed to object under Rule 404(b) to testimony indicating Defendant allegedly committed sexual offenses against S.F.C.'s *older* sister, T.C. Defendant argues the trial court committed plain error by allowing the statements about T.C. for two reasons: (1) the allegations

about T.C. were "unsubstantiated and unfairly prejudicial, in a case where conviction or acquittal turned almost exclusively on the jury's assessments of S.F.C.'s credibility, and most probably had an impact on the jury's verdicts"; and (2) S.F.C.'s parents' testimony, indicating they believed S.F.C. after learning Defendant had allegedly committed similar sexual offenses against T.C., improperly vouched for the credibility of S.F.C. We address each of Defendant's arguments in turn.

1. Rule 404(b) -- "Prior Bad Acts"

¶ 32 **[2]** North Carolina Rule of Evidence 404(b) provides:

> (b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment[,] or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021).

¶ 33 Our courts have characterized Rule 404(b) as a "general rule of *inclusion* of relevant evidence of other crimes, wrongs[,] or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Carpenter*, 361 N.C. 382, 386, 646 S.E.2d 105, 109 (2007) (citing *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990)).

¶ 34 Prior to our General Assembly's adoption of the North Carolina Rules of Evidence, the general rule was that "evidence of the commission of other independent offenses by an accused is not admissible as proof of guilt for the offense for which the accused is on trial." *State v. Sturgis*, 74 N.C. App. 188, 191, 328 S.E.2d 456, 458 (1985) (citing *State v. McClain*, 240 N.C. 171, 173, 81 S.E.2d 364, 365 (1954) (citations omitted) (explaining the "State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense" even if "the other offense is of the same nature as the crime charged")).

¶ 35 While North Carolina's appellate courts had relied heavily on *McClain* prior to the adoption of the North Carolina Rules of Evidence, our Supreme Court clarified Rule 404(b) does not function as a "general rule of exclusion" and that "a careful reading of Rule 404(b) clearly shows, evidence of other offenses is *admissible* so long as it is

relevant to any fact or issue other than the character of the accused." *Coffey*, 326 N.C. at 278, 389 S.E.2d at 54 (1990) (citation and quotation marks omitted).

¶ 36 Evidence admitted under Rule 404(b) nevertheless "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (citations omitted); *see also* N.C. Gen. Stat. § 8C-1, Rule 403 (2021).

> To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of *similarity and temporal proximity*. Evidence of a prior bad act generally is admissible under Rule 404(b) if it constitutes substantial evidence tending to support a reasonable finding by the jury that the defendant committed the *similar* act.

Al-Bayyinah, 356 N.C. at 155-56, 567 S.E.2d at 123 (citations and quotation marks omitted) (emphasis supplied); *see also State v. Sturgis*, 74 N.C. App. 188, 191-92, 328 S.E.2d 456, 458 (1985) (citing *State v. Greene*, 294 N.C. 418, 241 S.E.2d 662 (1978); then citing *State v. Fowler*, 230 N.C. 470, 53 S.E.2d 853 (1949)) (noting that evidence of prior bad acts may be admitted into evidence if those acts establish a defendant's motive, opportunity, or intent to commit the offense charged).

¶ 37 Additionally, "[i]n construing the exceptions to the general rule, our courts have been liberal in admitting evidence of similar sex crimes." *See Sturgis*, 74 N.C. App. at 191-92, 328 S.E.2d at 458 (citations omitted) (explaining that in *State v. Patterson*, 66 N.C. App. 657, 311 S.E.2d 683 (1984), evidence that a defendant "charged with committing a sexual offense . . . had committed numerous similar acts upon the [victim] over a four to five year period, was held competent to show defendant's 'motive and intent,' " and in *State v. Turgeon*, 44 N.C. App. 547, 261 S.E.2d 501 (1980), where "defendant was convicted of assault with intent to commit rape upon a young girl, evidence that the defendant had committed sexual acts upon the sister of the prosecutrix over a two year period preceding the act with which defendant was charged, was held admissible").

¶ 38 This Court has previously held testimony that a defendant who has "engaged in similar sexual conduct" with a victim's sibling is admissible and competent to show the "defendant's intent, motive and on-going plan to gratify his sexual desires." *Sturgis*, 74 N.C. App. at 193, 328 S.E.2d at

459. In *Sturgis*, the defendant "had committed acts similar to the offense charged in this case" when the victim and "her sisters had been entrusted to the care of defendant." *Id.* at 191, 328 S.E.2d at 458. The victim's sister "testified that on one occasion, after the offense with which defendant is charged, defendant felt her privates and removed her clothing[,]" and both sisters "testified that defendant instructed them not to tell their mother what he had done." *Id.*

¶ 39 Defendant failed to object under Rules 404(b) or Rule 403 to the testimony indicating he committed a sexual offense against T.C. at trial, despite vigorously objecting to similar statements about alleged sexual offenses against S.F.C's younger sister, K.C.

¶ 40 Here, the facts resemble those in *Sturgis*. The State's evidence tended to show Defendant had committed similar sexual offenses against the victim's older sister, T.C., and evidence presented tended to show the sexual offenses against T.C. occurred in the presence of S.F.C. Other testimony and evidence also indicated Defendant committed sexual offenses against both S.F.C.'s older and younger sisters, collectively demonstrating how Defendant had taken advantage of his position of trust by the parents and access to the girls in their home and his "intent, motive and on-going plan to gratify his sexual desires." *Id.* at 193, 328 S.E.2d at 459. "The plain error rule applies only in truly exceptional cases." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80,83 (1986). Defendant has failed to demonstrate Rule 404(b) error, much less plain error. Defendant's argument is overruled.

2. Improper Vouching

¶ 41 **[3]** Rule 701 of the North Carolina Rules of Evidence provides a lay witness may testify "to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2021).

¶ 42 "[O]ur Supreme Court has determined that when one witness vouch[es] for the veracity of another witness, such testimony is an opinion which is not helpful to the jury's determination of a fact in issue and is therefore excluded." *State v. Gobal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007), *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (2008) (citation omitted). "[I]t is typically improper for a party to 'seek to have the witnesses vouch for the veracity of another witness.' " *State v. Warden*, 376 N.C. 503, 507, 852 S.E.2d 184, 188 (2020) (original alterations omitted) (citing *State v. Robinson*, 355 N.C. 320, 334, 561 S.E.2d 245, 255 (2002).

¶ 43 This Court outlined the steps for determining whether one witness vouches for the credibility of another in *Gobal*: (1) examine whether the witness was testifying as a lay witness or as an expert, as Rule 701 only bars certain opinion testimony from lay witnesses, (2) "determine if the testimony of the witness is opinion, as opposed to fact," (3) decide if the testimony falls within the exception in Rule 701 by helping the jury determine "a fact in issue." *Gobal*, 186 N.C. App. at 317-19, 651 S.E.2d at 285-87. If Defendant failed to preserve the issue for appeal by not objecting at trial, this Court must then determine whether the admission of testimony vouching for the credibility of a witness constituted plain error, i.e., "whether it was probable, absent th[e] error, that the jury would have reached a different verdict than the one it actually reached." *Id.* at 319, 651 S.E.2d at 287 (citing *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983)).

¶ 44 Here, Defendant objects to following testimony of S.F.C.'s mother:

> [The State]: And after [S.F.C.] told y'all about those things that had happened to her, what did y'all do next?
>
> [S.F.C.'s Mother]: We didn't – we – we asked her, "Are you telling us the truth?" And she said, "Yeah." And I said, "Okay." And my husband went and called my stepdaughter [T.C.] and asked her –
>
> [The State]: So – so don't – don't tell me – don't tell me about [T.C.].
>
> [S.F.C.'s Mother]: Okay.
>
> . . .
>
> [The State]: And after [S.F.C.'s Father] talked to [T.C.], what happened next?
>
> [S.F.C.'s Mother]: That we – we found out that she was telling us the truth, that she got touched by [Defendant] and – by [S.F.C.'s other male cousin] and [Defendant]; they had did what they did to her.
>
> [The State]: [Mother], when [S.F.C.] first told you, why did you ask her if she was telling you the truth?
>
> [S.F.C.'s Mother]: Because I saw – I saw him like my own – my own child, and I couldn't believe it. I was like, but it's like your brother. And I never expect that he would have did my children like that.

¶ 45 Defendant also objects to the following testimony of S.F.C.'s father:

> [The State]: – without saying what she said, what did you talk to [T.C.] about?
>
> [S.F.C.'s Father]: I asked her had she ever been messed with at anytime in my house with my daughter [S.F.C.].
>
> [The State]: Okay. Now, did she give you an answer?
>
> [S.F.C.'s Father]: Yes.
>
> [The State]: Why did you call [T.C.] and ask her that question?
>
> [S.F.C.'s Father]: The reason was because I wanted to know if it was true. I just didn't jump off what [S.F.C.] told me and what she said on the way home. I wanted to know exact[ly] from the other person she said she was with to make sure the stories lined up for myself. And I didn't even tell my wife at that time that I had talked to [T.C.].

¶ 46 Both of S.F.C.'s parents were admitted and testified as lay witnesses. Both testified about their opinion, as opposed to a fact, because the statements were not "*instantaneous* conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation." *Gobal*, 186 N.C. App. at 317-18, 651 S.E.2d at 285-86 (emphasis supplied) (citations and quotation marks omitted) (explaining instant opinions such as, "defendant appeared calm" is admissible, but statements like, "because McCloskey became less nervous he must have been telling the truth," are inadmissible under Rule 701).

¶ 47 Defendant argues their testimony was also unnecessary to determine a fact in issue because S.F.C. had testified at trial, and the jury could determine for itself whether they believed S.F.C. *Id.* at 318-19, 651 S.E.2d at 286 ("[T]he jury was able to see for itself the manner and appearance of McCloskey when he testified, and determine for itself if it wanted to believe him. Therefore, the opinion as to his credibility was not helpful to the jury's determination of a fact in issue.").

¶ 48 This Court must analyze whether the admission of such opinion testimony constitutes plain error because Defendant failed to object at trial. *Id.* at 319, 651 S.E.2d at 287. Although this case depended on whether the jury believed S.F.C. or Defendant, like in *Gobal*, Defendant's

truthfulness and guilt was impeached in other ways: through the text messages Defendant sent to S.F.C.'s mother saying he knew what he had done was "something very, very serious that should never have happened," and Defendant's silence when S.F.C.'s father and her brother had confronted him about S.F.C.'s and her sisters' accusations at the family cookout. *Id.* The jury also may have relied on the evidence regarding Defendant's prior sexual offenses against S.F.C.'s younger sister, K.C., to establish Defendant's motive, opportunity, and intent to commit similar offenses against S.F.C.

¶ 49 Ample evidence in the record existed to support the jury concluding they believed S.F.C.'s credibility over Defendant. Defendant has failed to demonstrate "it was probable, absent th[e] error, that the jury would have reached a different verdict than the one it actually reached. *Id.* Defendant has failed to demonstrate plain error. His arguments are without merit.

VI. Ineffective Assistance of Counsel

¶ 50 **[4]** "Ordinarily, to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) 'counsel's performance was deficient' and (2) 'the deficient performance prejudiced the defense.' *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)); *accord State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985).

¶ 51 "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Fletcher*, 354 N.C. 455, 481, 555 S.E.2d 534, 550 (2001) (citing *Strickland*, 466 U.S. at 687–88, 80 L. Ed. 2d at 693). Deficient performance encompasses only those "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Prejudice may be found when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

¶ 52 Defendant argues his counsel's failure to object to the statements about sexual offenses committed against T.C. under Rule 404(b): (1) "was objectively unreasonable" because the claims were "unsubstantiated and unfairly prejudicial" and, (2) there is a reasonable probability the result would have been different if counsel objected because "there was no physical evidence of abuse," as the "allegations were made [ ] years after they were alleged to have occurred", and (3) "conviction or acquittal turned almost exclusively on the jury's assessment of S.F.C.'s credibility."

¶ 53 The trial court's order denying Defendant's Motion for Appropriate Relief explained his counsel: "effectively argued the absence of certain law enforcement witnesses," "presented inconsistencies in witness statements to the jury during cross examination," and "presented a vigorous defense; thoroughly testing the State's case through cross examination and the argument of motions to limit the state's presentation and presenting witnesses on Defendant's behalf."

¶ 54 Defendant's counsel's conduct and representation prior to and at trial did not fall below the threshold outlined in *Phillips*, *Fletcher*, and *Strickland*. Presuming counsel had objected to the statements about prior sexual assaults against T.C., the testimony would have likely been admitted under Rules 404(b) and 403. Defendant fails to show prejudice by his counsel's failure to object.

VII. Prosecutor's Statements During Closing Argument

¶ 55 **[5]** "It is [ ] well settled that when a defendant exercises his right to silence, it shall not create any presumption against him, and any comment by counsel on a defendant's failure to testify is improper and is violative of his Fifth Amendment right." *State v. Ward*, 354 N.C. 231, 250-51, 555 S.E.2d 251, 264 (2001) (citations and quotation marks omitted).

¶ 56 Prosecutors are prohibited from commenting on a defendant's failure to testify, *State v. Williams*, 341 N.C. 1, 13, 459 S.E.2d 208, 216 (1995), but they "may properly bring to the jury's attention the failure of a defendant to produce exculpatory evidence or to contradict evidence presented by the State." *State v. Parker*, 350 N.C. 411, 431, 516 S.E.2d 106, 120 (1999) (citing *State v. Mason*, 317 N.C. 283, 287, 345 S.E.2d 195, 197 (1986)).

¶ 57 "A prosecutor's challenged remarks must be reviewed in the overall context in which they were made and in view of the overall factual circumstances to which they referred." *State v. Penland*, 343 N.C. 634, 662, 472 S.E.2d 734, 750 (1996).

¶ 58 Here, the prosecutor made the following statement during closing argument:

> Do you remember that [S.F.C.'s father] said when he was testifying about what happened after the cookout and they were standing outside, and he said, "I was waiting for him to deny it"? He's still waiting.
>
> When you read this text, as you read the text, are you – are you waiting for him to deny it?

¶ 59 The prosecutor then read the text Defendant had sent to S.F.C.'s mother after S.F.C.'s parents had confronted him;

> I know it is something very – very serious that should never have happened. But before you take matters into your hands, I ask you, for the sake of my girls who will be left without me. I beg you to give me the chance, the opportunity, to watch them grow. I know it is something very serious that should never have happened.

¶ 60 The prosecutor's comments, when "viewed in the context in which they were made and in light of the overall factual circumstances to which they referred," indicate the prosecutor was not attempting to comment on the Defendant's Fifth Amendment right of silence. *Ward*, 354 N.C. at 250, 555 S.E.2d at 264 (citation and quotation marks omitted). In a case which centered around the credibility of the victim versus Defendant, the prosecutor was instead highlighting the fact that Defendant never denied S.F.C.'s allegations when confronted by her parents. Further, the texts Defendant had sent begging for mercy and admitting it "should never have happened," were properly admitted into evidence.

¶ 61 The prosecutor's argument is best described as a "comment on the strength of the State's evidence and the absence of any contradictory evidence." *Parker*, 350 N.C. at 431, 516 S.E.2d at 120. The trial court also administered the pattern jury instructions regarding Defendant's failure to testify, which instructed the jurors that Defendant's "decision not to testify create[d] no presumption against" him and his "silence . . . [wa]s not to influence [their] decision in any way." The jury is presumed to have followed the trial court's instructions. *State v. Steen*, 352 N.C. 227, 249, 536 S.E.2d 1, 14 (2000) (citation omitted) (explaining our state's appellate courts "presume[ ] that jurors follow the trial court's instructions"). Defendant has failed to demonstrate error or prejudice.

VIII. Conclusion

¶ 62 The trial court did not err by denying Defendant's motion to dismiss for insufficiency of the evidence. The State's evidence could support a jury finding Defendant would have committed a sexual offense against S.F.C. if he was not stopped or prevented by the presence of her parents.

¶ 63 The trial court did not commit plain error by allowing the statements indicating Defendant committed prior sexual offenses against S.F.C.'s older sister, T.C. If Defendant had objected under Rule 404(b), the trial could have properly admitted those statements for the purpose

of establishing Defendant's "intent, motive and on-going plan to gratify his sexual desires," just like the trial court admitted similar evidence of Defendant's actions towards S.F.C.'s younger sister. *Sturgis*, 74 N.C. App. at 193, 328 S.E.2d at 459. Any testimony purportedly vouching for the credibility of S.F.C. did not prejudice Defendant because ample evidence in the record existed to support a jury deciding they believed S.F.C. over Defendant. Defendant has failed to show plain error.

¶ 64 Defendant was not prejudiced by his counsel's failure to object to the admission of the statements regarding his alleged prior sexual offenses against T.C. Even if counsel had objected to the statements, the testimony would have likely been admitted under Rules 404(b) and 403.

¶ 65 Defendant has not demonstrated prejudice by the prosecutor's statements during closing argument. The prosecutor was "comment[ing] on the strength of the State's evidence and the absence of any contradictory evidence," *Parker*, 350 N.C. at 431, 516 S.E.2d at 120, and the jury was instructed not to consider Defendant's decision to refrain from testifying.

¶ 66 Defendant received a fair trial, free from prejudicial errors he preserved and argued on appeal. We find no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered*.

NO ERROR.

Judge WOOD concurs.

Judge MURPHY concurs in sections I-VI and concurs in result only as to section VII.

STATE OF NORTH CAROLINA
v.
ROBIN LYNN NOFFSINGER, DEFENDANT

No. COA21-566

Filed 6 December 2022

1. Constitutional Law—double jeopardy—felony child abuse—first-degree murder—prosecuted twenty-one years apart

After defendant was convicted of felony child abuse for injuries inflicted upon her infant son, her double jeopardy rights were not violated where, twenty-one years later, the State prosecuted her for first-degree murder because her son had died of complications resulting from the injuries at issue in the child abuse prosecution. Defendant's prosecution under a felony murder theory was proper because, although double jeopardy principles forbid separate prosecutions for felony murder and its predicate felony, these principles do permit the subsequent prosecution of a greater offense (here, murder) where a fact necessary for charging that offense (the child's death) was not present during the prosecution of the lesser-included offense (felony child abuse). Additionally, defendant's prosecution for murder by premeditation and deliberation or by torture was proper because those offenses are distinct from felony child abuse.

2. Constitutional Law—due process—felony child abuse—first-degree murder—prosecuted twenty-one years apart

After defendant was convicted of felony child abuse for injuries inflicted upon her infant son, her due process rights under the federal and state constitutions were not violated where, twenty-one years later, the State prosecuted her for first-degree murder because her son had died of complications resulting from the injuries at issue in the child abuse prosecution. The State's inability to pursue the murder charge until the child's death—along with its significant interest in prosecuting individuals who may be guilty of first-degree murder—outweighed any prejudice the twenty-one-year delay may have caused defendant.

Appeal by Defendant from order entered 28 June 2021 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 7 September 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State.

Marilyn G. Ozer for Defendant.

GRIFFIN, Judge.

¶ 1 This is a case that raises the issues of double jeopardy and due process from incidents of child abuse occurring in April 1997 that led to separate charges being brought against Defendant Robyn Lynn Noffsinger. These charges were brought by indictments issued twenty-one years apart. Defendant was found guilty of felony child abuse in 1997 and was given an active sentence. That prison sentence was completed. Defendant has now been indicted for first-degree murder from the same actions that formed the basis of the charges for the felony child abuse offense. Defendant argues the trial court erred in denying her motion to dismiss because prosecuting Defendant for first-degree murder would violate her constitutional rights (1) to not be twice put in jeopardy for the same offense; and (2) to due process of the law. We disagree and affirm the trial court's order.

I. Factual and Procedural Background

¶ 2 On 12 April 1997, Defendant's fifteen-month-old son, David Cody Rhinehart, was brought by an ambulance to the Columbia Brunswick Hospital. *State v. Noffsinger*, 137 N.C. App. 418, 419, 528 S.E.2d 605, 607 (2000). The emergency room doctor "observed that the child was not breathing, that he had a head fracture, abnormal pupil response, facial bruising, deformity on an arm and a leg, and a burned area in the diaper region, and that the child was having seizures." *Id.* at 420, 528 S.E.2d at 607. A pediatrician who treated the child's injuries testified that Defendant's son suffered from Battered Child Syndrome based on her "physical findings . . . and not finding a sufficient explanation for really any of the injuries as had been described." The pediatrician also testified that Defendant's son would "never" be able to function on his own and that "the entire part of his brain that involves learning, thinking, maturing, [and] developing normally ha[d] been destroyed." On 2 June 1997, Defendant was indicted for three counts of felony child abuse.

¶ 3 A jury found Defendant guilty of all three counts of felony child abuse. The Defendant was given three consecutive sentences of 31 to 47 months in prison. Defendant appealed, and this Court found no error in her trial. *Noffsinger*, 137 N.C. App. at 429, 528 S.E.2d at 613. Defendant's boyfriend at the time of the abuse, David Raeford Tripp, Jr., pled guilty to four counts of felony child abuse and was sentenced to 84 to 129 months in prison. Defendant and Tripp have served their respective sentences for felony child abuse.

¶ 4 On 6 March 2018, Defendant's son, who had been adopted and renamed David Elei Stuart, died from "complications of remote trauma, including blunt force and thermal injuries stemming from child abuse which occurred in April of 1997" according to the medical examiner. Defendant and Tripp were each indicted on one count of first-degree murder of Defendant's child on 21 May 2018. Defendant moved to dismiss the indictment for first-degree murder "on the grounds that the prosecution . . . violates her protection against double jeopardy and due process." After a hearing, the Brunswick County Superior Court entered an order denying Defendant's Motion to Dismiss. We granted Defendant's petition for writ of certiorari for the limited purpose of reviewing the order denying Defendant's Motion to Dismiss.

II. Analysis

¶ 5 Defendant brings two arguments on appeal. Defendant argues that the trial court should have granted her Motion to Dismiss because a first-degree murder prosecution would violate (1) her "constitutional right to be protected against double jeopardy" and (2) her "constitutional right to due process." This 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) (citation omitted).

A. Right Against Double Jeopardy

¶ 6 **[1]** Defendant asserts prosecuting her for first-degree murder violates her constitutional right to be protected against double jeopardy. It is undisputed that Defendant's prior felony child abuse conviction and first-degree murder indictment arose out of the same incident occurring in 1997. Thus, Defendant argues her former conviction for felony child abuse bars the State from initiating a subsequent first-degree murder prosecution.

¶ 7 The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause applies to states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). North Carolina's Constitution does not expressly prohibit double jeopardy, but this principle "has been regarded as an integral part" of the Law of the Land Clause of Article I, Section 19. *State v. Ballard*, 280 N.C. 479, 482, 186 S.E.2d 372, 373 (1972) (citations omitted). Under our state and federal constitutions, "if what purports to be two offenses actually is one . . . , double jeopardy prohibits successive prosecutions." *State v. Gardner*, 315 N.C. 444, 454, 340 S.E.2d 701, 709 (1986) (citing *Brown v. Ohio*, 432 U.S. 161, 166 (1977)).

¶ 8 In *Blockburger v. United States*, the United States Supreme Court declared that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304 (1932). If one offense is a lesser included offense of the other, successive prosecution is prohibited under the *Blockburger* test because the lesser offense does not require any proof of fact beyond that of the greater offense. *Brown*, 432 U.S. at 168. "It is not enough to show that one crime requires proof of a fact that the other does not. Each offense must include an element not common to the other." *State v. Strohauer*, 84 N.C. App. 68, 73, 351 S.E.2d 823, 827 (1987) (citations omitted).

¶ 9 The *Blockburger* test is not violated if the same conduct underlies two offenses, each of which requires proof of a fact of the crime that the other does not. *United States v. Dixon*, 509 U.S. 688, 689 (1993) (overruling *Grady v. Corbin*, 495 U.S. 508, 526 (1990), which had allowed the same conduct to bar prosecution because *Grady* was "wholly inconsistent with [the Supreme Court's] precedents and with the clear common-law understanding of double jeopardy"). The North Carolina Supreme Court has also concluded that if the same conduct underlies two offenses, that, by itself, does not violate the constitutional prohibition against double jeopardy. *State v. Gay*, 334 N.C. 467, 490, 434 S.E.2d 840, 853 (1993).

¶ 10 The *Blockburger* test is not the only standard for determining whether successive prosecutions are prohibited by double jeopardy protections. In *Diaz v. United States*, the United States Supreme Court recognized an exception in allowing successive prosecutions for two offenses requiring proof of the same facts. 223 U.S. 442, 448–49 (1912). The *Diaz* exception exists "where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred[.]" *Brown*, 432 U.S. at 169 n.7.

¶ 11 The United States Supreme Court applied the *Diaz* exception in *Garrett v. United States*, allowing prosecution of a defendant for a continuing criminal enterprise, despite his prior conviction for a predicate offense of that crime, marijuana importation. 471 U.S. 773, 775, 792–93 (1985). The Court explained that the defendant's continuing criminal enterprise activities had not been completed at the time he was indicted for marijuana importation, such that these were considered different offenses under *Diaz*. *Id.* at 791–92. The North Carolina Supreme Court has also referenced the *Diaz* exception. In *State v. Meadows*, a defendant was charged with second-degree murder several months after he

pleaded guilty to felonious assault with a deadly weapon, when the victim later died of the gunshot wounds he sustained from the assault. 272 N.C. 327, 329–30, 158 S.E.2d 638, 639–40 (1968). The Court found *Diaz* "apposite" in holding that second-degree murder was a distinct offense from the assault and, thus, the State's prosecution was not barred by double jeopardy. *Id.* at 331, 158 S.E.2d at 640–41. While the *Diaz* exception has never been applied by this Court, both federal and state precedent support its application in this case.

¶ 12 Here, Defendant argues that double jeopardy protections bar the State from prosecuting her for first-degree murder due to her prior conviction for felony child abuse, which occurred before the victim had died. North Carolina defines first-degree murder as:

> A murder which shall be perpetrated by means of . . . poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon. . . .

N.C. Gen. Stat. § 14-17(a) (2021).

¶ 13 N.C. Gen. Stat. § 14-17(a) describes three categories of criminal behavior that qualify as first-degree murder: "(1) willful, deliberate, and premeditated killings (category 1); (2) killings resulting from poison, imprisonment, starvation, torture or lying in wait (category 2); and (3) killings that occur during specifically enumerated felonies or during a 'felony committed or attempted with the use of a deadly weapon' (category 3)." *State v. Jones*, 353 N.C. 159, 166, 538 S.E.2d 917, 923 (2000) (citation omitted). The third category of first-degree murder is commonly known as felony murder. *Id.* at 164, 538 S.E.2d at 922. The State may proceed against a defendant on any theory and "it is proper for the trial court to submit the issue of the defendant's guilt of that charge to the jury on each of the theories of first degree murder supported by substantial evidence at trial." *State v. Clark*, 325 N.C. 677, 684, 386 S.E.2d 191, 195 (1989).

¶ 14 We apply the *Blockburger* test and *Diaz* exception to determine whether double jeopardy principles bar prosecution of Defendant for first-degree murder.

1. Felony Murder Theory

¶ 15 The felony murder theory allows the State to prosecute a defendant for first-degree murder if the victim's death occurred in the commission of certain enumerated felonies or of felonies committed or attempted with the use of a deadly weapon. *Jones*, 353 N.C. at 164, 538 S.E.2d at 922. The underlying felony becomes an element of the offense of first-degree murder and "may not thereafter be the basis for additional prosecution or sentence." *State v. Cherry*, 298 N.C. 86, 113, 257 S.E.2d 551, 567 (1979). Under *Blockburger*, each offense requires proof of the same facts, so "a defendant may not be punished for felony murder and for the underlying, 'predicate' felony." *See Gardner*, 315 N.C. at 454, 460, 340 S.E.2d at 709, 712.

¶ 16 In this case, Defendant was previously convicted and served a sentence for felony child abuse, which can be a predicate offense of felony murder. *State v. Pierce*, 346 N.C. 471, 493, 488 S.E.2d 576, 589 (1997). Prosecuting Defendant for felony murder would require proof of the same facts as her felony child abuse conviction, so it fails the *Blockburge*r test.

¶ 17 However, the *Diaz* exception to *Blockburger* allows Defendant to be prosecuted for felony murder. *Diaz* is applicable to Defendant's case because Defendant's son allegedly died of complications of that abuse twenty-one years after it occurred in 1997. While the State was able to prosecute Defendant for felony child abuse in 1997, it was precluded from prosecuting her for felony murder until her son's death. Applying the *Diaz* exception to these circumstances, the additional fact of his 2018 death renders felony murder a separate offense from felony child abuse. Defendant's prosecution for first-degree murder under the felony murder theory does not violate federal or state double jeopardy protections.

2. Other First-degree Murder Theories

¶ 18 In addition to felony murder, NC. Gen. Statute § 14-17(a) permits first-degree murder prosecution under theories of premeditation and deliberation or torture, among others. Different theories of first-degree murder under NC. Gen. Stat. § 14-17(a) require proof beyond a reasonable doubt of distinct criminal elements. For example, our Supreme Court has held that "premeditation and deliberation are not elements of the crime of felony-murder" but that the underlying felony is an element of felony murder. *State v. Swift*, 290 N.C. 383, 407, 226 S.E.2d 652, 669 (1976). Additionally, prosecution under the first-degree murder theory of premeditation and deliberation includes the element of a specific intent

to kill, while prosecution under a theory of torture or felony murder does not. *State v. Evangelista*, 319 N.C. 152, 158, 353 S.E.2d 375, 380 (1987).

¶ 19 The *Blockburger* test is satisfied if a defendant is convicted of an underlying felony and first-degree murder, based on a theory different from felony murder, because each offense requires proof of fact that the other does not. In *State v. Burgess*, a defendant was convicted for first-degree murder by premeditation and deliberation, felony murder with arson as the underlying felony, and arson. *State v. Burgess*, 345 N.C. 372, 381–82, 480 S.E.2d 638, 643 (1997). The North Carolina Supreme Court held the defendant could be sentenced separately for both arson and first-degree murder, based on the theory of premeditation and deliberation. *Id.* at 382, 480 S.E.2d at 643.

¶ 20 Here, felony child abuse is an offense distinct from murder by premeditation and deliberation or by torture because each offense requires proof of different criminal elements. Defendant's prosecution for first-degree murder theories such as premeditation and deliberation or torture satisfies the *Blockburger* test and does not violate Defendant's constitutional right to be protected against double jeopardy. The Double Jeopardy Clause does not constrain the State's prosecution of Defendant under any first-degree murder theory.

B. Right to Due Process

¶ 21 **[2]** Defendant next asserts a first-degree murder prosecution would violate her constitutional right to due process because she was found guilty of felony child abuse arising out of the same incident in 1997, twenty-five years ago, and has fully served the sentence imposed on her for that offense. Defendant argues that her Motion to Dismiss should have been granted because fundamental fairness "dictates that she should not again be forced to defend herself at trial" against criminal charges arising out of the same 1997 incident.

¶ 22 The Fourteenth Amendment of the United States Constitution provides that "[n]o State . . . shall deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV. Similarly, "[t]he Law of the Land Clause" in Article I, Section 19 of the North Carolina Constitution "has been held to be the equivalent of the Fourteenth Amendment's Due Process Clause in the Constitution of the United States." *Singleton v. N.C. Dep't of Health and Hum. Servs.*, 284 N.C. 104, 2022-NCCOA-412, ¶ 28 (citation omitted).

¶ 23 North Carolina does not have a statute of limitations for felony prosecutions. *State v. Johnson*, 275 N.C. 264, 271, 167 S.E.2d 274, 279

(1969). In 1991, North Carolina also abolished the ancient common law rule which prohibited prosecution of a defendant for murder if the victim died at least "a year and a day" beyond when the original injury was sustained. *State v. Vance*, 328 N.C. 613, 618, 403 S.E.2d 495, 499 (1991). Because the State is not subject to any time restrictions on charging or prosecuting for murder, Defendant argues that "the [D]ue [P]rocess [C]lause must bear the burden of providing some protection to a defendant who has already been punished for his or her conduct."

¶ 24 The United States Supreme Court has held "that the Due Process Clause has a limited role to play in protecting against oppressive delay." *United States v. Lovasco*, 431 U.S. 783, 789 (1977). A "due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.* at 790. The North Carolina Supreme Court applied this balancing test in *State v. Goldman* where a defendant was indicted for murder and armed robbery six years after the crime occurred. 311 N.C. 338, 340, 317 S.E.2d 361, 362–63 (1984). Balancing the "State's legitimate decision to defer prosecution during an ongoing investigation of the case" against the defendant's general allegations of prejudice from "faded memory and evidentiary difficulties[,]" the Court held that the defendant's constitutional due process rights were not violated. *Id.* at 345, 317 S.E.2d at 365.

¶ 25 In the present case, Defendant was indicted for first-degree murder twenty-one years after the incident occurred. A delay of twenty-one years is longer than the six-year delay at issue *Goldman*, but "it cannot be said precisely how long a delay is too long[,]" and "the courts must engage in a balancing test." *Id.* at 346, 317 S.E.2d at 366 (quoting *State v. McKoy*, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978)). The State's reason for deferring Defendant's indictment is legitimate, as the State was precluded from prosecuting Defendant for murder until 2018, when Defendant's son died. Defendant alleges that the twenty-one-year delay in initiating prosecution for first-degree murder caused actual prejudice to her defense because the "two other adults who were in the household in which the baby was abused have since passed away." Even assuming that this allegation is true, the State's inability to prosecute Defendant for first-degree murder until the victim's death, along with its significant interest in prosecuting individuals who may be guilty of first-degree murder, outweighs any prejudice to Defendant. The prosecutor is elected to decide whether sufficient evidence exists to charge her case and the burden to prove it beyond a reasonable doubt.

¶ 26 Under these circumstances, the Due Process Clause does not prohibit the State's prosecution of Defendant.

III. Conclusion

¶ 27 The trial court did not err in denying Defendant's Motion to Dismiss her indictment for first-degree murder. Defendant's prosecution for first-degree murder does not violate her constitutional rights to be protected against double jeopardy or to due process.

AFFIRMED.

Judges HAMPSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
DAVID RAEFORD TRIPP, JR.

No. COA21-688

Filed 6 December 2022

1. Constitutional Law—double jeopardy—felony child abuse—first-degree murder—prosecuted twenty-one years apart

After defendant was convicted of felony child abuse for injuries inflicted upon his girlfriend's infant son, his double jeopardy rights were not violated where, twenty-one years later, the State prosecuted him for first-degree murder because the child had died of complications resulting from the injuries at issue in the child abuse prosecution. Defendant's prosecution under a felony murder theory was proper because, although double jeopardy principles forbid separate prosecutions for felony murder and its predicate felony, these principles do permit the subsequent prosecution of a greater offense (here, murder) where a fact necessary for charging that offense (the child's death) was not present during the prosecution of the lesser-included offense (felony child abuse).

2. Constitutional Law—substantive due process—felony child abuse—first-degree murder—prosecuted twenty-one years apart

After defendant was convicted of felony child abuse for injuries inflicted upon his girlfriend's infant son, his substantive due process rights were not violated where, twenty-one years later, the State prosecuted him for first-degree murder because the child had died of complications resulting from the injuries at issue in the child abuse prosecution. The appellate court determined that defendant's

murder prosecution did not violate the federal constitution's Double Jeopardy Clause; therefore, the prosecution could not have violated the Due Process Clause of the Fourteenth Amendment, which does not provide greater double jeopardy protection than the Double Jeopardy Clause does. Further, defendant's murder prosecution did not violate the state constitution's Law of the Land Clause because, contrary to defendant's argument that he was being made to "pay his debt to society twice" after he had completed his sentence for felony child abuse, the State was charging defendant with a new and distinct crime.

Appeal by Defendant from order entered 28 June 2021 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 14 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Under the principles of double jeopardy and due process, may Defendant be prosecuted for murder twenty-one years after his conviction for felony child abuse now that the child has succumbed to his injuries? We hold that he may.

I. Background

¶ 2 On 12 April 1997, David, a fifteen-month-old child, was taken to the Columbia Brunswick Hospital by ambulance. The emergency room doctor "observed that the child was not breathing, that he had a head fracture, abnormal pupil response, facial bruising, deformity on an arm and a leg, and a burned area in the diaper region, and that the child was having seizures." *State v. Noffsinger*, 137 N.C. App. 418, 419, 528 S.E.2d 605, 607 (2000). A pediatrician who treated David's injuries determined that he suffered from Battered Child Syndrome based on her "physical findings . . . and not finding a sufficient explanation for any of the injuries as had been described." According to the pediatrician, David would "never" be able to live independently and that "the entire part of his brain that involves learning, thinking, maturing, [and] developing normally ha[d] been destroyed." David barely survived and was left unable to function on his own without assistance.

¶ 3 In 1998, David Raeford Tripp, Jr. ("Defendant") entered an *Alford* plea to four counts of felony child abuse. Defendant was the boyfriend of the abused child's mother, Robin Noffsinger, who was also indicted for felony child abuse charges as a result of the child's injuries. David suffered severe fractures to his skull, spine, limbs, and ribs; second- and third-degree burns to his buttocks and genitals; missing hair; and multiple bruises, cuts, and puncture wounds over his body, among others. The burns resulted in permanent nerve damage, and at the time of the plea, David was living in a long-term care home for children.

¶ 4 As part of the plea agreement, the State agreed to dismiss an indictment for malicious maiming, a Class C felony. The parties also agreed that the

> State will not use Defendant's guilty plea in either a direct or impeaching manner in any subsequent prosecution of Defendant arising out of the acts and transactions that form the basis of the charges to which the Defendant is pleading guilty except the State may use Defendant's conviction herein as allowed by Rule 609.
>
> Defendant reserves the right to raise a defense of former or double jeopardy in any subsequent prosecution of Defendant based on the acts or transactions forming the basis of the charges to which Defendant is pleading guilty.
>
> The State reserves the right to proceed against the Defendant at any later date for any and all criminal charges for which the law allows.

¶ 5 The trial court sentenced Defendant to active sentences for three counts of felony child abuse and a suspended sentence on the fourth count. He completed his sentences in 2008. David lived a disabled life for almost twenty-one years before allegedly succumbing to his injuries and dying in 2018. The State now seeks to prosecute Defendant for murder.

¶ 6 Defendant was indicted for first-degree murder on 21 May 2018. Because the indictment related to Defendant's previous offenses, he moved to dismiss the murder charge, alleging prosecution for first-degree murder would violate his right to be free from double jeopardy and his right to due process. The trial court denied his motion to dismiss on 28 June 2021. Defendant appealed this denial by petition for writ of certiorari. On 26 August 2021, this Court granted Defendant's petition

for writ of certiorari for the limited purpose of reviewing the trial court's denial of Defendant's Motion to Dismiss.

II. Jurisdiction

¶ 7 Because the denial of Defendant's motion to dismiss preceded final judgment on the merits, this appeal is interlocutory. *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). We may properly hear interlocutory appeals upon writ of certiorari. N.C. Gen. Stat. § 15A-1444(g) (2021). "Rule 21 of our appellate rules provides that 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 . . . no right of appeal from an interlocutory order exists.' " *Rauch v. Urgent Care Pharmacy, Inc.*, 178 N.C. App. 510, 515, 632 S.E.2d 211, 216 (2006) (quoting N.C. R. App. P. 21(a)(1)). As this Court has previously stated, "the consequences of rejecting Defendant's double jeopardy argument are surely serious." *State v. Smith*, 267 N.C. App. 364, 367, 832 S.E.2d 921, 925 (2019). Defendant filed a Petition for Writ of Certiorari on 29 July 2021. We allowed the petition on 26 August 2021.

III. Standard of Review

¶ 8 We review "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). Likewise, we review "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).

IV. Double Jeopardy

¶ 9 **[1]** "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.

¶ 10 This right against double jeopardy provides several protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664-65 (1969). We address the second of these protections as it is undisputed that Defendant's prior felony child abuse convictions and the current first-degree murder indictment arise out of the same incident that occurred in 1997.

¶ 11 Determining if a second prosecution is for the same offense, the U.S. Supreme Court relies on the Same-Elements Test of *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). *United States v. Dixon*, 509 U.S. 688, 696, 113 S. Ct. 2849, 2856, 125 L. Ed. 2d 556,

568 (1993). Two offenses for the same conduct are considered the same offense under this test unless "each offense contains an element not contained in the other." *Id.* Hence, lesser-included and greater offenses are treated as the same. *Brown v. Ohio*, 432 U.S. 161, 169, 97 S. Ct. 2221, 2227, 53 L. Ed. 2d 187, 196 (1977). For example, a contempt prosecution for the disruption of judicial business and a subsequent prosecution for the criminal assault that was part of the disruption fail the Same-Elements Test "because the contempt offense did not require the element of criminal conduct, and the criminal offense did not require the element of disrupting judicial business." *Dixon*, 509 U.S. at 697, 113 S. Ct. at 2856, 125 L. Ed. 2d at 568. Thus, both offenses may be prosecuted without violating the Double Jeopardy Clause.

¶ 12 Our State's felony murder rule allows for the conviction of first-degree murder when a victim is killed "in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." *State v. Watson*, 277 N.C. App. 314, 2021-NCCOA-186, ¶ 23 (quoting N.C. Gen. Stat. § 14-17). At the time of Defendant's original sentencing in 1997, a non-parent committed felony child abuse when the "person providing care to or supervision of a child less than 16 years of age . . . intentionally inflicts any serious physical injury upon or to the child or . . . intentionally commits an assault upon the child which results in any serious physical injury." N.C. Gen. Stat. § 14-318.4(a) (1997). The State concedes and we agree that, under the Same-Elements Test, Defendant's conviction of felony child abuse appears on its face to be a lesser-included offense of felony murder and should be treated as the same offense unless an exception applies. We now consider the exceptions.

¶ 13 One exception to the general prohibition of placing individuals in double jeopardy would have this Court uphold the prosecution of a greater- or lesser-included offense if our legislature specifically intends to treat the offense at issue as a separate offense from others. The U.S. Supreme Court illustrated this exception in *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 678, 74 L. Ed. 2d 535, 542 (1983) when it upheld the prosecution of both robbery and armed criminal action. Though one crime contained the same elements as that of the other such that prosecution for both generally ought to have been prohibited, the Court found no error with the prosecution because the legislature provided that "[t]he punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly

weapon." *Hunter*, 459 U.S. at 362, 103 S. Ct. at 676, 74 L. Ed. 2d at 539. Similarly, this Court has held "[w]hen a defendant is tried under two different statutes for the same conduct, 'the amount of punishment allowable under the double jeopardy clause . . . is determined by the intent of the legislature.' " *State v. Barksdale*, 237 N.C. App. 464, 473, 768, S.E.2d 126, 132 (2014) (quoting *State v. Freeland*, 316 N.C. 13, 21, 340 S.E.2d 35, 39 (1986)).

¶ 14 This legislative intent exception has only ever been utilized with *concurrent* sentencing and not *subsequent* prosecutions as is the case here. Though our legislature identifies felony child abuse and murder as separate crimes "even when both offenses arise out of the same conduct," *State v. Elliott*, 344 N.C. 242, 278, 475 S.E.2d 202, 218 (1996), we refrain, in this case, from considering whether the legislature's authorization to prosecute a single occurrence as two distinct crimes applies to a subsequent prosecution scenario when a more established exception exists.

¶ 15 The more established exception which applies in this case is found in *Diaz v. United States*. 223 U.S. 442, 449, 32 S. Ct. 250, 251, 56 L. Ed. 500, 503 (1912). Under the *Diaz* Exception, a defendant subsequently may be prosecuted for a separate offense if a requisite element for that offense was not an element of the offense charged during the defendant's prior prosecution. *Id.* For example, as in *Diaz*, a defendant convicted of assault and battery may subsequently be tried for murder if the victim later dies from his injuries. *Id.*

¶ 16 Here, the State could not have prosecuted Defendant for murder in 1998 because the abused child, David, had not yet died. To be convicted of murder, one must be proven guilty of "(1) the unlawful killing, (2) of another human being, (3) with malice." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citing N.C. Gen. Stat. § 14-17). It was not until David died in 2018, allegedly from his injuries, that the missing element necessary to pursue a murder indictment manifested. This scenario triggers the *Diaz* Exception. Where the perpetrator in *Diaz* was prosecuted for assault and battery before the victim's death and for murder after the victim's death, Defendant here was prosecuted for felonious child abuse before the victim's death and is now being prosecuted for murder after the victim's death.

¶ 17 Notwithstanding Defendant's exposure to prosecution under the federal scheme, Defendant asks us to consider whether our State affords greater protection from double jeopardy than the U.S. Constitution as applied to the facts of this case. Generally, States are free to grant greater

protections to its citizens than afforded under the U.S. Constitution. *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998). Accordingly, Defendant urges this Court to adopt the added protection of the Same Conduct Test used in the U.S. Supreme Court case of *Grady v. Corbin*. Under this test, the Double Jeopardy Clause stands as a bar against "a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady v. Corbin*, 495 U.S. 508, 510, 110 S. Ct. 2084, 2087, 109 L. Ed. 2d 548, 557 (1990). The U.S. Supreme Court later overturned this test in *United States v. Dixon*. 509 U.S. 688, 704, 113 S. Ct. 2849, 2860, 125 L. Ed. 2d 556, 573 (1993). In *Dixon*, the Court ruled that the test "is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy." *Id*. Citing the Court's reasoning in *Dixon*, the North Carolina Supreme Court refused to adopt it. *State v. Gay*, 334 N.C. 467, 490, 434 S.E.2d 840, 853 (1993). Bound by these precedents, we must not adopt the Same Conduct Test here. *See Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985) (stating this Court lacks authority to overrule decisions of our Supreme Court).

¶ 18 Defendant also urges this Court not to apply the *Diaz* Exception to our State's tradition of prohibiting double jeopardy. Here, too, the North Carolina Supreme Court has spoken. *State v. Meadows* fully recognizes the *Diaz* Exception as applied to our State's application of the principles barring double jeopardy. 272 N.C. 327, 331, 158 S.E.2d 638, 641 (1968). In *Meadows*, the defendant pleaded guilty to felonious assault before the victim died. *Id*. at 331, 158 S.E.2d at 640. After the victim died, the State sought to prosecute the defendant for murder. *Id*. Our Supreme Court cited *Diaz* in allowing the prosecution. *Id*. at 331, 158 S.E.2d at 641.

¶ 19 Defendant points out that *Meadows* was decided before our State disposed of the common-law year-and-a-day rule. *See State v. Vance*, 328 N.C. 613, 616-19, 403 S.E.2d 495, 498-99 (1991) (outlining the history of the year-and-a-day rule before abrogating it). Further, our legislature has not enacted a statute of limitations for the prosecution of felonies. *State v. Johnson*, 275 N.C. 264, 271, 167 S.E.2d 274, 279 (1969). Yet, these conditions do not affect this analysis of double jeopardy protections. Our legislature authorizes the prosecution of felonies years after their commission, and our constitutional safeguards permit it. *See State v. Barnett*, 223 N.C. App. 450, 459, 734 S.E.2d 130, 137 (2012) (exampling a felony conviction over twenty-five years after the offense).

V. Substantive Due Process

¶ 20 **[2]** In the absence of double jeopardy protection, the year-and-a-day rule, or an applicable statute of limitation, Defendant calls upon the aid of substantive due process to contend that it is a violation of his constitutional rights to prosecute him for first-degree murder twenty-one years after being convicted of felony child abuse for the same act. We are unpersuaded.

¶ 21 Substantive due process developed to "prevent[] the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *State v. Womble*, 277 N.C. App. 164, 2021-NCCOA-150, ¶ 79 (quoting *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998)). This doctrine arose from the Fourteenth Amendment of the U.S. Constitution and has been interpreted to exist within our State's constitutional variant—the Law of the Land Clause. *Id.* at ¶¶ 79, 82.

¶ 22 The U.S. Supreme Court has "decline[d] . . . to hold that the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 116, 123 S. Ct. 732, 742, 154 L. Ed. 2d 588, 602 (2003). Since we hold that the subsequent prosecution of Defendant is permitted under the U.S. Constitution's Double Jeopardy Clause, we likewise hold that it does not violate the Due Process Clause of the Fourteenth Amendment. We now turn our attention to our State's Law of the Land Clause.

¶ 23 Article I, Section 19, of our State's Constitution reads,

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

"The term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution." *In re Moore*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976). We note, however, that the U.S. Supreme Court's interpretation of the Due Process Clause is "not controlling[] authority for interpretation of the Law of the Land Clause." *Singleton v. N.C. HHS*, 284 N.C. App. 104, 2022-NCCOA-412,

¶ 29 (quoting *Evans v. Cowan*, 132 N.C. App. 1, 6, 510 S.E.2d 170, 174 (1999)). For instance, "[o]ur Supreme Court has read our Law of the Land Clause to provide greater protection than the Due Process Clause of the Fourteenth Amendment." *Womble*, 277 N.C. at ¶ 82. It protects "against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained." *State v. Joyner*, 286 N.C. 366, 371, 211 S.E.2d 320, 323 (1975).

¶ 24 Defendant does not cite to a specific law that offends the doctrine of substantive due process but asserts generally that Defendant's "right to due process would be violated if he is forced to pay his debt to society twice." To clarify, the State does not seek to prosecute Defendant once more for the crime of felony child abuse. Today, it seeks his prosecution for the crime of first-degree murder. Perhaps Defendant's "debt" for felony child abuse has been paid, but we look to whether a potential "debt" for murder is due. We therefore conclude the trial court's denial of Defendant's Motion to Dismiss does not violate Defendant's fundamental rights as protected under the doctrine of substantive due process.

VI. Conclusion

¶ 25 The *Diaz* Exception permits the subsequent prosecution of a greater-included offense if a fact necessary for that offense was not present during Defendant's prior prosecution. We hold that the *Diaz* Exception applies to the facts of this case and that substantive due process allows for the prosecution of Defendant for first-degree murder. The trial court's denial of Defendant's motion to dismiss is affirmed.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
ROBERT MacDONALD WALTERS, Defendant

No. COA22-291

Filed 6 December 2022

1. Search and Seizure—drug dog sniff—bag containing methamphetamine and legal hemp—not a Fourth Amendment search

In a prosecution for possession of methamphetamine, the trial court properly denied defendant's motion to suppress evidence from his arrest, including a bag containing methamphetamine and hemp that was seized from his truck after a drug-detecting police dog had sniffed the vehicle. Defendant had no legitimate privacy interest in possessing methamphetamine, and therefore the drug sniff did not constitute a search under the Fourth Amendment and did not require probable cause. Further, defendant's argument regarding North Carolina's legalization of hemp—specifically, that it rendered the drug sniff a Fourth Amendment search because the dog could not differentiate between legal hemp and illegal marijuana—was irrelevant because defendant could not create a legitimate privacy interest in possessing the illegal methamphetamine simply by storing it in the same bag along with the legal hemp.

2. Search and Seizure—probable cause—warrantless search—motor vehicle exception—possession of methamphetamine

In a prosecution for possession of methamphetamine, the trial court properly denied defendant's motion to suppress evidence from his arrest, including a bag containing methamphetamine that was seized from his truck during a warrantless search. Law enforcement had probable cause to search inside defendant's truck under the motor vehicle exception to the Fourth Amendment's warrant requirement, where one of the officers had seized methamphetamine from defendant on previous occasions, defendant had outstanding warrants for his arrest for methamphetamine possession, and where a drug-sniffing police dog that was trained and certified in detecting methamphetamine had alerted the officers to the truck.

Appeal by defendant from judgment entered 27 October 2021 by Judge R. Gregory Horne in Superior Court, Watauga County. Heard in the Court of Appeals 1 November 2022.

STATE v. WALTERS

[286 N.C. App. 746, 2022-NCCOA-796]

Attorney General Joshua H. Stein, by Assistant Attorney General Phyllis A. Turner, for the State.

Assistant Public Defender Max E. Ashworth, III, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant appeals from a judgment entered upon a jury verdict finding him guilty of possession of methamphetamine. Defendant argues evidence regarding the methamphetamine was inadmissible because the police did not have probable cause to search his vehicle due to recent changes in North Carolina law involving marijuana and industrial hemp. Because Defendant had no legitimate expectation of privacy in the bag where he stored both his hemp and methamphetamine, and Defendant's bag was not protected by the federal Constitution or this State's Constitution, we affirm the trial court's denial of Defendant's motion to suppress.

I. Background

¶ 2 Defendant contends the trial court erred by denying his motion to suppress evidence found during a search of his vehicle. Defendant and the State agreed, on the record, upon the factual basis for purposes of deciding the motion to suppress. They agreed the trial court should consider an affidavit by Defendant's counsel in support of the motion to suppress and a "SYNOPSIS" written by the responding deputy on the night of Defendant's arrest, which was attached to Defendant's counsel's affidavit as an exhibit. Defendant and the State did not formally introduce any additional evidence when the motion was heard before trial on 26 October 2021.

¶ 3 The synopsis indicates on 16 October 2020 Watauga County Sheriff's Deputy Brian Lyall was driving and on duty when he "noticed a black Dodge diesel truck" at an intersection. Deputy Lyall recognized the driver as Defendant; Deputy Lyall also had information from another deputy, Deputy Norris, that Deputy Norris had "seized suspected Methamphetamine off of [Defendant] in the recent past." Deputy Norris had also taken out felony possession warrants on Defendant, which were still outstanding.[1] Deputy Lyall turned around to follow

1. The outstanding warrants that were the original cause for Defendant's arrest were not included in the Record on Appeal, but Defendant does not dispute that he was arrested upon the outstanding warrants.

the truck and saw "a black in color Dodge sitting in the parking lot of" a car dealership. Deputy Lyall then turned on his lights and "initiate[d] a traffic stop."

¶ 4 Here, Defendant's counsel's affidavit and Deputy Lyall's synopsis differ on some details of the exact sequence of events. According to Deputy Lyall's synopsis, he asked for Defendant's driver's license, radioed dispatch, and confirmed Defendant still had an "outstanding warrant for his arrest." Defendant's counsel's affidavit states, based upon his review of the body-cam video of the event, that "Upon arriving at the Dodge Ram, Dep. Lyall opened the driver's side door of the Dodge Ram and ordered Defendant to exit the vehicle. . . . Defendant complied with Dep. Lyall's request and immediately exited the Dodge Ram." The affidavit continues, "[u]pon exiting the Dodge Ram, Dep. Lyall immediately placed the Defendant under arrest and handcuffed the Defendant." The affidavit notes, "[d]espite what is noted in Exhibit 'A,' [the synopsis,] Dep. Lyall did not ask Defendant for license, registration, or any other documentation prior to placing him under arrest." There was no further explanation of the discrepancy between the events contained in the body-cam video as asserted in Defendant's counsel's affidavit and Deputy Lyall's synopsis.

¶ 5 Deputy Lyall called "Canine Handler Watson to the scene," arrested Defendant, searched him, placed him in handcuffs behind his back, and put him in Deputy Lyall's patrol car. The affidavit states Deputy Lyall "retrieved the Defendant's cell phone so that Defendant could make arrangements for the Dodge Ram[,]" but the synopsis does not. The affidavit also states that, due to Defendant's discomfort and difficulty with having his hands handcuffed behind his back, Deputy Lyall allowed Defendant to exit the patrol car and Deputy Lyall moved Defendant's handcuffs to the front of Defendant's body. While Deputy Lyall was moving Defendant's handcuffs, or shortly thereafter, Deputy Watson arrived. Deputy Lyall then placed Defendant back in the patrol car.

¶ 6 The affidavit indicates Deputy Lyall asked Deputy Watson to "run his dog" around Defendant's truck after Deputy Lyall placed Defendant back in the patrol car. The synopsis does not indicate Deputy Lyall asked Deputy Watson to run his dog around the truck, but only states that after Deputy Lyall placed Defendant in the patrol car "Deputy Watson advised [Deputy Lyall] that his Canine indicated on the vehicle."[2]

2. Deputy Watson confirmed during the State's presentation of evidence that the "dog is certified in cocaine, heroin, meth[amphetamine], and marijuana." The dog is annually recertified to detect these substances. Defendant did not object to Deputy Watson's testimony.

Deputy Lyall searched the truck and "under the [driver's side] seat [Deputy Lyall] located a black [C]rown [R]oyal bag. Inside the bag was a bag of Marijuana, a Marijuana smoking device, a plastic tube of Marijuana and a plastic bag containing a white crystal like substance." Deputy Watson stayed behind to coordinate the towing of the truck while Deputy Lyall took Defendant to a magistrate's office where he was served the "outstanding warrant for possession of Methamphetamine." Defendant was later indicted for possession of methamphetamine, possession of marijuana paraphernalia, and simple possession of marijuana, a Schedule VI controlled substance, based on the search on 16 October 2020. "The suspected Methamphetamine" from 16 October 2020 was "sent to the Western Regional Laboratory" for testing. The State presented expert testimony at trial identifying the substance as methamphetamine. The record is unclear on the timing, but at some point prior to trial the "Marijuana" located during the search of Defendant's truck was identified as hemp. The State voluntarily dismissed the charges for possession of marijuana paraphernalia and possession of marijuana on 28 October 2021.

¶ 7 Defendant filed a pretrial motion to suppress "any and all evidence or potential evidence seized following an illegal search of [his] motor vehicle" on 16 October 2021. This motion was heard 26 October 2021, on the first day of Defendant's trial, after jury selection but before the State began presenting evidence. After hearing counsels' arguments on the motion, the trial court reconciled the differences between the synopsis and affidavit and made oral findings of fact:

> The Court would find that Deputy Brian Lyall of Watauga County Sheriff's department was on patrol. And to be clear, I'm also relying upon the attached affidavit and the synopsis from Deputy Brian Lyall that's included in the stipulation; . . .
>
> . . .
>
> THE COURT: On the 16th day of October 2020, that Deputy Lyall was operating his patrol car on 421 South in Boone, east side of Boone. That at the intersection of 421 South and Old 421 South, he observed a Dodge diesel pickup truck and observed [Defendant] to be the operator of that vehicle. That based upon Deputy Lyall's previous information, he knew that there was an outstanding order for arrest with regard to the driver, [Defendant]. Accordingly, he followed

> the vehicle and ended up finding the vehicle stopped in the PVA of the Chevrolet dealership on the east side of Boone. That upon seeing the vehicle he pulled up, activated his blue lights and initiated a formal stop of the vehicle.
>
> He approached the vehicle, found [Defendant] to be the operator. That through communication with his dispatch, and verified that there was an outstanding order for arrest for [Defendant]. That he approached the vehicle, directed [Defendant] to exit the vehicle, and placed him in custody pursuant to the order for arrest. That he placed [Defendant] in his patrol vehicle. That he then at the request of [Defendant], approached the Dodge Pickup truck to retrieve [Defendant's] cell phone so that he could make provision for disposition or care for the truck. That when Deputy Lyall returned with the cell phone, he noted that [Defendant] was uncomfortable, having been handcuffed with his hands behind his back; that he was fidgeting and was in an uncomfortable position. That Deputy Lyall then allowed [Defendant] to step from the vehicle and unlocked his handcuffs from behind [Defendant] and secured the handcuffs so [Defendant's] hands were in front to relieve the discomfort. That is shown on the video.
>
> Deputy Watson pulled onto the scene at this time. That at this point, [Defendant] was in custody pursuant to the order for arrest. That Officer Watson was a K9 handler and had a K9 officer. . . . And that after placing [Defendant] back into his patrol car after adjusting his handcuffs, Deputy Lyall requested Deputy Watson to run his dog around the Dodge Ram. That Deputy Watson did that and that the K9 alerted as to the vehicle. And subsequent to that, the interior portion of the vehicle was searched, resulting in the discovery and seizure of contraband that is underlying the charge presently before the court.

The trial court then discussed case law argued by Defendant and the State, after which the trial court concluded:

> That the parties having stipulated to the affidavit and attached arrest report, the Court has made the above

> findings of fact. The Court, therefore, would conclude that [Defendant] was in custody. It's separate and apart from his arrest, yet contemporaneous with that, Deputy Watson walked the trained K9 around the exterior portion of the vehicle and the dog alerted.
>
> The Court would conclude that the dog's alert constituted probable cause, and therefore, there was a basis separate and apart from the arrest to search the interior of the vehicle. That the subsequent search found whatever the subsequent evidence shows. Therefore, the Court would find and conclude that walking the K9 around the vehicle did not delay the ongoing arrest at the scene. That there was probable cause to support that walking the K9 around did not constitute a search of the vehicle. That the subsequent alert created probable cause for a search of the interior of the vehicle, and any items seized as a result were lawfully, subsequent search was lawful and any items seized were lawfully obtained.

The trial court then disposed of other pretrial motions, and the State presented evidence.

¶ 8 During the State's presentation of evidence, Defendant objected to Deputy Watson's testimony on the search of his truck generally and to Deputy Watson's testimony regarding the "Crown Royal bag with a container with a leafy green substance . . . ." Defendant did not object after either Deputy Watson or Deputy Lyall testified about the "white crystal substance" found in Defendant's truck. Defendant was ultimately convicted by a jury of possession of methamphetamine; the trial court entered a judgment on or about 27 October 2021. Defendant gave notice of appeal in open court.

II. Standard of Review

¶ 9 Defendant acknowledges he did not object when the State introduced Deputy Watson and Deputy Lyall's testimony regarding the "white crystal substance" found in the truck or the State Crime Lab forensic scientist's testimony that the substance found in Defendant's truck was identified as methamphetamine. Therefore, the issue of whether the trial court erred in denying his motion to suppress is unpreserved and ordinarily would be precluded from appellate review. *See State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 320 (2015). But,

> [i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L.Ed.2d 58 (2008). Here, Defendant "specifically and distinctly contend[s]," N.C. R. App. P. 10(a)(4), "[t]he trial court committed plain error when it denied [Defendant's] motion to suppress . . . ." (Emphasis removed.)

¶ 10 We therefore review Defendant's appeal for plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See* [*State v.*] *Odom*, 307 N.C. [655,] 660, 300 S.E.2d [375,] 378 [1983]. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error "had a probable impact on the jury's finding that the defendant was guilty." *See id.* (citations and quotation marks omitted); *see also Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (stating "that absent the error the jury probably would have reached a different verdict" and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error). Moreover, because plain error is to be "applied cautiously and only in the exceptional case," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *McCaskill*, 676 F.2d at 1002).

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Defendant "bear[s] the heavier burden of showing that the error rises to the level of plain error." *Id.* at 516, 723 S.E.2d at 333.

> "In conducting our review for plain error, we must first determine whether the trial court did, in fact, err in denying Defendant's motion to suppress." *State*

> *v. Powell*, 253 N.C. App. 590, 594–95, 800 S.E.2d 745, 748-49 (2017) (noting that, in a plain error analysis regarding the denial of a motion to suppress, we apply the normal standard of review to determine whether error occurred).
>
> "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." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176, *disc. rev. denied*, 369 N.C. 190, 793 S.E.2d 694 (2016).

State v. Newborn, 279 N.C. App. 42, 2021-NCCOA-426, ¶¶ 23-24. If the trial court erred, we then determine whether that error "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378).

III. Analysis

¶ 11 Defendant presents and argues a single issue on appeal: "Whether law enforcement officers need probable cause to use a drug-detection dog to sniff a vehicle for narcotics when the dog is unable to distinguish between contraband and noncontraband." Because Defendant did not have a legitimate expectation of privacy in the bag where he stored his methamphetamine, which could be detected by the drug-sniffing dog used by the police, the trial court did not err by denying Defendant's motion to suppress. We affirm.

¶ 12 Defendant did not challenge any of the trial court's findings of fact.[3] Instead, his arguments focus on the trial court's conclusion the officers

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3. As a preliminary matter, we note the trial court did not reduce its ruling on Defendant's motion to writing, and only made oral findings of fact and conclusions of law at Defendant's trial. As to a motion to suppress, "[t]he judge must set forth in the record his findings of fact and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2021). "A written determination setting forth the findings and conclusions is not necessary, but it is the better practice." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (citing *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012)). Here, the trial court resolved any issues of fact in its oral findings of fact, and we can address Defendant's arguments based upon the trial court's oral findings of fact and conclusions of law. "Thus, our cases require

had probable cause to search his truck and whether the dog sniff also constituted a search. The question on appeal is therefore whether the trial court erred in determining the use of a drug-sniffing dog and subsequent search of Defendant's truck was lawful. If the trial court did err, we must then consider whether this error was so fundamental in that "after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). Thus, we first focus our analysis on whether the deputies were constitutionally permitted to search Defendant's vehicle and whether the deputies lawfully used the drug-sniffing dog.

¶ 13 Defendant argues the trial court erred by denying his motion to suppress because the deputies made a warrantless search of his vehicle without probable cause when Deputy Watson ran his dog around the truck. Defendant does not argue, if the dog sniff is not a search, whether the dog sniff could assist in establishing probable cause for the subsequent search of his truck by Deputies Lyall and Watson. Defendant argues the dog sniff was a search because recent changes in North Carolina law–namely passage of the Industrial Hemp Act in 2015 legalizing the production, possession, and consumption of hemp–now renders drug-detecting dogs unable to differentiate between contraband and noncontraband items. Because the dogs signal to THC, which is present in both marijuana and hemp, and because Defendant now has a legitimate privacy interest in hemp, Defendant argues the use of drug-detecting dogs in this context "runs afoul of the holding in" *Illinois v. Caballes*, 543 U.S. 405, 160 L. Ed. 2d 842 (2005). Defendant argues the use of the dog is now a search, the deputies had no probable cause to search his truck, none of the exceptions to the warrant requirement for a search apply, the evidence of the methamphetamine should have been suppressed, and the trial court erred in denying his motion to suppress. Because Defendant does not challenge any of the trial court's findings of fact, we interpret these arguments to address the trial court's conclusion "there was probable cause to support that walking the K9 around did not constitute a search of the vehicle."

¶ 14 The State conversely argues "[t]he trial court properly denied Defendant's motion to suppress based on well-settled law in North Carolina[,]" specifically that "[t]he trial court relied on *State v. Branch*, 177 N.C. App. 104, 627 S.E.2d 506 (2006) and *Illinois v. Caballes*[,] 543

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findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing." *Id.*

U.S. 405, 125 S.CT. 834, 160 L. Ed. 842 (2005)." The State argues these cases determine Defendant could not have had a privacy interest in any contraband he possessed, and since the dog sniff revealed the location of a substance Defendant had no right to possess, *Caballes* and *Branch* establish that the dog sniff did not violate the Fourth Amendment. Defendant's arguments require us to begin with the basics of the constitutional protections afforded criminal defendants from unreasonable searches and seizures.

A. Search and Seizure

¶ 15 **[1]** "The Fourth Amendment to the United States Constitution protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]' " *State v. Teague*, 2022-NCCOA-600, ¶ 26 (quoting U.S. Const. amend. IV). " 'The North Carolina Constitution affords similar protection.' " *Id.* (quoting *State v. Cabbagestalk*, 266 N.C. App. 106, 111, 830 S.E.2d 5, 9 (2019)) (citing N.C. Const. art. 1, § 20). Defendant contends (1) following the legalization of industrial hemp in North Carolina a dog sniff is a search, and (2) this particular dog sniff was an "unreasonable" search from which he was protected by the federal and State Constitutions.

1. What is a Fourth Amendment "Search"

¶ 16 This Court has previously addressed what constitutes a Fourth Amendment "search" and the implications of using drug-sniffing dogs to seek contraband in *State v. Washburn*:

> The first clause of the Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "[T]he touchstone of the Fourth Amendment analysis has been whether a person has a constitutionally protected reasonable expectation of privacy." *State v. Phillips*, 132 N.C.App. 765, 770, 513 S.E.2d 568, 572 (internal quotation marks omitted), *disc. review denied and appeal dismissed*, 350 N.C. 846, 539 S.E.2d 3 (1999). Such an unreasonable search "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85, 94 (1984).
>
> Official conduct that does not compromise any legitimate interest in privacy is not a search subject to

> the Fourth Amendment. *Id.* at 123, 104 S.Ct. 1652, 80 L.Ed.2d at 101. Any interest in possessing contraband cannot be deemed legitimate, and thus, governmental conduct that only reveals the possession of contraband does not compromise any legitimate privacy interest. *Id.* at 121–23, 104 S.Ct. 1652, 80 L.Ed.2d at 99–101.
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> The United States Supreme Court discussed the Fourth Amendment implications of a canine sniff in *United States v. Place*. 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). There, the Court treated the sniff of a well-trained narcotics dog as *sui generis* because the sniff "disclose[d] only the presence or absence of narcotics, a contraband item." *Id.* at 707, 103 S.Ct. 2637, 77 L.Ed.2d at 121. As the United States Supreme Court explained in *Illinois v. Caballes*, since there is no legitimate interest in possessing contraband, a police officer's use of a well-trained narcotics dog that reveals only the possession of narcotics does not compromise any legitimate privacy interest and does not violate the Fourth Amendment. 543 U.S. 405, 408–09, 125 S.Ct. 834, 160 L.Ed.2d 842, 847 (2005).

State v. Washburn, 201 N.C. App. 93, 96-97, 685 S.E.2d 555, 558 (2009). Because a dog sniff was not a search, at least prior to the legalization of industrial hemp in North Carolina, "probable cause was not a prerequisite for" the use of a dog to detect contraband. *See id.* at 99, 685 S.E.2d at 560; *see also Branch*, 177 N.C. App. at 108, 627 S.E.2d at 509 ("[O]nce the lawfulness of a person's detention is established, *Caballes* instructs us that officers need no additional assessment under the Fourth Amendment before walking a drug-sniffing dog around the exterior of that individual's vehicle."). As a result, the police were generally free to use drug-sniffing dogs during traffic stops to detect contraband without implicating the Fourth Amendment. *Compare Rodriguez v. U.S.*, 575 U.S. 348, 350, 191 L. Ed. 2d 492, 496 (2015) (expanding upon *Caballes* and holding "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation.").

¶ 17 Defendant contends the United States Supreme Court and North Carolina appellate court cases "must now be re-examined due to

industrial hemp's legalization." Defendant notes that previously "the United States Supreme Court and this Court held using a drug-detection dog to walk around a vehicle's exterior to sniff for narcotics is not a search. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40, 121 S. Ct. 447, 453; *State v. Fisher*, 141 N.C. App. 448, 457, 539 S.E.2d 677, 684." But given the legalization of hemp, Defendant argues that, because a drug-sniffing dog may now alert to noncontraband, the underlying rationale in *Caballes* now requires probable cause to use a drug-sniffing dog because the dog can alert to noncontraband.

¶ 18 As discussed above, the Supreme Court of the United States explained the Fourth Amendment implications of dog sniffs in *Caballes*. *See Caballes*, 543 U.S. 405, 160 L. Ed. 2d 842. In *Caballes*, the defendant was stopped for speeding on the highway. *Id.* at 406, 160 L. Ed. 2d at 845. A K-9 unit overheard the responding officer call dispatch to report the stop and also responded to the scene. *Id.* at 406, 160 L. Ed. 2d at 845-46. When the K-9 unit arrived, the K-9 officer walked the dog around the defendant's vehicle while the responding officer wrote the defendant a citation. *Id.* The dog alerted; based on the alert the officers searched the trunk of the defendant's vehicle; the officers found marijuana; and then the officers arrested the defendant. *Id.*

¶ 19 The United States Supreme Court held

> [o]fficial conduct that *does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. Jacobsen*, 466 US, at 123, 80 L Ed 2d 85, 104 S Ct 1652. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that *only* reveals the possession of contraband "compromises no legitimate privacy interest." *Ibid.* This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." *Id.*, at 122, 80 L Ed 2d 85, 104 S Ct 1652 (punctuation omitted). In *United States v. Place*, 462 US 696, 77 L Ed 2d 110, 103 S Ct 2637 (1983), we treated a canine sniff by a well-trained narcotics-detection dog as "*sui generis*" because "it discloses only the presence or absence of narcotics, a contraband item." *Id.*, at 707, 77 L Ed 2d 110, 103 S Ct 2637; see also *Indianapolis v. Edmond*, 531 US 32, 40, 148 L Ed 2d 333, 121 S Ct 447 (2000).

Id. at 408-09, 160 L. Ed. 2d at 847 (emphasis added). The Supreme Court further held "the use of a well-trained narcotics-detecting dog–one that 'does not expose noncontraband items that otherwise would remain hidden from public view,' *Place*, 462 US, at 707, 77 L Ed 2d 110, 103 S Ct 2637–during a lawful traffic stop, generally does not implicate legitimate privacy interests." *Id.* at 409, 160 L. Ed. 2d at 847. The Supreme Court noted this holding was consistent with recent precedent addressing searches that could detect both lawful and unlawful activity:

> The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information *other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.*

Id. at 409-10, 160 L. Ed. 2d at 847-48 (emphasis added).

¶ 20 Here, Defendant did not have a "legitimate privacy interest" in his methamphetamine. The drug-sniffing dog was trained and certified to alert on methamphetamine, and Defendant did not create a "legitimate privacy interest" as to the methamphetamine simply by storing it in the same bag with the hemp. *See id.* at 408, 160 L. Ed. 2d at 847 ("We have held that any interest in possessing contraband cannot be deemed 'legitimate[.]' "). Deputy Watson confirmed during the State's presentation of evidence that the "dog is certified in cocaine, heroin, meth[amphetamine], and marijuana." The dog was annually re-certified to detect these substances. The dog was trained to alert to the methamphetamine even in the absence of hemp. Thus, Defendant's argument that *Caballes* "must be re-examined due to industrial hemp's legalization" is simply not presented by the facts of this case, where the methamphetamine and hemp were in the same bag, and the canine was trained to detect both substances.

¶ 21 The legalization of hemp has no bearing on the continued illegality of methamphetamine, and the Fourth Amendment does not protect against the discovery of contraband, detectable by the drug-sniffing dog, because Defendant decided to package noncontraband beside it. Additionally, we have repeatedly applied precedent established before the legalization of hemp, even while acknowledging the difficulties in distinguishing hemp and marijuana *in situ*. *See Teague*, ¶ 58 (finding

decisions of the federal courts of North Carolina persuasive and deciding "[t]he passage of the Industrial Hemp Act, in and of itself, did not modify the State's burden of proof at the various stages of our criminal proceedings"); *State v. Highsmith*, 2022-NCCOA-560, ¶¶ 16-20 (determining the difficulties in distinguishing hemp and marijuana did not alter the traditional probable cause analysis, and the scent of marijuana or hemp in addition to other facts may grant an officer probable cause to search for or seize suspected contraband); *State v. Parker*, 277 N.C. App. 531, 2021-NCCOA-217, ¶¶ 13, 31 (noting the defendant argued the trial court erred in denying his motion to suppress by "failing to address the material issue of the indistinguishable scents of marijuana and legal hemp[,]" this Court held "we need not determine whether the scent or visual identification of marijuana alone remains sufficient to grant an officer probable cause to search a vehicle" because the police had additional facts available to them, other than the scent of marijuana or hemp, sufficient to grant the police probable cause).

¶ 22 We need not re-examine the application of the Supreme Court's holding in *Caballes* to a canine sniff based on the facts of this case. Defendant had no legitimate expectation of privacy in his contraband simply because it was stored together with non-contraband in his vehicle, the dog-sniff could detect the methamphetamine regardless of the presence of hemp, and the dog-sniff of Defendant's truck did not constitute a search.

B. Probable Cause

¶ 23 **[2]** Next, we address the trial court's conclusion that the dog's "alert created probable cause for a search of the interior of [Defendant's] vehicle." We have, so far, only determined that the use of the drug-sniffing dog did not constitute a search prohibited by the Fourth Amendment. We must still determine whether the police had probable cause for the subsequent search of Defendant's vehicle.

¶ 24 This Court recently published an opinion in *Highsmith* where the defendant made a similar argument. *See Highsmith*, ¶ 10. In *Highsmith*, the police received multiple complaints of a house being used to sell narcotics. *Id.* ¶ 4. Two officers followed a vehicle after it left the residence, then pulled the vehicle over after noticing it "had a broken brake light" and it "illegally cross[ed] a yellow line." *Id.* The defendant "was sitting in the vehicle's front passenger seat." *Id.* ¶ 5. The police recognized the defendant from "past encounters and arrests," noticed ammunition in a rear passenger seat, and the defendant and the driver of the vehicle "gave inconsistent stories about where they were headed and from

where they were coming." *Id.* ¶¶ 5-6. The police called a K-9 unit, and after the K-9 unit arrived the dog "sniffed the exterior of the vehicle and alerted to the possible presence of drugs." *Id.* ¶ 7. The defendant was removed from the vehicle; the police searched the vehicle; and the officers found evidence of marijuana and paraphernalia for the sale of marijuana. *Id.* ¶ 7. The defendant was indicted and filed a motion to suppress. *Id.* ¶¶ 9-10. The defendant and the State in *Highsmith* made similar arguments to Defendant and the State in this case:

> Defendant filed a motion to suppress, challenging the lawfulness of the search and subsequent seizure of the marijuana. Defendant premised his argument on the emerging industry of legal hemp, indistinguishable by either sight or smell from marijuana. Defendant argued at the hearing that a K-9 alert standing alone cannot support probable cause when legalized hemp is widely available. Because marijuana and hemp are indistinguishable, Defendant argued, an unlawful seizure would first be needed in order to perform testing to confirm the substance was marijuana. The K-9 alert therefore could not support the warrantless search, and the ensuing evidence recovered should be suppressed, as the result of both an illegal search and an illegal seizure following the search.
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> The State argued the existence of legal hemp does not change the analysis that a K-9 alert can support probable cause. The prosecutor explained that because the K-9 alert was not the only factor giving rise to the officers' probable cause to believe Defendant was engaged in criminal activity, this is "a K-9 sniff *plus*" case. (Emphasis added). Other factors cited by the prosecutor were the inconsistent statements made to officers by Defendant and the driver of the vehicle, the fact that neither the driver nor Defendant was the registered owner of the vehicle, and *the officers' knowledge of Defendant's prior arrests related to marijuana*.
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> The trial court denied Defendant's motion to suppress by order entered 8 February 2021. The trial court concluded that "K-9 Mindy's positive alert for narcotics at the SUV, along with other factors in evidence, provided the officers on the scene with sufficient facts to

> find probable cause to conduct a warrantless search of the inside of the vehicle."

Id. ¶¶ 10-12 (emphasis added).

¶ 25 On appeal, the defendant in *Highsmith* narrowed his argument compared to the Defendant in the present case. The defendant did "not argue on appeal that the search of the vehicle was unconstitutional. Instead, he argue[d] the trial court failed to make adequate findings of fact and conclusions of law regarding the *seizure* of the marijuana found during the search, given the difficulty of distinguishing legal hemp from illegal marijuana." *Id.* ¶ 16 (emphasis in original). This Court engaged in the traditional totality of the circumstances test to determine whether the police had probable cause to conduct a warrantless search and seizure of the marijuana:

> The Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures and apply to "brief investigatory detentions such as those involved in the stopping of a vehicle." *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005) (citation and quotation marks omitted). However, "[i]t is a well-established rule that a search warrant is not required before a lawful search based on probable cause of a motor vehicle in a public roadway . . . may take place." *Id.* at 795-96, 613 S.E.2d at 39. This probable cause standard is met where the totality of "the facts and circumstances within the officers' knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (brackets and quotation marks omitted)[.]
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> The trial court found that the officer's search revealed not only marijuana, but also additional items including a digital scale, over one thousand dollars in folds of money, ammunition, and a flip cellphone. Under the totality of the circumstances: a vacuum-sealed bag of what appeared to be marijuana, hidden under the seat and found with these items, without any evidence

> that Defendant claimed to the officers the substance was legal hemp, the officers' suspicions were bolstered, amounting to probable cause to believe the substance at issue was in fact illicit marijuana and not hemp. The trial court therefore did not err in concluding that Defendant's Fourth Amendment rights were not violated.

Id. ¶¶ 17, 20. This Court then concluded "the trial court did not err in denying Defendant's motion to suppress . . . ." *Id.* ¶ 25. However, *Highsmith* does not answer the question on appeal; the defendant in *Highsmith* specifically did not challenge the legality of the search of his vehicle. *See id.* ¶ 16. But *Highsmith* does instruct us that, although the law regarding marijuana and hemp has recently changed, we still follow a traditional probable cause analysis in determining whether a defendant's Fourth Amendment rights have been violated by a warrantless search or seizure. *See* U.S. Const. amend. IV, § 1; *see also* N.C. Const. art. I, § 20.

¶ 26 "Typically, a warrant is required to conduct a search unless a specific exception applies." *Parker*, ¶ 25 (citation omitted). Here, the only applicable warrant exception is the motor vehicle exception. *See id.* The State conceded during the suppression hearing that "the search of the vehicle was not a search incident to arrest, per se." The trial court later concluded "there was a basis separate and apart from the arrest to search the interior of the vehicle."

In the context of the motor vehicle exception,

> [a] police officer in the exercise of his duties may search an automobile without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile carries contraband materials. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

Id. ¶ 25 (quoting *State v. Degraphenreed*, 261 N.C. App. 235, 241, 820 S.E.2d 331, 336 (2018)).

¶ 27 Here, the "facts and circumstances" available to Deputies Lyall and Watson established probable cause to search Defendant's truck, including the bag in which the methamphetamine and hemp were found, and

the trial court did not err by so concluding. As established above, the use of Deputy Watson's K-9 did not constitute a Fourth Amendment search. But the canine's alert was a factor contributing to a probable cause determination that supports Deputies Lyall and Watson's decision to search Defendant's truck. In addition to the positive indication by the dog, Deputy Lyall was aware of (1) Defendant's outstanding warrants for possession of methamphetamine, and (2) that Deputy Norris had previously seized methamphetamine from Defendant. Defendant's outstanding warrants, the fact that Deputy Norris had already seized methamphetamine from Defendant, and the positive drug-sniffing dog alert by a dog certified to detect methamphetamine is a sufficient basis for probable cause for Deputies Lyall and Watson to search Defendant's truck. The trial court did not err by concluding the deputies had probable cause to search the truck.

IV. Conclusion

¶ 28 Because the State's use of a drug-sniffing dog did not constitute a Fourth Amendment "search" and because Deputies Lyall and Watson had probable cause to search Defendant's truck, the trial court committed no plain error in denying Defendant's motion to dismiss. We affirm the decision of the trial court.

AFFIRMED AND NO ERROR.

Judges HAMPSON and JACKSON concur.

BARHAM v. BARHAM

[286 N.C. App. 764, 2022-NCCOA-798]

DR. TRAVIS PG BARHAM, PLAINTIFF
v.
LYNNE M. BARHAM, DEFENDANT

No. COA22-340

Filed 6 December 2022

1. Child Custody and Support—noncompliance with support order—civil contempt—willfulness—credit for previous overpayments

The trial court did not err by finding plaintiff-father in civil contempt for failure to comply with his child support obligations where, instead of paying the ordered amount of child support, plaintiff began paying one cent per pay period due to his belief that he had a credit for previous overpayments of child support. The trial court properly concluded that plaintiff was in willful violation of the child support order because plaintiff was able to pay and was not entitled to an automatic credit for previous overpayments; rather, plaintiff should have applied to the trial court for modification of his support obligations.

2. Child Custody and Support—noncompliance with support order—attorney fees—statutory findings

The trial court did not err by ordering plaintiff-father to pay attorney fees to defendant-mother pursuant to N.C.G.S. § 50-13.6 where plaintiff argued that he did not refuse to provide support but rather had previously overpaid support and sought a credit for his overpayments. The court made appropriate statutory findings—including that plaintiff had willfully failed to comply with his obligations under the child support order and that defendant was an interested party in good faith who had insufficient means to defray the expense of the suit.

3. Child Custody and Support—motion to establish credit for overpayment of support—Rule 11 sanctions—plausible legal theory

The trial court's order imposing Rule 11 sanctions upon plaintiff-father in response to his motion to establish credit for overpayment of child support was reversed where the sanctions were based upon the trial court's erroneous conclusion that plaintiff's motion lacked a plausible legal theory. Although plaintiff's actions in paying only one cent in child support per pay period in violation

of the child support order were not permissible, no caselaw precluded him from seeking a credit for previous overpayments.

Appeal by plaintiff from orders entered 2 August 2021 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 2 November 2022.

Connell & Gelb PLLC, by Michelle D. Connell; Mary E. Arrowood; and Fox Rothschild LLP, by Troy D. Shelton, for plaintiff-appellant.

Emily Sutton Dezio, PA, by Emily Sutton Dezio, for defendant-appellee.

ARROWOOD, Judge.

¶ 1 Dr. Travis PG Barham ("plaintiff") appeals from the trial court's orders of civil contempt for the failure to comply with his child support obligations, the grant of attorney's fees to Lynne M. Barham ("defendant"), and the imposition of Rule 11 sanctions. For the following reasons, we affirm the trial court's orders of contempt and attorney's fees and reverse the imposition of Rule 11 sanctions.

I. Background

¶ 2 Plaintiff and defendant were married on 21 February 1976. They are the parents of eight children, with their last child, Timothy, turning 18 on 30 August 2020 and graduating from high school in June 2021. Litigation between the parties began when plaintiff filed a complaint for child custody, child support, and equitable distribution on 10 September 2010. The parties were divorced by judgment of absolute divorce entered 6 June 2011.

¶ 3 Since 2011 there have been numerous court orders regarding child support, child custody, and alimony. On 27 February 2018, the parties signed a gatekeeper order stating "neither party shall file a motion for modification of custody or support without prior approval by the presiding judge."

¶ 4 After the parties' seventh child graduated from high school, plaintiff filed a motion to modify child support on 23 August 2019. This motion resulted in a consent order filed 10 January 2020 requiring plaintiff to pay $716.00 per month to commence on 1 February 2020 "pending further orders." This order also specified that it was a "final order resolv[ing] all matters [now] pending." Instead of the ordered amount, plaintiff began paying one cent per pay period on 17 January 2020.

¶ 5 On 26 February 2020, plaintiff filed a motion "to establish credit for over-payment of child support." Plaintiff's motion stated that he "ha[d] a credit for overpayment of child support . . . in the amount of $12,486.95" and "desire[d] his overpayment of child support be applied to his ongoing child support obligation effective February[] 2020 as he ha[d] already paid this child support in advance." Plaintiff's motion rested on the contention that each year from 2013 to 2019 he mistakenly made 26 payments instead of the required 24, establishing a "credit" of $12,486.95.

¶ 6 Defendant filed a motion for contempt on 11 May 2020 due to plaintiff's failure to abide by the 10 January 2020 child support order. The trial court entered an order to appear and show cause on 22 May 2020. On 4 June 2020, defendant filed a motion for Rule 11 sanctions alleging that plaintiff was not acting in good faith and lacked a viable legal claim for his motion to establish credit. Plaintiff took a voluntary dismissal of his motion on 27 October 2020 in order to use this argument as a defense to defendant's motion for contempt. The foregoing matters were heard by the trial court, Judge Scott presiding, on the 4th, 5th, 24th, and 25th of February 2021.

¶ 7 After trial, the court found plaintiff was in willful contempt for nonpayment of child support. Judge Scott listed 29 factual findings to support his conclusion and found plaintiff owed defendant $9,307.72 due to missed payments ranging from February 2020-February 2021. The trial court made findings illustrating that it considered the statutory factors set forth in N.C. Gen. Stat. § 50-13.4(c), including "the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings and accustomed standard of living of the child and the parties, the childcare . . . contributions of each party and other facts of the particular case." Additionally, the trial court found:

> 14. At trial, [plaintiff] argued that he had "pre-paid" his child support obligation from February 2020 forward by paying 26 payments from 2013-2019. It is well-established law in North Carolina, that prospective child support vests the day it is due. Additionally, [plaintiff's] claim is contradicted by his testimony that his payment of 26 payments per year were the result of his unilateral mistake.
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> 16. [Plaintiff's] position ignores the . . . opportunities for him to correct his unilateral mistake noting the several child support orders entered on

> this subject since 2013. [Plaintiff] is asking the [c]ourt to apply payments he made in 2013, 2014, 2015, 2016, 2017, 2018 and 2019 to a future obligation in 2020.
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> 19. The [c]ourt finds to accept [plaintiff's] proposition would place [defendant] in an undue hardship and that Timothy is unable to presently benefit from overpayments [plaintiff] made in 2013, 2014, 2015, 2016, 2017, 2018 and 2019.
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> 23. [Plaintiff's] actions to reduce his payment to $0.01 per pay period during the pendency of this action shows a willful act to purposefully violate the January 10, 2020 [o]rder. [Plaintiff] made a willful, calculated and deliberate decision to alter his payroll records to pay a lesser amount than obligated by the January 10, 2020 [o]rder. This willfulness is compounded by the fact that he reduced his child support payments without first filing a motion with this [c]ourt, even though the January 10, 2020 [o]rder specifies that he would continue paying $716 per month "pending further orders." The law has long prohibited parties from engaging in self-help remedies.
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> 25. The [c]ourt finds that [plaintiff] has had at all times the ability to pay the child support as ordered and currently has the present ability to pay and means to comply with the January 10, 2020 [o]rder.

¶ 8 The trial court also ordered plaintiff to pay reasonable attorney's fees provided by N.C. Gen. Stat. § 50-13.6. Based on the affidavit of attorney's fees filed with the trial court on 16 March 2021, plaintiff was ordered to pay $5,406.25.

¶ 9 Defendant's motion for Rule 11 sanctions filed in response to plaintiff's 26 February 2020 motion to establish credit for overpayment of child support was also granted. In pertinent part the trial court made the following findings of fact:

9. Beginning January 17, 2020, [plaintiff] began paying [defendant] one cent per pay period in child support, without first seeking any additional modification of child support from this [c]ourt. He has continued paying child support at this rate past February 1, 2020, and to the present.

. . . .

11. Defendant argued, and the [c]ourt agreed, that there was no allowable claim under existing North Carolina law to provide the relief [p]laintiff requested. [Plaintiff's m]otion for "[c]redit" for Over-Payment of Child Support filed on February 26, 2020 lacked a legal basis under existing North Carolina law for the relief requested. The [c]ourt held a conference with counsel to review his independent research into whether North Carolina law recognized [plaintiff's] claim. After summarizing its findings, the [c]ourt allowed [p]laintiff the opportunity to brief the matter or to argue a good faith basis for a change in existing North Carolina law. During the June 2020 and September 2020 conference with counsel, [p]laintiff's counsel was asked to provide the basis of the legal claim for "credit" for over-payment. This [c]ourt set October 27, 2020, as the due date for a brief on this subject from [p]laintiff's counsel, and on that date . . . [p]laintiff took a voluntary dismissal of [his motion]. Instead, [p]laintiff opted [to] reserve his arguments as a defense to [defendant's] motion for contempt for non-payment of child support.

12. It is worth noting that before, during, and after the extensive trial, the [c]ourt asked counsel to provide caselaw on the issue of "credits" and how they are recognized in North Carolina law. The [c]ourt, in its own research found *Brinkley v. Brinkley*, [135 N.C. App. 608, 522 S.E.2d 90 (1999)]. Plaintiff's counsel represented the party arguing against "credit" in *Brinkley* before the Court of Appeals.

> 13. Because there was not a plausible legal theory on the face of the February 26, 2020 [m]otion . . . and because [p]laintiff abandoned his ability to present arguments for good faith change in the existing law, [d]efendant has met her burden of showing that it was a sanctionable pleading.
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> 15. [Defendant] is an interested party, acting in good faith.

Based on the Rule 11 sanctions, plaintiff was ordered to pay $1,818.75 in attorney's fees to defendant. The trial court also considered two other motions for sanctions filed by defendant on the 2nd and 26th of June 2020 which the court denied. Plaintiff timely filed notice of appeal on 31 August 2021.

II. Discussion

A. Contempt Order for Nonpayment of Child Support

¶ 10 **[1]** "The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant judgment." *Bossian v. Bossian*, 2022-NCCOA-443, ¶ 16 (citation and internal quotation marks omitted).

¶ 11 Pursuant to N.C. Gen. Stat. § 5A-21(a) (2021), to hold a party in civil contempt the trial court must find: (1) the order remains in force; (2) the purpose of the order may still be served by compliance; (3) the noncompliance was willful; and (4) the non-complying party is able to comply with the order or is able to take reasonable measures to comply.

¶ 12 It is the role of the trial court to make findings addressing each element in its contempt order. N.C. Gen. Stat. § 5A-23(e) (2021). As "civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power." *Bossian*, ¶ 25 (citation omitted). Willfulness is defined as: "(1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Id.* Willfulness constitutes "more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law." *Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E.2d 729, 730 (1983).

¶ 13 Here, plaintiff argues he cannot be held in contempt for nonpayment of child support as he never violated a court order, nor did he attempt to deliberately avoid his child support obligations. Instead, plaintiff asserts he "was ahead on his support payments" because he paid beyond the court ordered amount the previous years. Plaintiff contends it is this fact which precludes a finding of willfulness as his prospective payment obligations were never "past due." According to plaintiff's analysis, instead of seeking a refund of his overpayments, he was entitled to disregard the operative child support order entered 10 January 2020 as "there was a positive balance on [his] account," indicating that each future child support payment was deemed "paid" as soon as it vested. We disagree.

¶ 14 This Court addressed a similar concept of credits for prospective child support obligations in *Brinkley v. Brinkley*, 135 N.C. App. 608, 522 S.E.2d 90 (1999). There, we acknowledged that "there are no hard and fast rules when dealing with the issue of child support credits." *Brinkley* at 612, 522 S.E.2d at 93 (citation and internal quotation marks omitted). We noted "that the imposition of a credit is not an automatic right even when the trial court finds that one party has overpaid his child support obligation[,]" but it may be appropriate "when an injustice would exist if credit were not given." *Id.* (citations omitted). Thus, contrary to plaintiff's argument, he was not automatically entitled to a child support credit nor was he authorized to unilaterally stop paying child support. "[A] supporting parent possesses no authority to . . . modify the amount of the court ordered child support payment." *Bossian*, ¶ 30 (citation and brackets omitted). It is the duty of the supporting parent to "apply to the trial court for modification." *Id.* (citation omitted). Consequently, when plaintiff altered his payment deposit schedule to deposit $0.01 per pay period, he was deliberately defying a court order.

¶ 15 Plaintiff continues to contest the trial court's contempt order by arguing that a parent's "mistaken apprehension" that he could stop paying child support prohibits a finding of willfulness. To support this contention, plaintiff relies on *Morris v. Powell*, 269 N.C. App. 496, 840 S.E.2d 223 (2020). However, plaintiff fails to acknowledge the distinction between the supporting parent in that case, compared to the instant case. In *Morris v. Powell*, the trial court found the father did not willfully violate the court order when he ceased making child support payments because the minor child no longer lived with the mother. 269 N.C. App. 496, 501, 840 S.E.2d 223, 226-27. We affirmed the trial court's decision not to hold father in contempt as contempt "requires willful noncompliance." *Id.* at 501, 840 S.E.2d at 227. The trial court in the instant case found plaintiff acted willfully in his disregard of the 10 January 2020 order and

this finding is evidenced by the record. "We will not disturb on appeal findings of fact that are supported by any competent evidence." *Id.* at 501, 840 S.E.2d at 226.

¶ 16 The record shows that plaintiff mistakenly made additional child support payments from 2013-2019. Accordingly, the trial court considered this evidence in its order. The court stated that although defendant's bank account, which the child support payments were deposited, was admitted into evidence, "[t]hose balances do not represent a stockpile of extra child support . . . thus, they have no bearing on whether [plaintiff] should have paid the child support outlined in the January 10, 2020 [o]rder." In addition to considering whether plaintiff accumulated a "credit" toward child support, the trial court applied N.C. Gen. Stat. § 50-13.10(a) (2021) to support its conclusion of contempt. Under N.C. Gen. Stat. § 50-13.10(a)(1)-(2), if the supporting party is not disabled or incapacitated:

> Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, *if, but only if, a written motion is filed, and due notice is given to all parties . . . before payment is due*[.]

N.C. Gen. Stat. § 50-13.10(a)(1)-(2) (emphasis added). The record indicates that "[plaintiff] did not file any motion before the payment was due to divest the child support payments . . . under the January 10, 2020 [o]rder." Instead of requesting modification prior to the payment vesting, plaintiff took it upon himself to reduce his child support payments. Plaintiff then filed a motion to establish credit toward child support, weeks after his first payment under the new order was due.

¶ 17 We find that the trial court properly found and concluded that plaintiff willfully violated the 10 January 2020 child support order requiring him to pay $716.00 per month for the support of Timothy. As illustrated above, the court's order contained competent evidence addressing plaintiff's noncompliance and ability to pay the allotted amount. The court's order included findings that plaintiff receives $60,000.00 in annual income from his work as a dentist, receives $2,487.00 per month in social security, and received $100,000.00 from the sale of his home in December 2020. Accordingly, we affirm the trial court's order of contempt.

B. Attorney's Fees under N. C. Gen. Stat. § 50-13.6

¶ 18 **[2]** Plaintiff is also appealing the trial court's award of attorney's fees pursuant to N.C. Gen. Stat. § 50-13.6 (2021). Specifically, plaintiff contends the fee order should be reversed as he did not "refuse to provide support" but "overpaid support." We disagree.

¶ 19 "The facts required by the statute must be alleged and proved to support an order for attorney's fees. Whether these statutory requirements have been met is a question of law, reviewable on appeal." *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 723-24 (1980) (citations omitted). The amount of attorney's fees awarded is reviewable only for an abuse of discretion. *Id.* at 472, 263 S.E.2d at 724. Our statute states, in pertinent part:

> In an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment . . . the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding[.]

N.C. Gen. Stat. § 50-13.6.

¶ 20 Here, the trial court specifically stated in its order plaintiff was in civil contempt as he "willfully refused to provide adequate support for the youngest child, Timothy[,]" in direct violation of the 10 January 2020 "controlling order of child support." The trial court made factual findings addressing the statutory considerations of N.C. Gen. Stat. § 50-13: "[t]his is an action for the enforcement of a child support award"; "[defendant] has incurred reasonable attorneys' fees"; "[defendant] is an interested party acting in good faith"; "[defendant] . . . [is] a dependent spouse and [plaintiff] . . . a supporting spouse"; and "[defendant] has insufficient means to defray the expense of the suit." The trial court further found that defendant's attorney's fees "are reasonable considering the time and effort expended in defending the motions" and "are consistent with the customary fee for like work in this relevant market." Accordingly, the trial court's award of attorney's fees met the statutory requirements, was not an abuse of discretion, and is hereby affirmed.

C. Rule 11 Sanctions

¶ 21 **[3]** Lastly, plaintiff challenges the trial court's order of Rule 11 sanctions and the court's conclusion "that there was no allowable claim under existing North Carolina law" as to his motion to establish a child support credit. For the following reasons, we find the trial court misinterpreted the applicable law and we reverse its order imposing sanctions.

¶ 22 We review the trial court's decision to impose sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11(a) *de novo*. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

> [Under] *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions[.]

Id.

¶ 23 "[T]he central purpose of Rule 11 is to deter baseless filings and to streamline the administration and procedure of our courts." *In re Cranor*, 247 N.C. App. 565, 585, 786 S.E.2d 379, 391 (2016) (citations omitted). It was not instituted to abate "creative advocacy[.]" *Coventry Woods Neighborhood Ass'n Inc. v. City of Charlotte*, 213 N.C. App. 236, 243, 713 S.E.2d 162, 167 (2011). On the contrary, the Rule was designed "to prevent abuse of the legal system[.]" *Grover v. Norris*, 137 N.C. App. 487, 495, 529 S.E.2d 231, 235 (2000). Moreover, our case law makes clear that our General Assembly "never intend[ed] to constrain or discourage counsel from the appropriate, well-reasoned pursuit of a just result for their client." *Id.* Thus, "in determining compliance with Rule 11, courts should avoid hindsight and resolve all doubts in favor of the signer." *Coventry Woods*, 213 N.C. App. at 236, 786 S.E.2d at 167 (quoting *Johnson v. Harris*, 149 N.C. App. 928, 938, 563 S.E.2d 224, 230 (2002)).

¶ 24 "There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose." *In re Will of Durham*, 206 N.C. App. 67, 71, 698 S.E.2d 112, 117 (2010) (citations omitted). Because the trial court based its Rule 11 order on a violation of the legal sufficiency prong, we do not address the factual sufficiency nor the

improper purpose prongs. *See Ward v. Jett Properties, LLC*, 191 N.C. App. 605, 607, 663 S.E.2d 862, 864 (2008).

¶ 25 Here, it was error for the trial court to conclude that plaintiff's motion lacked "a plausible legal theory." This is an inaccurate depiction of North Carolina law. As previously stated, *Brinkley v. Brinkley*, 135 N.C. App. 608, 522 S.E.2d 90 (1999), does not stand for the contention that child support credits are never available. Furthermore, plaintiff provided the trial court with documentation evidencing his overpayments, and requesting a credit for money previously paid is not sanctionable behavior. The trial court's misinterpretation of *Brinkley* is error. While we have found that the plaintiff's actions in unilaterally reducing his payments because of the claimed credit was not permissible, neither *Brinkley* nor any other precedent precludes one from seeking a credit, thus the court's imposition of Rule 11 sanctions was improper. Therefore, the trial court's order imposing Rule 11 sanctions is reversed.

III. Conclusion

¶ 26 For the reasons stated herein, the trial court's orders finding plaintiff in contempt and ordering the payment of reasonable attorney's fees are affirmed and the order imposing Rule 11 sanctions is reversed.

AFFIRMED IN PART AND REVERSED IN PART.

Judges ZACHARY and GRIFFIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 DECEMBER 2022)

STATE v. UNDERWOOD 2022-NCCOA-733 No. 22-268	Mecklenburg (17CRS229949)	No Error
BAER v. BAER 2022-NCCOA-797 No. 22-323	Wake (19CVD8313)	Dismissed
BLACKWELL v. ZYCZKIEWICS 2022-NCCOA-799 No. 21-783	Alamance (20CVD1150)	Affirmed
BRASWELL v. MONARCH AUTO RENTALS, INC. 2022-NCCOA-800 No. 22-442	Guilford (20CVS8544)	Dismissed
BS & HS LLC v. NYALKARAN INC. 2022-NCCOA-801 No. 22-129	Johnston (17CVS3116)	Affirmed
DELLINGER v. ZIMMERMAN 2022-NCCOA-802 No. 22-93	Iredell (12CVD2594) (16CVD2154)	Affirmed
DGH MGMT., LLC v. VILL. OF PINEHURST 2022-NCCOA-803 No. 22-553	Moore (20CVS1087)	Appeal dismissed.
GRIER v. GRIER 2022-NCCOA-804 No. 22-37	Mecklenburg (15CVD12199)	Reversed
IN RE A.M.S. 2022-NCCOA-805 No. 22-266	Davidson (21JB97)	Vacated and Remanded
IN RE J.B. 2022-NCCOA-806 No. 22-605	Union (20JB197)	Dismissed
IN RE K.W. 2022-NCCOA-807 No. 22-314	Union (19JT18)	Affirmed
IN RE L.D.G. 2022-NCCOA-808 No. 22-286	Buncombe (19JB259)	Reversed

JOHNSON v. JOHNSON 2022-NCCOA-809 No. 21-530	Hoke (20CVS179)	Affirmed in part; Dismissed in part
MONROE v. KNOWINGS 2022-NCCOA-810 No. 22-398	Moore (21CVS1164)	Dismissed
SISSON v. WATSON 2022-NCCOA-811 No. 22-465	Mecklenburg (19CVS6468)	Vacated in part, Dismissed in Part & Remanded
STATE v. ALLEN 2022-NCCOA-812 No. 22-400	Rutherford (11CRS52476) (11CRS53057-63)	Dismissed
STATE v. BOWERS 2022-NCCOA-813 No. 22-439	Pitt (20CRS1084) (20CRS53675-76)	No Error
STATE v. BROWN 2022-NCCOA-814 No. 22-366	New Hanover (20CRS2654) (20CRS52565)	No Error
STATE v. CATES 2022-NCCOA-815 No. 22-197	Davidson (18CRS53488)	No Error in Part, Vacated in Part, and Remanded
STATE v. CHUNN 2022-NCCOA-816 No. 22-486	Rowan (18CRS2219)	No Error
STATE v. CRUMBLEY 2022-NCCOA-817 No. 22-333	Wilson (19CRS53392) (20CRS93)	No Error
STATE v. DUNN 2022-NCCOA-818 No. 22-34	Duplin (18CRS52832)	NO PLAIN ERROR IN PART; NO PREJUDICIAL ERROR IN PART
STATE v. GREER 2022-NCCOA-819 No. 22-278	Watauga (19CRS50549)	No Error.
STATE v. HUMPHRIES 2022-NCCOA-820 No. 22-356	Cleveland (19CRS52419-20) (19CRS52463) (19CRS623-625)	NO PLAIN ERROR.

STATE v. HUNTER 2022-NCCOA-821 No. 22-279	Perquimans (18CRS50021-25)	No Error
STATE v. JUAREZ 2022-NCCOA-822 No. 22-328	Martin (19CRS50239)	No Error
STATE v. LEE 2022-NCCOA-823 No. 21-665	New Hanover (16CRS59540-41) (17CRS102-103)	NO PREJUDICIAL ERROR.
STATE v. PATTERSON 2022-NCCOA-824 No. 22-254	Mecklenburg (19CRS13134-36) (19CRS13138)	No Error
STATE v. POWELL 2022-NCCOA-825 No. 21-735	Brunswick (17CRS56065)	No Error
STATE v. REID 2022-NCCOA-826 No. 22-316	Buncombe (17CRS92983) (18CRS293) (18CRS475-76) (18CRS84322) (18CRS84324)	No Error
STATE v. RICHARDSON 2022-NCCOA-827 No. 22-342	Forsyth (17CRS197) (17CRS50582) (17CRS50584-85) (17CRS50622)	Affirmed
STATE v. ROGERS 2022-NCCOA-828 No. 21-707	New Hanover (19CRS56950) (19CRS56952)	New Trial.
STATE v. SMITH 2022-NCCOA-829 No. 22-247	Union (18CRS52019) (18CRS704375) (19CRS530)	No Plain Error in Part; No Error in Part
STATE v. SYLVESTER 2022-NCCOA-830 No. 22-5	Davidson (19CRS51866)	No Error
STATE v. WALKER 2022-NCCOA-831 No. 22-338	Cleveland (20CRS53738)	No Error

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

Jurisdictional defect—failure to designate judgment appealed from—petition for certiorari—no showing of merit or error below—A criminal defendant's appeal from his convictions for statutory rape and indecent liberties with a child was dismissed where, although defendant preserved his arguments for appellate review pursuant to Appellate Rule 10, and the State had waived any objection to defendant's failure to attach a certificate of service to his notice of appeal (by participating in the appeal without raising the service issue), defendant's notice of appeal contained a jurisdictional defect in that it did not designate the judgment defendant was appealing from as required under Appellate Rule 4(b). Further, defendant's petition for a writ of certiorari was denied because it lacked merit and failed to show that the trial court probably erred in determining that defendant's expert witness was not qualified to testify as to whether a sexual assault had occurred in the case. **State v. Hawkins, 427.**

Petition for writ of certiorari—no notice of appeal—no extraordinary circumstances—In a summary ejectment action, where the trial court granted a motion for summary judgment against defendant, ordered him to pay attorney fees, and subsequently denied his Civil Procedure Rule 60(b) motion for relief from those orders, and where defendant filed a notice of appeal only from the order denying his Rule 60(b) motion, the Court of Appeals denied defendant's petition for a writ of certiorari seeking review of the summary judgment order and corresponding attorney fees order. A writ of certiorari is not intended as a substitute for a notice of appeal, and defendant failed to show the existence of extraordinary circumstances justifying issuance of a writ of certiorari. **LouEve, LLC v. Ramey, 263.**

Petition for writ of certiorari—satellite-based monitoring orders—appellate panel split—After defendant's convictions for multiple sexual offenses (for which he was required to enroll in lifetime satellite-based monitoring, or SBM) and subsequent appeals, defendant was eventually resentenced, at which point the trial court also entered new SBM orders. Defendant sought appellate review by notice of appeal and a petition for writ of certiorari. The appellate panel was split in its analysis regarding the appropriate level of review of defendant's constitutional challenge to the new SBM orders. A majority of the appellate court issued a writ of certiorari to review the new SBM orders, while the third member of the panel would have dismissed the portion of the appeal related to those orders. However, of the two members of the panel to issue certiorari, only one would have reached the merits of defendant's constitutional argument (and found no Fourth Amendment violation), while the other would have vacated the new SBM orders because, since by his review the old SBM orders remained in effect, the trial court lacked jurisdiction to enter new ones. The new SBM orders therefore remained undisturbed. **State v. Perkins, 495.**

Preservation of issues—attorney discipline—due process and equal protection—not raised at disciplinary hearing—In a disciplinary action regarding an attorney who charged excessive fees when representing two intellectually disabled brothers who spent over thirty years in prison for crimes they did not commit, the attorney failed to preserve for appellate review his argument that the State Bar violated his constitutional rights to due process and equal protection under the law in its enforcement of the Rules of Professional Conduct, where he did not raise the argument at the disciplinary hearing. **N.C. State Bar v. Megaro, 364.**

Preservation of issues—collection on judgment—alleged procedural errors—no timely objection—no ruling by trial court—In a matter involving plaintiff's attempt to collect on a judgment against defendant, defendant's challenges to the

APPEAL AND ERROR—Continued

validity of the issued writ of execution based on alleged procedural errors regarding service of the Notice of Right were not preserved for appeal because defendant failed to timely object. Even assuming defendant did timely object, the record contained no ruling on defendant's objections by the trial court, so defendant failed to meet both requirements for preservation under Appellate Rule 10(a). **Radiance Cap. Receivables Twenty One, LLC v. Lancsek, 674.**

Preservation of issues—constitutional argument—exclusion of defendant's father from courtroom—Rule 2—In a murder trial held during an ongoing coronavirus pandemic, defendant did not object when the trial court excluded his father from the courtroom during jury selection (to comply with pandemic-related social distancing guidelines), and therefore defendant failed to preserve for appellate review his argument that the trial court's action violated his state and federal constitutional rights to a public trial. Further, the appellate court declined to invoke Appellate Rule 2 to review defendant's argument because nothing in the record demonstrated "exceptional circumstances" sufficient to justify suspending the Appellate Rules in order to prevent "manifest injustice." **State v. Woodley, 450.**

Preservation of issues—constitutional argument—state constitution—waiver—In a prosecution for multiple drug possession charges, defendant waived appellate review of his argument that both the actions of the officers who arrested him and the trial court's denial of his motion to suppress violated Article 1, § 20 of the North Carolina Constitution, where he did not raise his argument at trial pursuant to Appellate Rule 10(a). **State v. Tabb, 353.**

Preservation of issues—constitutional issue—child neglect and dependency proceeding—In a neglect and dependency proceeding, respondent mother failed to preserve her constitutional argument that the trial court erred by awarding custody of her son to the department of social services without first making a finding that respondent was unfit or had acted inconsistently with her constitutionally protected right as a parent, because respondent failed to raise the issue at either the adjudicatory or dispositional hearings. **In re J.N.J., 599.**

Preservation of issues—objection to question—unresponsive answer—no motion to strike—In defendant's prosecution for robbery with a dangerous weapon, where defendant objected to the State's question concerning whether defendant fit the description of the suspect but then did not move to strike the witness's unresponsive answer giving the witness's opinion that defendant was the perpetrator, defendant waived appellate review of the issue. However, the appellate court did consider defendant's argument that the alleged error amounted to plain error. **State v. Kelly, 311.**

Record on appeal—sealed sua sponte—child's medical records—confidential records of child abuse investigation—In a mother's appeal from a child custody order, the Court of Appeals sua sponte sealed the record on appeal where the record included the child's confidential medical records and records of a child abuse investigation by the department of social services (DSS) and by child protective services (CPS), which was conducted after the mother claimed that the child had been abused. Because the investigation showed that the mother's claims were unsubstantiated and because neither DSS nor CPS filed a juvenile petition under Chapter 7B of the General Statutes, the mother was not technically obligated to file the child's confidential records under seal pursuant to Appellate Rule 42. Nevertheless, there was no good reason to make personal, sensitive information about the child available to the public. **Frazier v. Frazier, 565.**

ATTORNEYS—Continued

the attorney's license for five years was affirmed where clear, cogent, and convincing evidence supported the DHC's findings of fact, including that the brothers had been consistently diagnosed as mentally retarded and that the attorney knew that the brothers lacked the capacity to understand the agreements through which he charged them excessive fees. The evidence also supported a restitution payment to the brothers representing the improper fees the attorney deducted from the brothers' compensation award from the Industrial Commission. Further, there was no discrepancy between the DHC's written order and oral ruling where, although the written order contained more detail, both rulings imposed the same disciplinary action and conditions. **N.C. State Bar v. Megaro, 364.**

Legal malpractice—negligent drafting of deed—easement of record—within chain of title—In an action arising from the allegedly negligent drafting of a deed, where plaintiff sued two sets of attorneys—one that drafted the deed, the other that plaintiff hired to sue the first set, although no action was filed—there was no legal malpractice in the failure to include a landscape easement as an exception in the covenants clause of the deed because the general warranty deed's legal description excluded recorded easements and the landscape easement had previously been recorded and was in the chain of title. Therefore, the trial court properly granted summary judgment to both sets of defendant attorneys. **Neeley v. Fields, 65.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Adjudication—findings of fact—recitation of allegations in petition—sufficiency of evidence—In a child neglect and dependency case, the trial court's findings of fact, despite mirroring the allegations in the petition filed by the department of social services, were supported by clear and convincing evidence—including social workers' testimony—and reflected the trial court's processes of logical reasoning, as demonstrated by the court's detailed orally rendered judgment. The findings, minus a few minor unsupported details, which the appellate court disregarded, were sufficient to support the trial court's adjudication of a minor child as neglected and dependent. **In re J.N.J., 599.**

Dependency—infant with severe respiratory issues—parents smoked and lacked training—no alternative care arrangement—The trial court properly adjudicated a minor child—who was born premature with underdeveloped lungs; who required two trained, full-time caregivers; and who could not be in contact with any smoke, residue, or particulate—as dependent based on factual findings, which were supported by clear and convincing evidence, that the child's parents were unable to provide proper care and supervision because they had not completed the necessary medical training, that both parents admitted to smoking and their homes smelled of smoke and contained smoking paraphernalia, and that there was no appropriate alternative child care arrangement. **In re J.N.J., 599.**

Dependency—statutory factors—sufficiency of findings—The trial court erred in adjudicating an infant child dependent on the basis that the child had been left unattended in his crib for approximately five minutes in respondent father's home (while respondent was not present in the home) where its conclusions were not supported by the findings of fact. Although the facts recited prior issues with the child's mother (substance abuse and unstable housing, and the fact that the child tested positive for THC at birth), the child was then placed with respondent father, and there was no indication that respondent father had not provided proper care since that time or that the child was at risk of being harmed during the five minutes he was

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

left unattended. The court's minimal facts failed to establish, as required by N.C.G.S. § 7B-101(9), that both parents were incapable of providing care or supervision and that they lacked appropriate alternative child care arrangements. **In re D.S., 1.**

Neglect—child left unattended for brief time—no impairment found—conclusions unsupported—The trial court erred in adjudicating an infant child neglected because the court's conclusions were not supported by the findings of fact or the evidence. The findings did not establish neglect as defined in N.C.G.S. § 7B-101(15) where, although the child had been left unattended in his crib for approximately five minutes in respondent father's home (while respondent was not present in the home), there were no findings that the failure to provide proper care or supervision led to the child suffering an impairment of any kind, that there was a substantial risk of such impairment, or that the child lived in an environment injurious to his welfare. Findings regarding prior issues with the child's mother (substance abuse and unstable housing, and the fact that the child tested positive for THC at birth) were insufficient to show a further risk of harm where the child had been placed in respondent father's care. **In re D.S., 1.**

Neglect—infant with severe respiratory issues—parents smoked and lacked training—The trial court properly adjudicated a minor child—who was born premature with underdeveloped lungs; who required two trained, full-time caregivers; and who could not be in contact with any smoke, residue, or particulate—as neglected based on factual findings, which were supported by clear and convincing evidence, that the child's parents were unable to provide proper care and supervision because they had not completed the necessary medical training; that both parents admitted to smoking and their homes smelled of smoke and contained smoking paraphernalia; and that respondent mother had a history of engaging in relationships with domestic violence, had a troubled relationship with respondent father and allowed him to convince her to lie to social services about the child's parentage, and had two other children in nonsecure custody. Based on these findings, there was a substantial risk of the child's physical impairment if he were allowed to live with either parent. **In re J.N.J., 599.**

Neglect—substantial risk of future neglect—newborn—mental health, care of newborn, older siblings—The trial court's order adjudicating respondents' newborn baby as neglected was affirmed where the unchallenged findings of fact showed a substantial risk of future neglect to the baby based on significant mental health and parenting capacity issues with each of the parents, the parents' failure to address those issues, the parents' inability to provide basic care to the newborn during his post-birth hospital stay, and prior social services involvement with the parents' other children. Although the unchallenged findings were sufficient to support the trial court's conclusions, the appellate court also held that the challenged findings—including additional facts concerning the parents' behavior and care of the newborn and a social services employee's understanding of records she reviewed—were supported by clear and convincing evidence. **In re M.C., 632.**

Neglect—substantial risk of future neglect—newborn—neglect of older siblings—The trial court's order adjudicating respondent-mother's newborn baby as neglected was affirmed where there was a history of the parents' home being filthy and having holes in the floor, of both parents having significant mental health issues, and of both parents abusing drugs; and where the parents failed to substantially comply with the terms of their case plan for their two older children in addressing those problems. Sufficient evidence supported the trial court's findings of

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

fact (including certain events occurring after the filing of the petition, relating to ongoing circumstances relevant to conditions alleged in the petition), which in turn supported the trial court's conclusion that there was a substantial risk of future neglect of the child. **In re G.W., 587.**

Permanency planning—termination of reunification efforts—irreconcilable contradictions in trial court's order—The trial court's permanency planning order terminating efforts to reunite respondent-mother with her child was vacated and remanded where the order's findings and decrees contained irreconcilable contradictions. Specifically, the order found both that reunification "clearly would be unsuccessful and futile" and that reunification "may be possible within the next six months," and it ordered the mother to undergo a parental capacity assessment as part of a psychological evaluation (which would be unnecessary if reunification were no longer a goal). **In re T.D.N., 650.**

CHILD CUSTODY AND SUPPORT

Best interests of the child—sole custody to father—sufficiency of findings— The trial court in a child custody case did not abuse its discretion in determining that it was in the child's best interests to grant sole custody to her father and visitation to her mother. The court made sufficient findings of fact—none of which were challenged on appeal—to support its determination, including that the parties were unable to co-parent their child; the child's therapist had no concerns about the father's ability to care for the child; and that the mother reported that the father's wife had allowed the child to be sexually abused, but social services found no evidence of abuse and the child later stated that her mother had told her to lie about being abused. **Frazier v. Frazier, 565.**

Child support modification—calculation of income—stipulation of parties—no record evidence—In a lengthy and complex child support case, the trial court's factual finding that the parties had previously stipulated to limiting their evidence to two particular years' worth of income for purposes of calculating child support was in error where the specific terms of the oral stipulation did not affirmatively appear in the transcript or the record, and where there was no indication that the trial court contemporaneously inquired of the parties about the stipulation at the time it was made. Moreover, the trial court erred by entering a child support order that relied on the undocumented stipulation and that was based only upon the parties' past income (specifically, from seven and five years earlier) rather than their current income. **Eidson v. Kakouras, 388.**

Child support modification—calculation of income—sufficiency of findings—evidentiary support—In a lengthy and complex child support case, the trial court's order determining child support was vacated and the matter remanded for further findings of fact regarding how the trial court calculated the parties' incomes—including why all rental expenses from defendant father's rental properties were omitted when calculating his net rental income, how the "profit" and "loan to shareholder" income for defendant's businesses was computed, and how the trial court arrived at the figures for plaintiff mother's monthly income. **Eidson v. Kakouras, 388.**

Child support modification—findings of fact—bad faith—imputed income— In its order modifying child support, the trial court's factual findings were supported by competent evidence where it was within the trial court's discretion to make credibility determinations and where defendant was required to provide ongoing documentation of his income (even if the trial court incorrectly identified the specific

CITIES AND TOWNS—Continued

governmental activity. Finally, the town did not waive its immunity by purchasing a liability policy, which contained a clause explicitly preserving the town's defense of governmental immunity. **Est. of Ladd v. Funderburk, 46.**

CIVIL PROCEDURE

Civil no-contact order—complaint dismissed—no findings of fact—Where the trial court failed to make any findings of fact when it entered an order dismissing plaintiff's complaint seeking a civil no-contact order against another student at her school (pursuant to N.C.G.S. § 50C), the appellate court was unable to conduct meaningful review. The trial court's order was vacated and the matter remanded to the trial court to make findings of fact as required by Civil Procedure Rule 52(a). **Haidar v. Moore, 415.**

Consent order—equitable distribution—Rule 59 motion to amend judgment—untimely—In a divorce case involving a consent order on equitable distribution, which directed plaintiff ex-wife to transfer funds from her retirement accounts to defendant ex-husband pursuant to two qualified domestic relations orders (QDROs), the trial court properly denied defendant's motion for entry of the QDROs where defendant filed the motion nearly sixteen years after the consent order was entered. Because defendant's motion requested relief beyond the entry of the QDROs—defendant also sought passive gains and losses on the unpaid retirement funds and moved to compel discovery regarding those gains and losses—it constituted a Rule 59 motion to amend the consent order, which needed to be filed no more than ten days after the consent order was entered. Additionally, defendant failed to allege that the consent order was either not actually consented to or that it was obtained by mutual mistake or fraud. **Bracey v. Murdock, 191.**

Rule 59 motion—jury instruction denied—cross-examination limited—no abuse of discretion—In an estate dispute between decedent's son (plaintiff) and decedent's former romantic partner (defendant) in which the jury found for plaintiff, the trial court properly denied defendant's motion for a new trial, made pursuant to Civil Procedure Rule 59, where defendant was not entitled to a jury instruction on the duty to read (regarding a document defendant prepared for plaintiff to sign that gave defendant a portion of decedent's estate), and where defendant did not show prejudice or an abuse of discretion by the trial court's limitation of his cross-examination of plaintiff. **Davis v. Woods, 547.**

Rule 59 motion—new trial limited to damages—amendment of jury award—lack of authority—In an estate dispute in which both plaintiff (decedent's son) and defendant (decedent's former romantic partner) asserted multiple claims including conversion, unjust enrichment, fraud, and breach of fiduciary duty, the trial court did not abuse its discretion when, in granting defendant's motion for a new trial pursuant to Civil Procedure Rule 59, it limited the rehearing to the issue of damages. However, the trial court erred by unilaterally amending the amount of damages determined by the jury, for which it had no authority under Rule 59. Although the parties stipulated to the amount of money defendant received from one of decedent's benefits, the parties did not stipulate to the amount of damages. The court's order amending the jury verdict was vacated and the matter was remanded for a new trial solely on the amount of damages. **Davis v. Woods, 547.**

Rule 60(b)—summary judgment and attorney fees—notice of hearing—trial court's discretion—In a summary ejectment action, the trial court did not abuse its discretion by denying defendant's Civil Procedure Rule 60(b) motion for relief

CONSTITUTIONAL LAW—Continued

challenge to a state program that provides scholarships for attendance at nonpublic schools constituted a facial challenge—because, if successful, the remedy would result in invalidating the program in its entirety—and not an as-applied challenge, the trial court erred by denying defendants' and legislative-intervenors' motions to transfer the case to a three-judge panel pursuant to N.C.G.S. § 1-267.1 and Civil Procedure Rule 42(b)(4). **Kelly v. State of N.C., 23.**

Double jeopardy—felony child abuse—first-degree murder—prosecuted twenty-one years apart—After defendant was convicted of felony child abuse for injuries inflicted upon her infant son, her double jeopardy rights were not violated where, twenty-one years later, the State prosecuted her for first-degree murder because her son had died of complications resulting from the injuries at issue in the child abuse prosecution. Defendant's prosecution under a felony murder theory was proper because, although double jeopardy principles forbid separate prosecutions for felony murder and its predicate felony, these principles do permit the subsequent prosecution of a greater offense (here, murder) where a fact necessary for charging that offense (the child's death) was not present during the prosecution of the lesser-included offense (felony child abuse). Additionally, defendant's prosecution for murder by premeditation and deliberation or by torture was proper because those offenses are distinct from felony child abuse. **State v. Noffsinger, 729.**

Double jeopardy—felony child abuse—first-degree murder—prosecuted twenty-one years apart—After defendant was convicted of felony child abuse for injuries inflicted upon his girlfriend's infant son, his double jeopardy rights were not violated where, twenty-one years later, the State prosecuted him for first-degree murder because the child had died of complications resulting from the injuries at issue in the child abuse prosecution. Defendant's prosecution under a felony murder theory was proper because, although double jeopardy principles forbid separate prosecutions for felony murder and its predicate felony, these principles do permit the subsequent prosecution of a greater offense (here, murder) where a fact necessary for charging that offense (the child's death) was not present during the prosecution of the lesser-included offense (felony child abuse). **State v. Tripp, 737.**

Due process—felony child abuse—first-degree murder—prosecuted twenty-one years apart—After defendant was convicted of felony child abuse for injuries inflicted upon her infant son, her due process rights under the federal and state constitutions were not violated where, twenty-one years later, the State prosecuted her for first-degree murder because her son had died of complications resulting from the injuries at issue in the child abuse prosecution. The State's inability to pursue the murder charge until the child's death—along with its significant interest in prosecuting individuals who may be guilty of first-degree murder—outweighed any prejudice the twenty-one-year delay may have caused defendant. **State v. Noffsinger, 729.**

Effective assistance of counsel—consent to trial strategy—representation not deficient—The defendant in a first-degree murder trial received neither per se nor prejudicially ineffective assistance of counsel where he had consented to defense counsel's strategy of conceding that defendant fired the gunshot that killed the victim and of arguing that defendant was guilty only of lesser-included offenses (namely, second-degree murder). Further, defense counsel's performance was not deficient where he presented testimony showing potential shortcomings in processing the crime scene and where, at closing argument, he presented a coherent argument that the State had not met its burden of proving the premeditation and deliberation elements of first-degree murder. **State v. Moore, 341.**

SEARCH AND SEIZURE—Continued

certified in detecting methamphetamine had alerted the officers to the truck. **State v. Walters, 746.**

Reasonable suspicion—sight and smell of marijuana—legalization of industrial hemp—no effect—In a prosecution for multiple drug possession charges, which arose after law enforcement approached a stationary vehicle and observed defendant in the passenger seat with currency and a bag of marijuana on his lap, the trial court properly denied defendant's motion to suppress evidence from his arrest where defendant argued that the sight and smell of marijuana did not give the officers reasonable suspicion to seize his person or to search the vehicle given North Carolina's legalization of industrial hemp. Defendant's argument lacked merit where recent case precedent held that the mere smell of an intoxicating substance is sufficient to give officers reasonable suspicion and where there were other factors apart from the sight and smell of marijuana to establish reasonable suspicion to detain defendant (including the currency on defendant's lap). **State v. Tabb, 353.**

Removal of package at mailing facility—brief retention for drug dog sniff—Fourth Amendment rights not implicated—In a prosecution for various charges relating to the illegal sale of marijuana, the trial court properly denied defendant's motion to suppress evidence discovered after law enforcement removed and briefly retained a suspicious package (later linked to defendant) from a conveyor belt at a FedEx facility for the purpose of having a dog conduct a drug sniff. The five- to ten-minute retention of the package and the subsequent drug dog sniff did not constitute a "seizure" and a "search" (respectively) for Fourth Amendment purposes; rather, those acts merely provided support for law enforcement's determination that probable cause existed to obtain search warrants for the package and for other locations, including defendant's residence and the self-storage unit where the package was headed. Further, defendant waived appellate review of his Fourth Amendment arguments where he did not object at trial to evidence concerning the package's initial removal from the conveyor belt. **State v. Teague, 160.**

Search warrant—probable cause—search of residence—operative and competent facts—In denying defendant's motion to suppress evidence obtained during a warrantless search of his home pursuant to his live-in girlfriend's probation supervision, the trial court did not err by concluding that the search warrant, which was obtained after the warrantless search, was issued on a sufficient showing of probable cause where the warrant was issued based on the personal observations of the police officers investigating the home and was not based upon the statements of the girlfriend—whose credibility was highly questionable—as to what she believed was in the house. **State v. Lucas, 321.**

Seizure—police car blocking motorist's vehicle in driveway—blue lights activated—In a prosecution for driving while impaired, the trial court erred by denying defendant's motion to suppress based on its erroneous conclusion that defendant was not seized, for purposes of the Fourth Amendment and Art. I, sec. 20 of the North Carolina Constitution, at the point when a police officer—who had observed defendant's vehicle pulling into the driveway of a closed business in the middle of the night—pulled in behind defendant's car and activated the marked patrol car's blue lights. A reasonable person would not have concluded that they were free to leave, particularly where defendant was impeded from doing so by the placement of the officer's vehicle. **State v. Eagle, 80.**

Seizure—timing—submission to show of force—plain view doctrine—In a prosecution for multiple drug possession charges, the trial court properly denied